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REPORTS

FROM

COMMISSIONERS:

TWENTY-TWO VOLUMES.

—(14.)—

JUDICATURE; LAW COURTS (SCOTLAND); NATURALIZATION AND ALLEGIANCE.

Session

10 *December* 1868 —— 11 *August* 1869.

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1868-9.

REPORTS FROM COMMISSIONERS:

1868-9.

TWENTY-TWO VOLUMES:—CONTENTS OF THE

FOURTEENTH VOLUME.

N. B.—*THE* Figures *at the* beginning of the line, *correspond with the* N° *at the foot of each* Report; *and the* Figures *at the* end of the line, *refer to the* MS. Paging *of the Volumes arranged for The House of Commons.*

JUDICATURE COMMISSION:

[4130.] First Report of the Judicature Commissioners - - - p. 1

LAW COURTS (SCOTLAND):

[4125.] First Report of the Commissioners appointed to inquire into the Courts of Law in Scotland; together with Minutes of Evidence 29

[4188.] Second Report; together with Minutes of Evidence - - 423

NATURALIZATION AND ALLEGIANCE:

[4109.] Report of the Royal Commissioners for inquiring into the Laws of Naturalization and Allegiance; together with an Appendix containing an account of British and Foreign Laws, and of the Diplomatic Correspondence which has passed on the subject, Reports from Foreign States, and other Papers - - - 607

JUDICATURE COMMISSION.

FIRST REPORT

OF

THE COMMISSIONERS.

Presented to both Houses of Parliament by Command of Her Majesty.

LONDON:
PRINTED BY GEORGE EDWARD EYRE AND WILLIAM SPOTTISWOODE,
PRINTERS TO THE QUEEN'S MOST EXCELLENT MAJESTY.
FOR HER MAJESTY'S STATIONERY OFFICE.

1869.

[*Price 4d.*]

LONDON:
Printed by GEORGE E. EYRE and WILLIAM SPOTTISWOODE,
Printers to the Queen's most Excellent Majesty.
For Her Majesty's Stationery Office.

COMMISSION.

VICTORIA R.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith; to Our right trusty and well-beloved Councillor Hugh MacCalmont Baron Cairns,[1] a Judge of Our Court of Appeal in Chancery; Our right trusty and well-beloved Councillor Sir William Erle, Knight; Our right trusty and well-beloved Councillor Sir James Plaisted Wilde, Knight, Judge of Our Court of Probate and Judge Ordinary of the Court for Divorce and Matrimonial Causes; Our trusty and well-beloved Sir William Page Wood,[2] Knight, a Vice Chancellor; Our trusty and well-beloved Sir Colin Blackburn, Knight, One of the Justices of Our Court of Queen's Bench; Our trusty and well-beloved Sir Montague Edward Smith, Knight, One of the Justices of Our Court of Common Pleas; Our trusty and well-beloved Sir John Burgess Karslake, Knight,[3] Our Attorney General; Our trusty and well-beloved Sir Roundell Palmer, Knight; Our trusty and well-beloved William Milbourne James,[4] Esquire, One of Our Counsel learned in the Law, Vice Chancellor of Our County Palatine of Lancaster; Our trusty and well-beloved John Richard Quain, Esquire, One of Our Counsel learned in the Law; Our trusty and well-beloved Henry Cadogan Rothery, Esquire, Registrar of Our High Court of Admiralty of England; Our trusty and well-beloved Acton Smee Ayrton, Esquire; Our trusty and well-beloved George Ward Hunt,[5] Esquire; Our trusty and well-beloved Hugh Culling Eardley Childers,[6] Esquire; Our trusty and well-beloved John Hollams, Esquire; and Our trusty and well-beloved Francis Dobson Lowndes, Esquire, Greeting.

Whereas We have deemed it expedient for divers good causes and considerations that a Commission should forthwith issue to inquire into the operation and effect of the present constitution of Our High Court of Chancery of England, Our Superior Courts of Common Law at Westminster, Our Central Criminal Court, Our High Court of Admiralty of England, the Admiralty Court of Our Cinque Ports, Our Courts of Probate and of Divorce for England, the Courts of Common Pleas of Our Counties Palatine of Lancaster and of Durham respectively, and the Courts of Error and of Appeal from all the said several Courts.

Now know ye, that We, reposing great trust and confidence in your zeal, discretion, and integrity, have authorized and appointed you the said Hugh MacCalmont Baron Cairns, Sir William Erle, Sir James Plaisted Wilde, Sir William Page Wood, Sir Colin Blackburn, Sir Montague Edward Smith, Sir John Burgess Karslake, Sir Roundell Palmer, William Milbourne James, John Richard Quain, Henry Cadogan Rothery, Acton Smee Ayrton, George Ward Hunt, Hugh Culling Eardley Childers, John Hollams, and Francis Dobson Lowndes, or any six or more of you, to make diligent and full inquiry into the operation and effect of the present constitution of Our High Court of Chancery of England, Our Superior Courts of Common Law at Westminster, Our

[1] Lord Cairns ceased to be Judge of the Court of Appeal in Chancery upon being appointed Lord Chancellor.
[2] Raised to the Peerage as Lord Hatherley, upon being appointed Lord Chancellor in the place of Lord Cairns.
[3] One of Her Majesty's Counsel.
[4] Now Sir William Milbourne James, Knight, a Vice Chancellor.
[5] Now the Right Honourable George Ward Hunt.
[6] Now the Right Honourable Hugh C. E. Childers.

By a Royal Warrant under Her Majesty's Sign Manual, dated 22d October 1867, the Right Honourable Sir Robert Joseph Phillimore, Knight, Judge of Her Majesty's High Court of Admiralty, Sir George William Wilshere Bramwell, Knight, one of the Barons of Her Majesty's Court of Exchequer, and William Gandy Bateson, Esquire, were added to the Commission.

By a further Royal Warrant, under Her Majesty's Sign Manual, dated 25th January 1869, Sir Robert Porrett Collier, Knight, Her Majesty's Attorney General, and Sir John Duke Coleridge, Knight, Her Majesty's Solicitor General, were added to the Commission.

Central Criminal Court, Our High Court of Admiralty of England, the Admiralty Court of Our Cinque Ports, Our Courts of Probate and of Divorce for England, the Courts of Common Pleas of Our Counties Palatine of Lancaster and of Durham respectively, and the Courts of Error and of Appeal from all the said several Courts, and into the operation and effect of the present separation and division of jurisdictions between the said several Courts, and also into the operation and effect of the present arrangements for holding the sittings in London and Middlesex, and the holding of sittings and assizes in England and Wales, and of the present division of the legal year into terms and vacations, and generally into the operation and effect of the existing laws and arrangements for distributing and transacting the judicial business of the said Courts respectively, as well in Court as in Chambers, with a view to ascertain whether any and what changes and improvements,—either by uniting and consolidating the said Courts or any of them, or by extending or altering the several jurisdictions, or assigning any matters or causes now within their respective cognizance to any other jurisdiction, or by altering the number of Judges in the said Courts, or any of them, or empowering one or more Judges in any of the said Courts to transact any kind of business now transacted by a greater number, or by altering the mode in which the business of the said Courts or any of them, or of the sittings and assizes, is now distributed or conducted, or otherwise,—may be advantageously made so as to provide for the more speedy, economical, and satisfactory dispatch of the judicial business now transacted by the same Courts, and at the sittings and assizes respectively, and further to make inquiry into the Laws relating to Juries, especially with reference to the qualification, summoning, nominating, and enforcing the attendance of Jurors, with a view to the better, more regular, and more efficient conduct of Trials by Jury, and the attendance of Jurors at such Trials.

And for the better discovery of the truth in the premises We do by these Presents give and grant to you, or any six or more of you, full power and authority to call before you, or any six or more of you, such and so many of the officers and clerks of Our said Courts, and all such other persons as you shall judge necessary, by whom you may be informed of the truth in the premises, and to inquire of the premises by all other lawful ways and means whatsoever.

And We do hereby give and grant unto you, or any six or more of you, full power and authority to cause all or any of the officers and clerks of any of Our said Courts to bring and produce before you, or any six or more of you, all rolls, records, orders, books, papers, or other writings belonging to any of Our said Courts, or to any of the officers within the same.

And Our further will and pleasure is that you do within nine calendar months after the date of this Our Commission, or as soon as the same can conveniently be done, (using all diligence,) certify unto Us in Our Court of Chancery, under the hands and seals of you, or any six or more of you, what you shall have done in the premises.

And We further will and command that this Our Commission shall continue in full force and virtue, and that you Our said Commissioners, or any six or more of you, shall and may from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment.

And for your assistance in the due execution of this Our Commission We have made choice of Our trusty and well-beloved Thomas Joseph Bradshaw, Esquire, Barrister-at-Law, to be Secretary to this Our Commission, and to attend you, whose services and assistance We require you to use from time to time as occasion shall require.

Given at Our Court at Saint James's the Eighteenth day of September One thousand eight hundred and sixty-seven, in the Thirty-first Year of Our Reign.

By Her Majesty's Command.

GATHORNE HARDY.

FIRST REPORT.

TO THE QUEEN'S MOST EXCELLENT MAJESTY.

We, Your Majesty's Commissioners, whose hands and seals are hereunto set, having been appointed by Your Majesty to inquire into the operation and effect of the present constitution of the High Court of Chancery of England, the Superior Courts of Common Law at Westminster, the Central Criminal Court, the High Court of Admiralty of England, the Admiralty Court of the Cinque Ports, the Courts of Probate and of Divorce for England, the Courts of Common Pleas of the Counties Palatine of Lancaster and of Durham respectively, and the Courts of Error and of Appeal from all the said several Courts; and into the operation and effect of the present separation and division of jurisdictions between the said several Courts; and also into the operation and effect of the present arrangements for holding the sittings in London and Middlesex, and the holding of Sittings and Assizes in England and Wales, and of the present division of the legal year into terms and vacations, and generally into the operation and effect of the existing laws and arrangements for distributing and transacting the judicial business of the said Courts respectively, as well in Court as in Chambers, with a view to ascertain whether any and what changes and improvements,—either by uniting and consolidating the said Courts or any of them, or by extending or altering the several jurisdictions, or assigning any matters or causes now within their respective cognizance to any other jurisdiction, or by altering the number of Judges in the said Courts, or any of them, or empowering one or more Judges in any of the said Courts to transact any kind of business now transacted by a greater number, or by altering the mode in which the business of the said Courts or any of them, or of the sittings and assizes, is now distributed or conducted, or otherwise, —may be advantageously made so as to provide for the more speedy, economical, and satisfactory despatch of the judicial business now transacted by the same Courts, and at the Sittings and Assizes respectively; and further to make inquiry into the laws relating to juries, especially with reference to the qualification, summoning, nominating, and enforcing the attendance of jurors, with a view to the better, more regular, and more efficient conduct of Trials by Jury, and the attendance of jurors at such trials, do most humbly submit to Your Majesty this our First Report.

Introductory Observations.

In commencing the inquiry which we were directed by Your Majesty to make, the first subject that naturally presented itself for consideration was the ancient division of the Courts, into the Courts of Common Law, and the Court of Chancery, founded on the well known distinction in our law between Common Law and Equity.

This distinction led to the establishment of two systems of Judicature, organized in different ways, and administering justice on different and sometimes opposite principles, using different methods of procedure, and applying different remedies. Large classes of rights, altogether ignored by the Courts of Common Law, were protected and enforced by the Court of Chancery, and recourse was had to the same Court for the purpose of obtaining a more adequate protection against the violation of Common Law rights than the Courts of Common Law were competent to afford. The Common Law Courts were confined by their system of procedure in most actions, — not brought for recovering the possession of land,—to giving judgment for debt or damages, a remedy which has been found to be totally insufficient for the adjustment of the complicated disputes of modern society. The procedure at Common Law was founded on the trial by jury, and was framed on the supposition that every issue of fact was capable of being tried in that way; but experience has shown that supposition to be erroneous. A large number of important cases frequently occur in the practice of the Common Law Courts which cannot be conveniently adapted to that mode of trial; and ultimately those cases either find their way into the Court of Chancery, or the Suitors in the Courts of

Common Law are obliged to have recourse to private arbitration in order to supply the defects of their inadequate procedure.

The evils of this double system of Judicature, and the confusion and conflict of jurisdiction to which it has led, have been long known and acknowledged.

The subject engaged the attention of the Commissioners appointed in 1851 to inquire into the constitution of the Court of Chancery. Those learned Commissioners, after pointing out some of the defects in the administration of justice arising out of the conflicting systems of procedure and modes of redress adopted by the Courts of Common Law and Equity respectively, state their opinion, that "a practical and effectual remedy "for many of the evils in question may be found in such a transfer or blending of "jurisdiction, coupled with such other practical amendments, as will render each Court "competent to administer complete justice in the cases which fall under its cognizance."

In like manner the Commissioners appointed in 1850 to inquire into the constitution of the Common Law Courts make, in their Second Report, a very similar recommendation. They report that "it appeared to them that the Courts of "Common Law, to be able satisfactorily to administer justice, ought to possess in all "matters within their jurisdiction the power to give all the redress necessary to protect "and vindicate Common Law rights, and to prevent wrongs, whether existing or likely "to happen unless prevented;" and further that "a consolidation of all the elements "of a complete remedy in the same Court was obviously desirable, not to say im-"peratively necessary, to the establishment of a consistent and rational system of "procedure."

In consequence of these Reports several Acts of Parliament have been passed for the purpose of carrying out to a limited extent the recommendations of the Commissioners.

By virtue of these Acts the Court of Chancery is now, not only empowered, but bound to decide for itself all questions of Common Law without having recourse, as formerly, to the aid of a Common Law Court, whether such questions arise incidentally in the course of the suit, or constitute the foundation of a suit, in which a more effectual remedy is sought for the violation of a common law right, or a better protection against its violation than can be had at Common Law. The Court is further empowered to take evidence orally in open Court, and in certain cases to award damages for breaches of contract or wrongs as at Common Law; and Trial by Jury,—the great distinctive feature of the Common Law,—has recently, for the first time, been introduced into the Court of Chancery.

On the other hand, the Courts of Common Law are now authorized to compel discovery in all cases, in which a Court of Equity would have enforced it in a suit instituted for the purpose. A limited power has been conferred on Courts of Common Law to grant injunctions, and to allow equitable defences to be pleaded, and in certain cases to grant relief from forfeitures. These changes, however, fall far short of the recommendations of the Common Law Commissioners, who in their Final Report expressed the opinion, that power should be conferred on the Common Law Courts "to give, in respect of rights there recognized, all the protection and redress which "at present can be obtained in any jurisdiction."

The alterations, to which we have referred, have no doubt introduced considerable improvements into the procedure both of the Common Law and Equity Courts; but, after a careful consideration of the subject, and judging now with the advantage of many years experience of the practical working of the systems actually in force, we are of opinion that "the transfer or blending of jurisdiction" attempted to be carried out by recent Acts of Parliament, even if it had been adopted to the full extent recommended by the Commissioners, is not a sufficient or adequate remedy for the evils complained of, and would at best have mitigated but not removed the most prominent of those evils.

The authority now possessed by the Court of Chancery to decide for itself all questions of Common Law has no doubt worked beneficially. But the mode of taking evidence orally before an Examiner, instead of before the Judge who has to decide the case, has justly caused much dissatisfaction; and Trial by Jury,—whether from the reluctance of the Judge or of the Counsel to adopt such an innovation, or from the complexity of the issues generally involved in the suit, or because the proceedings in Chancery do not give rise to so many conflicts of evidence as proceedings in other Courts,—has been attempted in comparatively few cases.

In the Common Law Courts the power to compel discovery has been extensively used, and has proved most salutary; but the jurisdiction conferred on those Courts to grant injunctions and to allow equitable defences to be pleaded has been so limited and restricted,—the former extending only to cases where there has been an actual violation

of the right, and the latter being confined to those equitable defences where the Court of Chancery would have granted a perpetual and unconditional injunction,—that these remedies have not been of much practical use at Common Law, and Suitors have consequently been obliged to resort to the Court of Chancery, as before, for the purpose of obtaining a complete remedy.

Much therefore of the old mischief still remains, notwithstanding the changes which have been introduced; and the Court of Chancery necessarily continues to exercise the jurisdiction of restraining actions at law on equitable grounds, and even claims to exercise that jurisdiction in cases where an equitable defence might be properly pleaded at Common Law.

It may be further observed, in illustration of the evils of the double procedure, that whenever a new class of business arises, such as the litigation arising out of railway and other joint stock companies, proceedings, frequently of an experimental character, are commenced both at Law and in Equity by different suitors, leading to the inconvenience of protracted litigation, and the danger of conflicting judgments. We may refer to the litigation lately pending between the sellers of railway shares and the jobbers on the Stock Exchange, by which the sellers sought to obtain an indemnity from the jobbers against calls. The litigation began in a Court of Common Law. A suit in Equity soon followed, by a different plaintiff against the same defendants, both suits asking for similar redress. The Court of Common Law decided in favour of the plaintiff. The Court of Equity shortly after delivered judgment to the same effect. The defendants appealed in both suits; in the one case to the Exchequer Chamber, in the other to the Court of Appeal in Chancery. Both appeals were pending at the same time, but there was no official machinery by which the Judges of Appeal in Chancery and the Court of Exchequer Chamber could enter into communication with the view of arriving at a common result. The Court of Exchequer Chamber reversed the judgment of the Court below; the Court of Appeal in Chancery, acting independently of the Court of Exchequer Chamber, arrived at the same conclusion, and about the same time delivered its judgment, reversing the decision of the Vice-Chancellor. The Defendants were thus subjected to litigation (at the instance, no doubt, of different parties), carried on at the same time in different Courts, and exposed to the risk of conflicting decisions, those Courts operating under different forms of procedure, and being controlled by different Courts of Appeal.

The litigation arising out of Joint Stock Companies has constituted a very large proportion of the business which has engaged the attention of Courts of Law and Equity for some years. Directors of Joint Stock Companies fill the double character of agents and trustees for the companies and shareholders; and the effect of their acts and representations has frequently been brought into question in both jurisdictions, and sometimes with opposite results. The expense thus needlessly incurred has been so great, and the perplexity thereby occasioned in the conduct of business so considerable, as to convince most persons, who have followed the development of this branch of the law, of the necessity that exists for a tribunal invested with full power of dealing with all the complicated rights and obligations springing out of such transactions, and of administering complete and appropriate relief, no matter whether the rights and obligations involved are what are called legal or equitable.

We may refer also to the present condition of the High Court of Admiralty. A conflict, bearing some analogy to that which has so long existed between the Court of Chancery and the Courts of Common Law, seems likely to arise, if it has not already arisen, between the latter Courts and the Court of Admiralty. From ancient times the Courts of Common Law exercised a jealous supervision over the jurisdiction of the Court of Admiralty, and by the issuing of frequent writs of prohibition took pains to confine the jurisdiction of that Court within the narrowest limits. The consequence was, that, except in time of war, when it sat as a Prize Court, there was very little business in the Court of Admiralty until its jurisdiction was extended by recent legislation. Now, however, by virtue of several Acts of Parliament, the first of which was passed so lately as 1840, but more especially by the Admiralty Court Act, 1861, the jurisdiction of the Court has been extended to a variety of cases, which had been theretofore considered as exclusively cognizable in Courts of Common Law. As the Court of Chancery, chiefly by means of its power of granting injunctions for threatened as well as actual injuries, has extended its jurisdiction over a large class of cases properly cognizable in Courts of Common Law, the Court of Admiralty, assisted by the recent legislation above mentioned, and enjoying the peculiar advantage of a Court enforcing the law of maritime lien by proceedings in rem, might be expected, if this system were

continued, to extend its jurisdiction over many kinds of litigation relating to ships or cargoes, in respect of which the Courts of Common Law have a concurrent jurisdiction, but are not able to afford such convenient redress. The cause of this is manifestly the imperfection of the Common Law system, and the consequent necessity of seeking for a more complete remedy elsewhere.

Not only are the procedure of and the remedies administered by the Courts of Common Law and the Court of Admiralty different, but sometimes the redress to be obtained is regulated by different and conflicting principles. Thus in a collision suit the damages are, in some cases, assessed on one principle in a Court of Common Law, and on an entirely different principle in the Court of Admiralty. At Common Law, if both parties are found to be in fault, the Plaintiff fails. In the Court of Admiralty, the Plaintiff, under exactly similar circumstances, is entitled to recover half his damages from the Defendant; and there being generally in such cases a cross suit, the Defendant is also entitled to recover half his damages from the Plaintiff. This anomaly, if our recommendations are adopted, will require to be corrected by legislation.

The Court of Admiralty, even with the extended jurisdiction conferred on it by recent enactments, still labours under the same defect as the other Courts. It cannot, in many cases, give a complete remedy; the suitor may obtain one portion of his redress in the Court of Admiralty, but he must go into a Court of Common Law, or it may be into the Court of Chancery, for the rest. The Court of Admiralty has jurisdiction over a claim for damage to cargo, where the owner is not domiciled in England, but it has no jurisdiction over the claim of the shipowner for the freight due in respect of the same cargo; the shipowner must proceed for that in a Court of Common Law. It seems plain that these are counter claims, which ought to be capable of being set off against each other in the same suit. In the same way, the jurisdiction of the Court of Admiralty over claims for necessaries supplied to a ship is restricted to the case of a foreign ship, and to that of a British ship where there is not any owner domiciled in England; but if it happens that for some other cause the ship is under arrest, or that the proceeds thereof are in Court, then the Court exercises jurisdiction over all claims for building, equipping, or repairing the ship. All these claims may at the same time be litigated by a different procedure in a Court of Common Law; and hence it may happen not unfrequently that litigation may be proceeding simultaneously in the Court of Admiralty and at Common Law for the adjustment of disputes arising out of the same transaction, between the same parties or those who are liable to indemnify them. The conflict of judicial decisions, which may be thus occasioned, is made more perplexing, by the want of a Common Court of Appeal, as the appeal from the Court of Admiralty is to the Privy Council, and from the Common Law Courts to the Exchequer Chamber and the House of Lords.

The present state of the County Courts may also be appropriately referred to, as exhibiting the strange working of a system of separate jurisdictions, even when exercised by the same Court.

The County Court has jurisdiction in Common Law cases, up to 50*l.* in contracts, and to 10*l.* in torts. It has also equitable jurisdiction in certain cases when the value of the property in dispute does not exceed 500*l.*, and in at least one of such cases, namely an administration suit, it is now competent for any County Court Judge to restrain the prosecution of actions brought by creditors in any of the Superior Courts of Common Law. By an Act of Parliament of last session some of the County Courts have also been invested with Admiralty jurisdiction in a large class of cases, where the amount in dispute does not exceed, in some cases 150*l.* and in others 300*l.* There is an appeal in each class of cases, within certain limits, to a Court of Common Law, to the Court of Chancery, or to the Court of Admiralty. But these jurisdictions, though conferred on the same Court and the same Judge, still remain (like the Common Law and Equity sides of the old Court of Exchequer) quite distinct and separate. The Judge has no power to administer in one and the same suit any combination of the different remedies which belong to his three jurisdictions, however convenient or appropriate such redress may be. That can only be accomplished, under the County Court system, by three distinct suits brought in the same Court and before the same Judge, carried on under three different forms of procedure, and controlled by three different Courts of Appeal. In this case, therefore, although we appear at first sight to have obtained that great desideratum, which the Common Law Commissioners call "the con-" solidation of all the elements of a complete remedy in the same Court," yet, as that remedy can only be had in three separate suits, the evil is equally great.

We are of opinion that the defects above adverted to cannot be completely remedied by any mere transfer or blending of jurisdiction between the Courts as at present constituted; and that the first step towards meeting and surmounting the evils complained of will be the consolidation of all the Superior Courts of Law and Equity, together with the Courts of Probate, Divorce, and Admiralty, into one Court, to be called "Her Majesty's Supreme Court," in which Court shall be vested all the jurisdiction which is now exercisable by each and all the Courts so consolidated.

This consolidation would at once put an end to all conflicts of jurisdiction. No suitor could be defeated because he commenced his suit in the wrong Court, and sending the suitor from equity to law or from law to equity, to begin his suit over again in order to obtain redress, will be no longer possible.

The Supreme Court thus constituted would of course be divided into as many Chambers or Divisions as the nature and extent or the convenient despatch of business might require.

All suits, however, should be instituted in the Supreme Court, and not in any particular Chamber or Division of it; and each Chamber or Division should possess all the jurisdiction of the Supreme Court with respect to the subject-matter of the suit, and with respect to every defence which may be made thereto, whether on legal or equitable grounds, and should be enabled to grant such relief or to apply such remedy or combination of remedies as may be appropriate or necessary in order to do complete justice between the parties in the case before the Court, or, in other words, such remedies as all the present Courts combined have now jurisdiction to administer.

We consider it expedient, with a view to facilitate the transition from the old to the new system, and to make the proposed change at first as little inconvenient as possible, that the Courts of Chancery, Queen's Bench, Common Pleas, and Exchequer should for the present retain their distinctive titles, and should constitute so many Chambers or Divisions of the Supreme Court; and as regards the Courts of Admiralty, Divorce and Probate, we think it would be convenient that those Courts should be consolidated, and form one Chamber or Division of the Supreme Court.

We further recommend that in order to prepare for any changes that may hereafter be thought expedient in the constitution of these Chambers or Divisions of the Supreme Court, all future judicial and other appointments therein should be made subject to the possibility of such changes.

Between the several Chambers or Divisions of the Supreme Court so constituted it would be necessary to make such a classification of business as might seem desirable with reference to the nature of the suits and the relief to be sought or administered therein, and the ordinary distribution of business among the different Chambers or Divisions should be regulated according to such classification. For the same reason which induces us to recommend the retention for the present of the distinctive titles of the different Courts in their new character, as so many divisions of the Supreme Court, we think that such classification should in the first instance be made on the principle of assigning as nearly as practicable to those Chambers or Divisions such suits as would now be commenced in the respective Courts as at present constituted; with power, however, to the Supreme Court to vary or alter this classification in such manner as may from time to time be deemed expedient.

It should further be competent for any Chamber or Division of the Supreme Court to order a suit to be transferred at any stage of its progress to any other Chamber or Division of the Court, if it appears that justice can thereby be more conveniently done in the suit; but except for the purpose of obtaining such transfer, it should not be competent for any party to object to the prosecution of any suit in the particular Chamber or Division in which it is being prosecuted, on the ground that it ought to have been brought or prosecuted in some other Chamber or Division of the Court. When such transfer has been made, the Chamber or Division, to which the suit has been so transferred, will take up the suit at the stage to which it had advanced in the first Chamber, and proceed thenceforward to dispose of it in the same manner as if it had been originally commenced in the Chamber or Division to which it was transferred.

From the consolidation of all the present Superior Courts into one Supreme Court, it follows, that all the Judges of those Courts will become Judges of the Supreme Court; and thus every Judge (with the exception of those who are to sit exclusively in the Appellate Court herein-after recommended), though belonging to a particular Division, will be competent to sit in any other Division of the Court, whenever it may be found convenient for the administration of justice.

Here arises an important and difficult question, as to the number of Judges who should ordinarily sit in each Chamber or Division of the Supreme Court. Hitherto the constitution of the Court of Chancery and of the Courts of Common Law, in this respect, has been entirely different. Each division of the Court of Chancery is presided over by a single Judge, who adjudicates on all matters as a Court of First Instance, except in the few cases when he sits as a Court of Appeal from the County Courts. In like manner, a single Judge administers justice in the Courts of Probate, Divorce, and Admiralty respectively. On the other hand, in the Sittings of the Courts of Common Law in Banc, the Court is ordinarily constituted of four Judges. The matters adjudicated upon by the single Judge in the Court of Chancery are in many instances as important as the business transacted before the four Judges in the Courts of Common Law; so that there would seem to be either a want of power in the Court of Chancery, or an excess of power in the Courts of Common Law; but it must be borne in mind that a considerable proportion of the business of the Courts of Common Law is transacted by one of the Judges sitting at Chambers; much of the business of these Courts also consists of the review of trials which have taken place before a Judge and Jury; they also review the decisions of the Judge sitting at Chambers; they are also empowered to decide various important matters, some of which involve questions of general public interest, on which their determination is in some cases final.

With a Court of Appeal such as we propose to recommend, common to all the Divisions of the Supreme Court, constantly sitting, and easy of access, we think that matters of great importance may properly, as now in the Court of Chancery, be intrusted to the jurisdiction in the first instance of a single Judge; but, having regard to the principles which have guided us in our previous recommendations, and to the importance of avoiding any too violent transition from the modes of conducting judicial business to which the public have been accustomed, and in which they may be presumed to place confidence, we think it will be advisable to authorize a single Judge to exercise the jurisdiction of the Supreme Court, in the despatch of all such business appropriated to the Divisions of the Queen's Bench, Common Pleas, and Exchequer respectively as by general orders, or by the special order of the Court, or the consent of the parties, may be remitted to him; and that all matters now disposed of in banco in those Courts shall be heard and determined by not more than three Judges. We also think that the Judges of each Division or Chamber in which there are several Judges should have power to sit in banco in two sub-divisions at the same time, with the assistance, whenever necessary, of a Judge or Judges from any other Division of the Court.

Procedure in the Supreme Court.

The next question that arises for consideration is that of the Procedure to be adopted in the Supreme Court as above constituted. We can only give a sketch in this Report of the leading principles of the system which we recommend, leaving for General Orders, or for a Code of procedure, as may appear most advisable, the fuller development and completion of the scheme proposed.

The present modes of procedure in the Court of Chancery, the Courts of Common Law, the Court of Admiralty, and the Courts of Probate and Divorce are in many respects different; the forms of pleading are different, the modes of trial and of taking evidence are different, the nomenclature is different, the same instrument being called by a different name in different Courts; almost every step in the cause is different. Each Court is confined to its own forms of procedure. Nor is this difference due entirely to the different nature of the cases which the Courts are called upon to try; for often the same question has to be tried, and the same remedy sought, by a totally different method, according as the proceeding is in the Court of Chancery, the Courts of Common Law, or the Court of Admiralty. This variety in procedure was originally due to causes connected with the origin and history of the different jurisdictions, and it has been influenced in more recent times by the almost complete isolation of the several Courts, and by the circumstance that in the Courts of Common Law the ordinary rule and practice is to refer the decision of disputed questions of fact to a jury, without any appeal except by way of reference to a new jury; whilst in the Court of Chancery the judge ordinarily, in the Courts of Divorce and Probate frequently, and in the Court of Admiralty invariably decides all questions of fact and law, subject to appeal.

We recommend, that as much uniformity should be introduced into the procedure of all the Divisions of the Supreme Court as is consistent with the principle of making the procedure in each Division appropriate to the nature of the cases, or classes of cases, which will be assigned to each; such uniformity would in our opinion be attended with

the greatest advantages, and after a careful consideration of the subject, we see no insuperable difficulty in the way of its accomplishment.

Much may be done at the very commencement of a suit to prevent unnecessary litigation, delay, and expense. In a considerable number of suits there is no substantial question as to the right of the plaintiff to, at least, some relief. Frequently the object of the defendant is to gain time; sometimes he only disputes part of the claim, or of the amount sought to be recovered. In other cases, such as administration suits, suits to take partnership accounts, suits for specific performance, and suits for foreclosure or redemption, it is often from the first known what order must be made upon the hearing of the cause. In many such suits, notwithstanding improvements recently introduced, the proceedings are still conducted as they are in suits involving a real question as to the plaintiff's right to relief. Considerable delay is thus caused, and useless costs are incurred.

All suits, we think, should be commenced by a document to be called a Writ of Summons, and these writs of summons should be issued from one office. In all cases in which the plaintiff seeks to recover a money demand, whether founded upon a legal or equitable right, the practice established by the Common Law Procedure Act, 1852, should we think be adopted and the Writ should be specially endorsed with the amount sought to be recovered, and in default of appearance the plaintiff should be allowed to sign judgment for it. Further, in all cases in which a special endorsement has been made on a writ, and the defendant has appeared, the plaintiff should be entitled, on affidavit verifying the cause of action, and swearing that in his belief there is no defence, to take out a summons to show cause why he should not be at liberty to sign judgment; upon which summons such order may be made as the justice of the case may require.

In like manner, in cases of ordinary account, as in the case of a partnership or executorship, or ordinary trust account, where nothing more is required in the first instance than an account, the Writ should be specially endorsed, and in default of appearance, or after appearance, unless the defendant shall satisfy a Judge that there is really some preliminary question to be tried, an order for the account, with all usual directions, should be forthwith made. The Judge should also be empowered at any time, on summary application in Chambers or elsewhere, to direct, if he think fit, any necessary inquiries or accounts, notwithstanding it may appear that there is some special or further relief sought, or some special matter to be tried, as to which it may be proper that the suit should proceed in the ordinary manner.

When the Defendant enters an appearance, and the suit has to proceed further, the issues between the parties must be ascertained by pleading, or otherwise. The systems of pleading now in use, both at Common Law and in Equity, appear to us to be open to serious objections. Common Law pleadings are apt to be mixed averments of law and fact, varied and multiplied in form, and leading to a great number of useless issues, while the facts which lie behind them are seldom clearly discoverable. Equity pleadings, on the other hand, commonly take the form of a prolix narrative of the facts relied upon by the party, with copies or extracts of deeds, correspondence, and other documents, and other particulars of evidence, set forth at needless length. The best system would be one, which combined the comparative brevity of the simpler forms of Common Law pleading with the principle of stating, intelligibly and not technically, the substance of the facts relied upon as constituting the plaintiff's or the defendant's case, as distinguished from his evidence. It is upon this principle that most modern improvements of pleading have been founded, both in the United States and in our own colonies and Indian possessions, and in the practice recently settled for the Courts of Probate and Divorce. PLEAD

We recommend that a short statement constructed on this principle, of the facts constituting the plaintiff's cause of complaint, not on oath, to be called the Declaration, should be delivered to the defendant. Thereupon the defendant should deliver to the plaintiff a short statement, not on oath, of the facts constituting the defence, to be called the Answer. When new facts are alleged in the Answer, the plaintiff should be at liberty to reply. The pleadings should not go beyond the Reply, save by special permission of a Judge; but the Judge should, at any stage of the proceedings, permit such amendment in or addition to the pleadings as he may think necessary for determining the real question or controversy between the parties, upon such terms, as to costs and otherwise, as he may think fit.

We think, that a defendant, having a right or claim against a plaintiff with reference to the subject matter of the suit, or arising out of the same transaction, which at present he cannot enforce without a separate or cross action or suit, should be at liberty

to bring forward such right or claim by his Answer, which, in that case, should have the same effect as if it were a Declaration in a cross action or suit, so as to enable the Court or a Judge to pronounce a final judgment between the parties with respect both to the original and to the cross demand. The same principle might, we think, be extended to the recovery of other demands of the defendant, capable of being set off against the plaintiff's demand, when the balance is in favour of the defendant. But a Judge should be empowered, on application by the plaintiff before trial, to refuse permission to allow such cross right or claim to be brought forward, if he shall be of opinion that it cannot conveniently be adjudicated upon in the case to be tried.

We think also, that the Court should have power to direct that any person not originally a party to the suit, but who may have such an interest in the subject matter thereof as to make his presence necessary or expedient to enable the Court to do complete justice, should be summoned to attend the further proceedings and be bound thereby; and that, with this view, the plaintiff should be at liberty to make any person, against whom he may conceive himself to be entitled to relief, a party defendant to the suit. And, on the other hand, that, where the defendant is or claims to be entitled to contribution or to indemnity or other relief over against any other person or persons, or where from any other cause it shall appear to the Court fit that a question in the suit should be determined, not only as between the plaintiff and defendant, but as between the defendant and any other person, the Court should have power to make such order as may be proper for the purpose of having the question so determined.

We think, that either party should be at liberty to apply at any time, either before or after pleading, for such order as he may upon the admitted facts in the case be entitled to, without waiting for the determination of any other questions between the parties.

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With regard to the trial and determination of disputed questions of fact, the mode of trial varies according to the Court in which the litigation happens to be pending, without any sufficient power of adaptation to the requirements of particular cases.

In the Court of Chancery, until recently, the Judge had no power to summon a jury, whatever might be the conflict of evidence or dispute as to the facts; all questions of fact as well as of law were generally decided by the Judge. In some cases, it was the practice to send issues to be tried by a jury at Common Law. This course, however, was taken, not as a mode of trial, but merely for the assistance or information of the Court, which still reserved to itself the ultimate decision of the facts, and if dissatisfied with the first verdict might send the case before a second jury, or decide the facts according to its own view, and without regard to the verdict. Substantially the practice of the Court of Chancery remains unaltered; but there is now a power, which is rarely exercised, of summoning a jury, and the practice of sending issues to be tried at Common Law has become less frequent.

The Court of Admiralty, which decides for itself all questions of law and fact, may in special cases call in the assistance of nautical or mercantile assessors, but it has no power to summon a jury. The Court, however, by a recent statute has power to direct any question of fact arising in a suit to be tried in a Court of Common Law, and, if it thinks fit, to order a new trial; but the verdict of the jury, when final, is conclusive upon the Court. This power, we understand, has been exercised in only one instance.

In the Courts of Probate and Divorce application is made to the Judge in each case to fix the mode of trial, either before himself or by a jury. In the Probate Court, if the parties agree in asking for a jury, the application is usually granted; if they do not agree, the Judge fixes the mode of trial which he considers best adapted to the case; but in the case of an heir-at-law cited, or otherwise made party to the suit, a jury may be demanded as of right. A similar rule of practice exists in the Court of Divorce. In that court also, in cases of dissolution of marriage, either party may demand a jury as of right.

In the Courts of Common Law a jury has always been regarded as the constitutional tribunal for trying issues of fact; and the theory is, that all such questions are fit to be tried in that way. It has, however, long been apparent, in the practice of the Courts of Common Law, that there are several classes of cases litigated in those courts to which trial by jury is not adapted, and in which the parties are compelled—in many cases after they have incurred all the expense of a trial—to resort to private arbitration. Until the Common Law Procedure Act of 1854, the parties could not be compelled to go to arbitration, and the power given by that Act is limited to cases where the dispute relates wholly or in part to matters of mere account, or where the parties have themselves before action agreed in writing to refer the matter in difference to arbitration.

The system of arbitration which has thus been introduced, is attended with much inconvenience. The practice is to refer cases which cannot be conveniently tried in court either to a Barrister or to an Expert. A Barrister can seldom give that continuous attention to the case which is essential to its being speedily and satisfactorily disposed of; and an Expert, being unacquainted with the law of evidence, and with the rules which govern legal proceedings, allows questions to be introduced which have nothing to do with the matters at issue. In neither case has the Referee that authority over the practitioners and the witnesses which is essential to the proper conduct of the proceedings. If the barrister or solicitor who is engaged in the suit, or even a witness, has some other engagement, an adjournment is almost of course. The Arbitrator makes his own charges, generally depending on the number and length of the meetings, and the professional fees are regulated accordingly. The result is great and unnecessary delay, and a vast increase of expense to the suitors. The Arbitrator thus appointed is the sole judge of law and fact, and there is no appeal from his judgment, however erroneous his view of the law may be, unless perhaps when the error appears on the face of his award. Nor is there any remedy, whatever may be the miscarriage of the Arbitrator, unless he fails to decide on all the matters referred to him, or exceeds his jurisdiction, or is guilty of some misconduct in the course of the case.

In the Court of Chancery questions involving complicated inquiries, particularly in matters of account, are always made the subject of reference to a Judge at Chambers. These references are practically conducted before the chief clerk, but any party is entitled, if he think fit, to require that any question arising in the course of the proceedings shall be submitted to the Judge himself for decision. In such a case the decision of the Judge is given after he has been sitting in Court all day hearing causes. It has been represented to us that this system does not give satisfaction, and that there is not sufficient judicial power to dispose of the business in Court, and at the same time to give that personal attention to the business in Chambers which was contemplated when references to the Judge in Chambers were substituted for the old references to the Masters in Chancery.

In the Court of Admiralty references are always to the Registrar, assisted if necessary by one or two merchants or other skilled persons as assessors or advisers; the Registrar, from his knowledge of law, is enabled to regulate the conduct of the case; the merchants—assuming them to be properly chosen—have that practical knowledge which enables them to advise him on questions of a commercial nature that may arise in the course of the proceedings. The reference proceeds like a trial at law until it is concluded, without adjournment, except for special cause, and there is an appeal at once to the Judge in case the Registrar miscarries.

It seems to us that it is the duty of the country to provide tribunals adapted to the trial of all classes of cases, and capable of adjusting the rights of litigant parties in the manner most suitable to the nature of the questions to be tried.

We therefore recommend that great discretion should be given to the Supreme Court, as to the mode of trial, and that any questions to be tried should be capable of being tried in any Division of the Court.

(1.) By a Judge.
(2.) By a Jury.
(3.) By a Referee.

The plaintiff should be at liberty to give notice of trial by any one of these modes which he may prefer, subject to the right of the defendant to move the Judge to appoint any other mode. When the trial is to be by a Jury or by Referee, a Judge, on application by either party, if he think the questions to be tried are not sufficiently ascertained upon the pleadings, should have power to order that issues be prepared by the parties, and if necessary settled by himself. The Judge should also, on the application of either party have power to direct that any question of law should be first argued, that different questions of fact arising in the same suit should be tried by different modes of trial, and that one or more questions of fact should be tried before the others.

The system which, in all the Divisions of the Supreme Court to which it can be conveniently applied, we would suggest for the trial of matters suitable for trial by Referees, is as follows:

OFFICIAL REFEREES.

We think that there should be attached to the Supreme Court officers to be called Official Referees, and that a Judge should have power, at any time after the writ of summons, and with or without pleadings, and generally upon such terms as he may think fit, to order a cause, or any matter arising therein, to be tried by a Referee; and that whenever a cause is to be tried by a Referee, such trial should be by one of these

Official Referees, unless a Judge otherwise orders. We think, however, that a Judge should have power to order such trial to be by some person not an Official Referee of the Court, but who on being so appointed should *pro hâc vice* be deemed to be and should act as if he were an Official Referee. The Judge should have power to direct where the trial shall take place, and the Referee should be at liberty, subject to any directions which may from time to time be given by the Judge, to adjourn the trial to any place which he may deem to be more convenient.

The Referee should, unless the Judge otherwise direct, proceed with the trial in open Court, *de die in diem*, with power, however, to adjourn the further hearing for any cause which he may deem sufficient, to be certified under his hand to the Court.

The Referee should be at liberty, by writing under his hand, to reserve, or pending the reference to submit any question for the decision of the Court, or to state any facts specially with power to the Court to draw inferences; and the verdict should in such case be entered as the Court may direct. In all other respects the decision of the Referee should have the same effect as a verdict at Nisi Prius, subject to the power of the Court to require any explanation or reasons from the Referee, and to remit the cause or any part thereof for reconsideration to the same, or any other Referee. The Referee should, subject to the control of the Court, have full discretionary power over the whole or any part of the costs of the proceeding before him.

In connection with the subject of trial, it seems proper to refer to the recommendation of the Patent Law Commissioners in their Report of the 29th July 1864, who, after observing, that the present mode of trying the validity of patents is not satisfactory, advise, that such trials should take place before a Judge, sitting with scientific assessors to be selected by himself in each case, but without a jury, unless at the desire of both parties to the suit; and that on such trials the Judge, if sitting without a jury, should decide questions of fact as well as of law. It appears to us that a plan similar in substance to that recommended by the Patent Law Commissioners, might with advantage be applied to the trial, not of Patent cases only, but of any cases involving questions of a scientific or technical character, in which the Judge, or the Referee by leave of the Judge, may think it desirable to have the aid, during the whole or any part of the proceedings, of scientific assessors.

VIDENCE. As respects the mode of taking evidence at the trial, the practice of the Courts varies considerably. The rule in the Common Law Courts always was and still is that the evidence at the trial should be taken by oral examination of the witnesses in open Court. Formerly, in the Court of Chancery, the witnesses were examined and cross-examined on written interrogatories by an officer of the Court, in the absence of the parties and their legal advisers. At present the evidence in chief is taken, either by affidavit, or orally before an examiner generally in the absence of the opposite party, who has however the power of cross-examination at a later stage, in some cases orally before an examiner, and in others in open Court. In the Court of Admiralty the practice of examining the witnesses in open Court has been recently introduced, and is now in general use. In the Courts of Probate and Divorce the witnesses are also, examined in open Court. There can be no doubt that whenever there is a conflict of evidence the best way of extracting the truth is by oral examination of the witnesses in open Court, in the presence of the Judge or jury who have to decide the case; but there are often formal and collateral matters necessary to be proved in the course of a suit which can be conveniently proved by affidavit, and written evidence may sometimes be combined with oral evidence so as to save expense, and facilitate a speedy trial.

We recommend, for these reasons, that, in the absence of any agreement between the parties, and subject to any General Order of the Court applicable to any particular class of cases, the evidence at the trial should be by oral examination in open Court, but that the Court should have power at any time to direct that the evidence in any case, or as to any particular matter at issue, should be taken by affidavit, or that affidavits of any witnesses may be read at the trial, or that any witnesses may be examined upon interrogatories or otherwise before a commissioner or examiner. Any witness who may have made an affidavit should be liable to cross-examination in open Court, unless the Court or a Judge shall direct the cross-examination to take place in any other manner. Upon interlocutory applications, the evidence should, we think, as a general rule be taken by affidavit, but the Court or a Judge should upon the application of either party have power to order the attendance, for cross-examination or otherwise, of any person who may have made an affidavit.

The existing practice as to requiring admissions of written documents should, in our opinion, be continued. We think also, that a similar practice might with advantage be extended to the admission of certain facts as well as documents; and therefore we

recommend that if it be made to appear to the Judge, at or after the trial of any case, that one of the parties was a reasonable time before the trial required in writing to admit any specific fact, and without reasonable cause refused to do so, the Judge should either disallow to such party or order him to pay (as the case may be) the costs incurred in consequence of such refusal.

Incident Powers.

Some other incidental powers which the Court, in our opinion, ought to possess, may be conveniently mentioned in this place.

The Judge at the trial should, without consent of the parties, have power to reserve leave to the Court to enter a nonsuit or verdict, and when the Judge at the trial has reserved any question of law, he should have power to direct the cause to be set down for argument before the Court, without motion for a rule nisi. Upon motion for a new trial the Court should have power, although no leave has been reserved at the trial, to order a nonsuit or verdict to be entered.

The time within which an application must be made for a new trial should be regulated by General Orders of the Supreme Court.

We recommend that every Order of a Judge at Chambers or at Nisi Prius should have the same force and effect as a rule of Court now has, and that a Judge sitting in Chambers or at Nisi Prius should have the same power to enforce, vary, or deal with any such order by attachment or otherwise as is possessed by the Court, but the Court should have power, upon application in a summary way, to enforce, vary, or discharge any such order.

We think that a Judge should have power, at any time after writ issued, upon being satisfied that the plaintiff has a good cause of action or suit, and that the defendant is about to leave, or is keeping out of the jurisdiction in order to avoid process, to order an attachment to issue against any property of the defendant which may be shown to be within the jurisdiction; such property to be released upon bail being given, and in default of bail to be dealt with, as a Judge may direct. This power, which is analogous to that now vested in the Court of Admiralty, may make the use of writs of Capias and Ne exeat regno by the Courts of Common Law and Chancery (which are sometimes used oppressively) less frequent. It may also render the retention of the process of foreign attachment in the Lord Mayor's Court in the City of London unnecessary.

Costs.

In the Court of Chancery, the Court of Admiralty, and the Courts of Probate and Divorce, the Court has at present full power over the costs. We think that the absence of this power in the Courts of Common Law often occasions injustice, and leads to unnecessary litigation. We therefore recommend that in all the Divisions of the Supreme Court the costs of the suit and of all proceedings in it should be in the discretion of the Court.

General Orders.

Power should be vested in the Supreme Court to regulate from time to time by General Orders the procedure and practice in all its Divisions, and to make such changes in the duties of the several officers of the Court, as may from time to time be thought fit, and may be consistent with the nature of their appointments.

Sittings and Assizes.

We now proceed to consider the present general arrangements for the conduct of judicial business.

The Sittings during Term are occupied, together with a portion of those after Term, in the Courts of Common Law, by business in Banco, Nisi Prius Sittings going on at the same time. Some descriptions of business in the Courts of Common Law can only be transacted during Term. In all other Courts there is practically no difference in the business done at the Sittings during and out of Term.

We think that, unless it should be thought right wholly to abolish the division of the legal year into Terms, there should be three instead of four Terms, commencing respectively on the 2nd November, 11th January, and 1st May in each year, the duration of each Term to be four weeks.

There may be some convenience in retaining such fixed periods with a view to the necessary times of vacation, which immediately precede the autumnal and winter Sittings of the Courts, and which it might be expedient in the spring to regulate, so as to coincide as nearly as possible with the Easter recess of Parliament. But we are of opinion that there should not be in any Division of the Court any distinction between the business capable of being transacted in or out of Term, and that all the Courts should have power to sit at any time, in or out of Term, for the despatch of any business.

With respect to the business of the Common Law Courts in Banco, it is unnecessary to add anything here to the recommendations in the previous part of our Report. For the despatch of such part of the present Chamber business of the Common Law Courts as requires to be transacted by a Judge, we think that one Judge at least should sit continuously during the legal year.

We have next to consider the arrangements for holding Sittings for the trial of causes in London and Middlesex, and for holding Assizes in other parts of England and Wales.

ITTINGS IN ONDON AND IIDDLESEX.

The system at present prevailing in London and Middlesex is, that each of the three Superior Courts of Common Law holds separate Nisi Prius Sittings; those after Hilary, Trinity, and Michaelmas Terms, at which the more important business is transacted, being limited by Statute to periods of twenty-four days. Constant complaints have been made of the arrears at these sittings, and of the unequal distribution of business between the three Courts. To remedy this, we propose that all causes to be tried at these Sittings should be entered upon a common list or lists. These Sittings should be held continuously throughout the legal year, by as many Courts as the amount of business to be disposed of may render necessary; and we think it expedient that all issues of fact in the Chancery Division of the Supreme Court, to be tried by a jury, should, unless the Court otherwise order, be entered for trial at these Sittings, and be tried accordingly. During the time allotted to the circuits we propose that at least two Nisi Prius Courts should sit continuously in the Metropolis.

The present Home Circuit is composed of five counties in the immediate neighbourhood of London. Between these counties and London there is constant railway communication, and we have no doubt that the legal business usually transacted at Assizes in those counties can be more conveniently disposed of in the Metropolis than at separate Assizes held for each county. In Surrey, especially, it is notorious that nearly all the causes tried at the Assizes are causes which would have been tried in the Metropolis, if there had been an opportunity of trying them at the previous Sittings. We also think that the criminal business for the counties composing the Home Circuit, which, if that Circuit were continued, would be disposed of at the Assizes, might with advantage be transferred to the Central Criminal Court. That Court has already jurisdiction over certain portions of the counties of Essex, Kent, and Surrey; and we think that any additional expense, that may be incurred by trying the prisoners from those counties at the Central Criminal Court, will be more than compensated by the speedy trial of prisoners, and the saving occasioned by the abolition of a separate Assize for each of the five counties, and of the Winter Assize. The extended area also, from which the jurors will be taken, will render the attendance of any particular juror, or class of jurors, less frequent, and the duties of the jurors on the whole less onerous.

We therefore propose that the counties composing the Home Circuit should, with Middlesex, constitute for all the purposes of trial, both in civil and criminal cases, one venue or county. As respects the City of London, we do not think it will be expedient, until the proposed new Courts of Justice shall have been erected, to disturb the existing arrangements for holding separate Sittings at the Guildhall for the trial of cases of a commercial character.

We think it desirable, as a general rule, that one Judge only, save in case of special need, should be appointed to attend at each Session of the Central Criminal Court.

CIRCUITS.

The arrangements for holding Sittings or Assizes in the other parts of England and Wales have been much considered by the Commission; but we are not prepared, without further deliberation, to submit to Your Majesty a detailed scheme on that subject.

We propose, however, to indicate briefly in our present Report the direction of the changes on this subject, which we are disposed to recommend, and some of the principles on which, we think, those changes should be founded.

Throughout England and Wales the extent of the venue depends entirely on ancient accidental divisions. All counties, including towns and cities which are counties of themselves, form separate venues. Power has been given by statute to try causes, arising within a county of a city or town, in the county adjoining by a jury of that county, the practical effect of which is, that where a county of a town is not an assize town, the jurors within such towns are exempted from serving altogether, and the burden of trying causes arising within those towns is thrown exclusively on the jurors of the adjoining county.

The necessity for holding Assizes in every county, without regard to the extent of the business to be transacted in each county, leads, in our judgment, to a great waste of judicial strength, and a great loss of time in going from one circuit town to another, and causes much unnecessary cost and inconvenience to those whose attendance is necessary or customary at the Assizes.

The distribution of a small amount of business among a large number of circuit towns is the cause of serious evil to the suitors. From the impossibility of ascertaining beforehand with accuracy the business likely to arise, the time allotted to some towns often proves insufficient, and complaints arise that the trial of causes is hurried, or that the parties are driven to dispose of their cases by reference, or otherwise, unless they submit to the loss and inconvenience of having their causes postponed until the next Assizes. The expense and trouble of bringing together judges, sheriffs, and grand jurors, and the time occupied in the preliminaries of an Assize, are the same at a small place, where there is but little business, as at a large one. The number of jurors, special and common, required to be in attendance, is much increased by the limited extent of the existing assize districts. If those districts were enlarged, a juror, who had once attended at the Assizes, would probably be relieved from future attendance for a considerable time.

We are, therefore, of opinion that the judicial business of the country should no longer be arranged and distributed according to the accidental division of counties, but that the venue for trials should be enlarged, and that several counties should be consolidated into Districts of a convenient size,—that such Districts should for all purposes of trial at the assizes, both in civil and criminal cases, be treated as one venue or county,—and that all counties of towns or cities should for the purposes of such Districts be included in an adjacent district or county.

In arranging the Circuits, we think that they should be so remodelled as to render the amount of business likely to be transacted on each Circuit as nearly equal as may be practicable; and in fixing the towns at which the Assizes should be held, we recommend that those towns should be chosen which are the most central,—with which there is the best and most rapid railway communication from all parts of the district,—and to which the inhabitants are most in the habit of resorting for the purposes of business. We may add, that after deducting the counties now forming the Home Circuit, we have reason to think that six Circuits for England and Wales would be found sufficient.

We think that in lieu of the ordinary Assize Commissions, one Commission only should be necessary for each Circuit; and that in place of the opening of the Commissions as now used, a notice should be inserted in the Gazette of such Commissions respectively, and of the days of holding the Assizes under them; and that all the Judges of the several Divisions of Queen's Bench, Common Pleas, and Exchequer should be in the Commission for each Circuit, and should be auxiliary to each other so far as may be necessary, and may be prescribed by General Orders of the Supreme Court.

We also consider it advisable that all local venues in civil actions should be abolished, leaving it to the Court or Judge to control the choice of the plaintiff in case an inconvenient venue should be chosen.

In order to lighten the business on Circuit, we think it expedient that the jurisdiction of Quarter Sessions should be extended to Burglary, and some other offences which we do not think it necessary here to define; and that a classification of offences triable at the Assizes and at Quarter Sessions should be made, and that all Magistrates be directed to make their committals in accordance with such classification, unless it appear to the Magistrate, and he state in his warrant of commitment, that the case appears to him to be of such importance as to be fit for trial at the Assizes.

A Proviso* similar to that which is now introduced into the Commissions for the Winter Assizes should, in our opinion, be invariably inserted in the Commissions for every Assize, limiting the duties of the Judges to the trial of persons committed to the Assizes only.

**Note.*—The form of the proviso above referred to is as follows :—

Provided always, and our will and pleasure is, that wherever it shall be made to appear by the warrant of commitment or recognizance to prosecute, or otherwise, that the offence of any person or persons was intended to be inquired into and heard and determined at any sessions of the peace in the county aforesaid, it shall not be necessary for you our said justices hereby assigned, or for any of you, to inquire into or hear or determine such offences; provided also, and our will and pleasure is, that whenever it shall be made to appear by the warrant of commitment or recognizance to prosecute, or otherwise, that any prisoner in our said gaol has been committed thereto in order to his or her being tried at the next sessions of the peace for the said county, you our said justices hereby constituted, or any of you, shall not be required to deliver our said gaol of such prisoner, but shall be at liberty to order such prisoner to remain in our said gaol.

Juries.

We now proceed to the subject of Juries. Complaints have for some time been made, and more particularly by special jurors in the metropolis, of the inconveniences and inequalities of the present system. We believe that these complaints are well founded, and that they are chiefly attributable to the imperfect mode in which the jury lists are now framed, and to the numerous exemptions from serving which are now allowed.

We are confirmed in these views by the evidence recently taken by the Select Committee of the House of Commons. We do not propose to refer to this evidence in detail. It will suffice to notice the statement that for the whole county of Middlesex the number of special jurors is only 1,800, of whom it is stated that in consequence of the imperfect state of the list, at least one third are not available. It also appears that the total number of special jurors in the lists for the counties of Kent and Sussex are respectively only 400 and 197. It is manifest from these figures that the duty is not fairly distributed amongst those, who might be, and who, under an amended state of the law, ought to be duly qualified to serve. The existing state of the special jury lists is however not wholly due to the careless manner in which they are now framed and revised, nor to the existing exemptions from service on juries; but is in some measure attributable to the vague definition of "merchant" and "esquire" as qualifications for special jurors. When it is remembered that in each parish the duty of designating the common and special jurors devolves upon the churchwardens and overseers, it can hardly excite surprise if complaints are made that in some places those competent to serve are omitted from the list, whilst in others the designation of "merchant" or "esquire" is given to jurors, who have not those special qualifications which it is desirable that special jurors should possess.

The defects of the present system appear to be particularly felt in Middlesex, where the duties of special jurors have recently, from various causes, been greatly increased. We allude particularly to the establishment of the Courts of Probate and Divorce; to the growing tendency (doubtless arising in great measure from the increased facilities of communication) of trying in London causes which arise in different parts of the country; and to the numerous cases in which special juries are now summoned to assess compensation for property taken for the purposes of public undertakings.

We think that the burden thus thrown upon special jurors might, without prejudice to the suitors, be materially lessened by altering and extending the qualification of special jurors, and that, on the other hand, the qualification of other jurors should be somewhat raised. If the constitution of common juries is improved, it is not improbable that the resort to a special jury will be less frequent.

In the metropolis a rateable value as low as 30*l.* qualifies a juror, and in the country 20*l.* In Wales the qualification is three fifths of that in England. Having regard to the changes which have taken place in the value of property since these amounts were fixed, we think that the value of the rated house which qualifies the householder should be raised to 50*l.* in parishes wholly or in part within any town containing, according to the census next preceding the preparation of the jury list, 20,000 inhabitants and upwards, and to 30*l.* in other places. We think that the qualification in Wales should be the same as in England. In other respects we think that the qualification of a juror should be as at present.

We are of opinion, that aliens having been resident in this country for 10 years, if possessed of the requisite qualification, should be liable to serve as jurors, and that alienage should not be ground of challenge. We further recommend that the right of an alien to claim a trial by a jury de medietate linguæ should be abolished.

Our attention has been called to the numerous grounds upon which persons qualified to serve as jurors are now entitled to exemption. We recommend that all exemptions on the ground of charter, prescription, or otherwise than by statute, should be abolished, and that the list of exemptions should be narrowed as far as possible, the exemptions being limited to persons whose avocations render them undesirable as jurors, or whose duties are of such a character, and would be so far interrupted by their serving on juries, as to occasion practical detriment to the public.

We think that the special jurors should consist of those at present qualified, and such as occupy a private dwelling house rated at 100*l.* in a town of 20,000 inhabitants and upwards, or elsewhere at 60*l.*, or who occupy premises other than a farm rated at 200*l.*, or a farm rated at 500*l.* By this extension of the qualification of special jurors, we think that their duties would be distributed over a much larger proportion of the whole body of jurors, without lessening that amount of intelligence, which the suitors naturally expect when they have resort to a special jury.

On the other hand, we are of opinion that persons qualified as special jurors should continue on the general panel as common jurors, both in civil and criminal cases, and should not be exempted from serving on common juries as at present is the practice. This practice of excluding special jurors from the list of common jurors is inconsistent with the present state of the law; and it is remarkable that it should have been continued, notwithstanding the pointed manner in which attention has more than once been called to the subject. The Common Law Commissioners appointed in 1850, in their second Report, after recommending that the qualification of jurymen in the country should be raised (a recommendation which has not hitherto been acted upon), stated "that on every trial there should be an admixture of jurymen of the class from which "the special juries are now taken. This is indeed now the law, though in practice the "names of persons qualified to be special jurors are not placed on the common jury "panel. There is every reason why jurors of the higher class should assist in the "administration of justice to the same extent as those who constitute the common "juries. We think the higher class of jurors should bring the assistance of their more "cultivated minds and superior intelligence to the decision of cases which, though they "may not admit of the additional expense attendant under the present system on "having a special jury, may not be the less important to the parties whose interests "are involved. At the same time it should be understood that we do not propose to "abolish the right, which now exists, of having a special jury as at present appointed. "What we recommend is, that the general jury panel should be made up indiscriminately "from all persons qualified to serve on either jury."

The same learned Commissioners in their third Report, issued after an interval of several years, said: "We think it right to avail ourselves of this opportunity to invite "renewed attention to our former observations respecting the constitution of Juries. "More especially we would urge the consideration of that part of our recommendations, "which relates to securing the attendance on common juries of the class of persons, "who now serve exclusively on special juries, with a view to the improvement of the "former by the admixture of persons of higher education and intelligence. We are "strongly persuaded that a very great improvement would by this means be effected "in the constitution of Juries; and as we do not propose to do away with the right "of parties to resort to a special jury, or to deprive special jurors when serving, as "such, of the additional remuneration which they are in the habit of receiving, we "can see no ground why the liability of such persons to serve on common juries, which "already exists in law, though it is not required in practice, should not be enforced."

In these views we entirely concur.

We now proceed to refer shortly to the preparation and revision of the jury lists. It is clear that the lists should be prepared with more care than at present. The recommendations of the Select Committee of the House of Commons, in their Report of 1868, as to, on the one hand, paying the overseers their expenses, and on the other making them liable to a penalty for negligence, seem to us well worthy of consideration. The lists should state after the name of each person, who, in the judgment of the overseers, is qualified as a special juror, that he is so, and the nature of the qualification, and we recommend that no person, whose name is in the jury book as a juror, should be excused from attendance on the ground of any disqualification or exemption not claimed by him at or before the revision of the list, and we would suggest that a notice to this effect should be printed at the bottom of the list.

We think that the revision of the jury lists should be by the justices at petty sessions, as at present, and that the justices should certify that they have examined the list, and that the same is, to the best of their knowledge and belief, a true and proper list of the special and common jurors, and that the jury book should be made up as at present from the lists thus revised. The decision of those who revise the lists as to the qualification of a special juror should as respects that list be final.

With the view of lessening the inconveniences, which result from deaths and removals, we recommend that the overseers should be required at intervals of three months to send to the office of the under sheriff a list of all persons on the list who have died or left the district, and that it should be the duty of the under sheriff to amend the list accordingly.

In order to secure the impartial summoning of Juries, directions should be given to the sheriffs and summoning officers not to summon a second time any person who has been summoned as a juror, so long as there are a sufficient number of jurors, who have not been summoned since he was. The performance of this duty should be enforced by a penalty, but no failure in its performance should form a ground of challenge, or of excuse to a juror summoned and not attending.

We recommend that in London and Middlesex the special jurors should be taken from a panel in like manner as they now are at the assizes, but the present power to order a special jury on the old system should be retained.

It is further, we think, important that either party should in all cases have the right to exclude from the jury as many as six names, or by leave of the judge a greater number. This right to be exercised by delivering to the associate, immediately before the cause is called on, a list of the names objected to.

In cases where a full available special jury are not in attendance, a tales should not be demanded as of right, but should be allowed by leave of the judge or by consent. In case of the non-attendance of a full special jury, the judge should have power to direct the trial to proceed with not less than nine special jurors, or to direct additional jurors qualified to act as special jurors to be obtained from another panel or otherwise.

We think that all special jurors summoned, and not in attendance when called, should pay, as of course, unless excused, a fine of 10*l.*, and that such fine should not be remitted or reduced except for cause shown. We further think that the judge should have power to impose an additional fine, and to order such additional fine to be applied in or towards the payment of any costs occasioned by the non-attendance of the jurors.

In the event of the death, illness, or default of attendance of any jurors during any trial, civil or criminal, the judge should have power, if he thinks fit, to allow the trial to proceed, and the verdict of the remaining jurors should be a sufficient verdict.

The question of remuneration to jurors appears to us to be one of some difficulty. It would manifestly be impracticable to fix an amount, which would adequately compensate special jurors for their loss of time. On the other hand it is important that the remuneration to common jurors should not be sufficient to make them desirous of serving for the purpose of obtaining it. We think that in fixing the remuneration regard should be had to the service being one which it is the duty of the jurors to render, and which is in some measure analogous to other public duties which are necessarily performed gratuitously. We think that the remuneration should be by day, and not by the cause tried, and should be confined to jurors actually serving. If remuneration is given upon this principle, it will be necessary, in order to provide a fund for the purpose, to fix a Court fee to be paid by the suitors in each cause.

The practice of depriving the jury of fire should, in our opinion, be discontinued; and we think that the judge should have power to allow reasonable refreshment to be supplied to them.

It is desirable that the Supreme Court should be empowered by General Orders to make rules as to the number of jurors to be summoned, and the duration of their attendance, and generally as to the mode of summoning jurors.

Appeals.

We now come to the important subject of Appeals. It follows, from the principles of our preceding recommendations, that the system of appeal from all the Divisions of the Supreme Court exercising jurisdiction in the first instance ought to be made, as far as possible, simple and uniform.

At present, the Appeal from orders or decrees made by the Judges of First Instance, in the Court of Chancery, is either to the Court of Appeal in Chancery, or to the House of Lords, at the option of the appellant; there is also an appeal to the House of Lords from the Court of Appeal in Chancery. Appeals and Errors from the Courts of Queen's Bench, Common Pleas, and Exchequer must in all cases go to the Court of Exchequer Chamber, from whence a further Appeal, or Error, as the case may be, lies to the House of Lords. From the Court of Probate Appeal also lies to the House of Lords. From the decrees and orders of the Judge Ordinary of the Divorce Court an appeal lies to the Full Court, consisting of the Judge Ordinary and two Common Law Judges; and also in certain cases from the Full Court, or from the Judge Ordinary exercising the powers of the Full Court, to the House of Lords. From the Court of Admiralty, the sole appeal is to your Majesty in Council, or, practically, to the Judicial Committee of the Privy Council.

Upon the constitution of the House of Lords, considered as a Court of Appeal, we do not consider it to be within the scope of our Commission to offer any other remarks than that it unavoidably impairs the efficiency of the Court of Chancery during the session of Parliament, by withdrawing the Lord Chancellor for the whole of four days in every week from his own Court. Upon the constitution of the Judicial Committee of the Privy Council we also abstain from saying more, than that it has been, for

many years, found impossible to discharge the appellate duties of that body without withdrawing one or more Judges (often the Lords Justices or the Master of the Rolls, sometimes the Judge of Admiralty or Probate, or one of the Chiefs of the Courts of Common Law) from their respective Courts, to the great inconvenience of suitors, and delay of business in those Courts, during the considerable, and continually increasing, periods of time occupied in every year by the transaction of Privy Council business. Any arrangements, therefore, which may tend to relieve the House of Lords, or the Judicial Committee, from any appeals which now go there will so far add to the strength of the Supreme Court.

The Court of Appeal in Chancery, consisting of the Lord Chancellor and the Lords Justices, is in practice generally divided into two Courts, in one of which the Lord Chancellor presides alone, in the other the Lords Justices; and, during the Session of Parliament, the Lord Chancellor's Court is closed, as has been already stated, except for two days in the week. When the Lord Chancellor happens to be less conversant with equity business than the Lords Justices, his decision, sitting alone in appeal from a Court of Equity, cannot be so satisfactory to the suitors, as if he had the benefit of their assistance; and when the Lords Justices, as has sometimes happened, differ in opinion, the appeal to them necessarily fails, the judgment of the Court below is affirmed, and a further appeal to the House of Lords frequently results. Cases of more than usual importance are, indeed, sometimes reserved for hearing, or are directed to be reargued, before the Full Court of Appeal; but the pressure of business, and the engagements of the Lord Chancellor for so great a portion of the year in the House of Lords, confine within very narrow limits the time which can be allotted to sittings of the Full Court.

The Court of Exchequer Chamber is formed by a combination of all the Judges of the Courts of Queen's Bench, Common Pleas, and Exchequer, under such arrangements, that errors and appeals from each of those Courts are determined by Judges taken from the other two. The inconveniences of this system are, in practice, very serious. All these Judges having, during nearly the whole year, pressing demands upon their time for other purposes, are only able to devote a very limited number of days after each term to the hearing of appeals and errors; and each of these periods requires to be broken up into three parts, and the constitution of the Court to be three times changed, in order to dispose of a portion of the appeals and errors from each of the Courts of First Instance. The effect generally is so far to reduce the number of Judges, who are able to attend in the Court of Exchequer Chamber, as, in case of any difference of opinion, to render it possible that the majority of opinions, in the Court of Appeal and the Court of First Instance taken together, may be overruled by the minority,—a result which, as the Judges of Appeal are not appointed or selected specially to act as such Judges, and the Judges who have been overruled to-day may to-morrow themselves sit in appeal from some decision of the Judges who have taken part in overruling them, is eminently unsatisfactory. The same causes also lead, in many cases, to great and unavoidable delays in the disposal of Common Law errors and appeals.

The constitution of the Full Court of Divorce, by the addition of two Judges of the Common Law Courts, withdrawn *pro hâc vice* from their other duties, and associated with the Judge Ordinary, is liable to some of the same objections.

The conditions on which Appeals or Errors can be brought from the different Courts are also widely different.

To the Court of Appeal in Chancery and to the House of Lords from the Court of Chancery, an appeal lies from all Orders and Decrees, whether interlocutory or final, of the Courts below, and upon all questions, whether of fact or of law; except that the verdict of a Jury, or of a Judge exercising the functions of a Jury, can only be impugned by a motion for new trial. The jurisdiction of the Court of Appeal in Chancery, or of the Master of the Rolls or a Vice-Chancellor to rehear his own decree, a practice which is also allowed, may be excluded by a formal procedure called Enrolment, which takes place at the instance of any party, practically at any time within five years from the date of the decree or order enrolled, if nothing has been done in the meantime by the suitor with a view to bring the matter before the Court of Appeal. After this no error in the decree or order enrolled, except mere clerical mistakes, can be corrected by the Court of First Jurisdiction, or by the Court of Appeal in Chancery, without a new suit for that purpose, called a Bill of Review. The same formality, which shuts the door of the Court of Appeal in Chancery, opens to the dissatisfied suitor that of the House of Lords, which does not receive appeals from

decrees or orders of the Court until after they have been enrolled. Both the Court of Appeal in Chancery, and the House of Lords, proceed upon the same record and evidence, which were before the Court from which the appeal is brought; and the Court of Appeal in Chancery, both in what are technically called Rehearings of decrees and decretal orders, and upon appeal petitions or motions, has all the powers possessed by the Court of First Instance, and can therefore allow amendments of the record, and in some cases may receive new or further evidence; which is contrary to the practice of the House of Lords.

From the Courts of Common Law to the Exchequer Chamber, Error lies in certain cases, and Appeal in others. Error is brought, as of right, on matter of law apparent on the record, on judgments on demurrers, on bills of exceptions for the improper reception or rejection of evidence, or for misdirection by the Judge at the trial, on special cases, on judgments *non obstante veredicto*, and for arrest of judgment. Appeal lies, as of right, from decisions upon points of law reserved at a trial. It also lies, but not without leave of the Court, unless the Judges differ, on motions for new trial on the ground of improper reception or rejection of evidence, or of misdirection by the Judge. No judgment, rule, or order is appealable which does not fall within one or other of these classes of cases. From all judgments of the Court of Exchequer Chamber, a further Appeal or Error, as the case may be, lies to the House of Lords.

Among the inconveniences of this system are the following:—Error cannot be brought from any interlocutory judgment, *e.g.*, a judgment allowing a demurrer, before the final determination of all issues of law and of fact joined upon the record. The point of law decided on the demurrer may be sufficient, if the judgment stands, to determine the whole controversy between the parties; yet if, as is commonly the case, issues of fact, as well as law, have been joined in the pleadings, it is necessary to go through the expense and delay of trying all those issues, though according to the judgment on the demurrer they are wholly immaterial, in order to get into the Court of Error. As to Bills of Exceptions, the rule is that they must be tendered at the time of trial, and before verdict given, excluding all opportunity for deliberate consideration, and giving occasion to difficulties as to the proper mode of stating the terms, or substance and effect, of the Judge's ruling; no bill of exceptions being admissible unless signed by the Judge, and no proof of his ruling, extrinsic to the bill of exceptions itself, (*i.e.*, by shorthand note or otherwise,) being allowed. The practice has been to hand in a hasty and imperfect note at the trial, leaving the bill of exceptions itself to be afterwards agreed upon by the parties, or settled by the Judge. In some cases it is found difficult, in others impossible, to come to any agreement or settlement, and, whenever any difference arises, it leads to great delay and expense. The cases are so few in which the points of law really intended to be raised can be satisfactorily taken by this form of proceeding that it is of little use. The convenient mode, and that generally adopted, of raising those points, except when the parties agree to have a special case stated, a practice attended with its own inconveniences, is either by reserving them at the trial, which depends on the leave of the Judge, and the consent of the parties, or by motion for a new trial. The power of appeal when the latter mode is adopted, if the Court gives a unanimous judgment, is not of right, but depends upon the will and discretion of the Court.

When Appeal is brought, the Court of Exchequer Chamber does not proceed simply upon the materials which were before the Court below, but a Case must be made up between the parties, which must be settled by the Judge if the parties differ; and, as such difference often happens, this is apt to lead to considerable expense and delay.

Appeals lie to the House of Lords, as of right, from all final Orders or Decrees of the Court of Probate, whether depending on questions of law or of fact only, and from all interlocutory decrees or orders of that Court, by the leave of the Court, but not otherwise.

In the Divorce Court, every decision of the Judge Ordinary, whether on law or on fact, is subject to an appeal to the Full Court, whose decision is final, except in cases of dissolution of marriage, nullity of marriage, or declaration of legitimacy, in which excepted cases only an appeal lies from sentences and final judgments of the Divorce Court to the House of Lords.

In the Court of Admiralty, as in the Court of Probate, all final sentences are appealable as of right, and all interlocutory judgments are appealable by the leave of the Court only.

The rules as to the time for appealing, in the different Courts, are also different.

For appeals and rehearings in Chancery, a period of five years from the date of the decree or order appealed from is allowed, after which the leave of the Lord Chancellor

or Lords Justices is necessary, and such leave may be given at any time, but will only be given if it shall "appear, under the peculiar circumstances of the case, to be just "and expedient."

For appeals to the House of Lords from the Court of Chancery, two years from the date of the enrolment of the order appealed from, and thenceforth until the end of a fortnight after the beginning of the next session of Parliament, are allowed; and when a final decree is appealed from, all prior interlocutory orders in the same cause, though enrolled for more than the prescribed period, may be included in the appeal.

At Common Law, six years from the date of final judgment are allowed for bringing error to the Exchequer Chamber, and a like period of six years for bringing error from the Exchequer Chamber to the House of Lords. In cases of appeal, as distinguished from error, in the Common Law Courts, notice of appeal must be given within four days after the decision appealed from, unless the time is enlarged. When such notice is given, as for want of the opportunity of full consideration it generally is, no time is limited within which the party must proceed to prosecute his appeal.

In the Probate Court application for leave to appeal from an interlocutory decree or order must be made within a month after the delivery of the decree or order, or within such enlarged time as the Court may direct; and it may be doubtful whether any time is limited for appealing from Final Decrees or Orders.

In the Divorce Court, the appeal from the Judge Ordinary to the Full Court must be filed within three months from the date of the decree appealed from; and that to the House of Lords, whether from the Full Court or from the Judge Ordinary, within one month.

Appeals from the Court of Admiralty must be founded either on notice given to the Registrar immediately after the delivery of the judgment, or upon a declaration, called a Protocol of Appeal, made before a notary and witnesses within fifteen days, and must be prosecuted by presenting a petition of appeal to your Majesty in Council within one year from the date of the sentence or decree appealed from.

As to security for the costs of appeal:—

In the Court of Chancery none is required beyond a deposit of 20*l.* with the Registrar, when the petition is for rehearing of a decree or decretal order. Upon interlocutory appeals no deposit is made. In the Courts of Common Law, every appellant (in an appeal technically so called) and every defendant in an action who brings error is required to give substantial bail to pay costs; but a plaintiff who is also plaintiff in error gives no security. In the Courts of Probate and Divorce no security for costs is taken, but the general orders of the House of Lords require all appellants to that tribunal to enter into their own recognizances, without sureties, for 400*l.* Appellants from the Court of Admiralty, if resident out of the jurisdiction of the Court, may be required to give bail in 300*l.*; if within the jurisdiction, they give no security.

In the Court of Chancery and the Probate Court an appeal does not operate as a stay of execution unless the Court, upon a special application, so directs. In the Divorce Court it does, practically, so operate. In the Courts of Common Law appeal or error operates always as a stay of execution as soon as security is given. In the Court of Admiralty an appeal is followed, as of course, by an inhibition, which has the same effect.

Court of Appeal.

For these various and discordant systems of appeal we recommend the substitution of the scheme embodied in the following suggestions:

First, we propose that in the place of the Court of Exchequer Chamber, and of the Court of Appeal in Chancery, both which Courts, as now constituted, would cease to exist, there should be established, as a part of the Supreme Court, a Court of Appeal, consisting of— Constitution of Court

The Lord Chancellor,
The Lords Justices,
The Master of the Rolls, and
Three other permanent Judges, with
Three of the Judges of the Supreme Court to be nominated annually by the Crown;

an additional Vice-Chancellor being substituted, as a Judge of First Instance, for the Master of the Rolls. The Court of Appeal thus constituted should be empowered to sit either as a Full Court, or in Divisions, but the number of Judges sitting together in any Division ought never to be less than three. The Judges of the Court, other than the nominated Judges, should always form a majority of the Court.

We propose further, that to this Court an appeal should lie from all judgments, decrees, rules, and orders, in suits or proceedings not strictly criminal, of any division or Judge of the Supreme Court, with certain exceptions which we shall afterwards specify. It may hereafter deserve consideration, after experience of the working of the Court thus constituted, whether its decisions may not be made final, unless leave to appeal from them be given, either by the Court itself, or by the House of Lords. In the meantime, we recommend that there should be a right of appeal to the House of Lords.

A direct appeal to the House of Lords, without going through the Court of Appeal, might, we think, be allowed in all cases in which an appeal on matter of law would lie to the Court of Appeal, if the respondent consents to that course being taken, but not otherwise.

The limitations or exceptions to which we think the right of appeal ought to be subject are the following: Judgments, Decrees, or Orders founded upon and applying the verdict of a jury, or the verdict of a Judge discharging the functions of a jury ought not to be appealable, except upon matter of law. Interlocutory orders, if made by any division of the Supreme Court, consisting of three or more Judges, should not be appealable, except in case of difference of opinion among the Judges, or by special leave of the Court; and, if made by any Division or Judge with respect to any question of procedure or practice, as to which the Court or Judge had power to make the order, should be appealable only under such regulations as may be made by General Orders. As a general rule, no appeal should be allowed as to costs only.

The time for appealing from interlocutory orders made in the progress of a suit, before the final decision upon the merits between the parties, ought to be regulated by General Orders. In all other cases a fixed period, not exceeding six months from the time when any judgment, decree, rule, or order is made or entered upon the record, should, we think, be allowed for appealing against it. These rules, as to the time for appealing, should apply both to appeals to the Court of Appeal, and to appeals to the House of Lords; and the office of the Clerk of the Parliaments ought to be open for the reception of appeals at all times of the year, whether Parliament be or be not sitting.

All proceedings in error and bills of exceptions should be abolished; and every appeal to the Court of Appeal should be brought by notice of motion, by way of appeal, in a summary way, without any petition or formal procedure. No enrolment of any judgment, decree, rule, or order should be necessary in order to enable any party to appeal therefrom to the House of Lords; and every appeal to the House of Lords should be brought by a petition in a short form, stating the title of the cause or matter, with the names of the parties thereto, and the date of the order appealed from, and when the same was made or entered on the record; and also, who are the respondents to the appeal, and whether a general reversal, or a variation in any and what particulars, of the order appealed from is sought, but without setting out at length any of the proceedings.

The right of appeal should, we think, as a general rule, be conditional on substantial security being given by the appellant for the costs of the appeal. Inasmuch, however, as there may be cases to which this rule could not be applied without inconvenience or injustice, we think, that both the nature and the amount of such security, and the regulations according to which it may be required or dispensed with, are subjects which may properly be dealt with by General Orders of the Court.

No appeal should operate as a stay of execution, or of proceedings under the order appealed from, unless the Court, or a Judge of the Court, from which the appeal is brought, or the Court of Appeal, shall so order. But such stay of execution should be granted, as of course, when the order under appeal is for a money payment, on the terms of payment of the money into Court, or of security being given to the satisfaction of the Court.

With respect to the hearing of appeals, we would propose, that the following Rules should be established and made applicable both to the Court of Appeal and to the House of Lords.

Every appeal should be deemed to be in the nature of a rehearing, and the Court of Appeal should have power, if the justice of the case shall appear so to require, to allow any pleading or any special case to be amended, or any supplemental pleading or statement to be added to the record; or, upon any question of fact, to admit further evidence. Upon appeals and motions for new trial, proof of a Judge's ruling by a shorthand writer's notes ought, in our opinion, to be received. Upon the hearing of the appeal the Court should have jurisdiction over the whole record, and no interlocutory order, from which there has been no appeal, should operate so as to bar or prejudice a decision upon the merits.

The Court should also have power, upon the hearing of any appeal, to vary or alter the order under appeal in favour of the respondent, in any manner which may appear proper to do complete justice between the parties, as if the respondent had presented a cross appeal, complaining of any part of the order by which he may deem himself to have been aggrieved.

If these recommendations are adopted, we think that there should be no rehearing of any cause or matter before the Court by which it was originally heard, except by leave of the Court, nor, unless by consent of all parties, after the expiration of the time limited for appealing; and that Bills of Review for error apparent on the record should be abolished. Nothing, however, in these rules should take away or abridge the power of the Court to rectify any error which may have occurred in drawing up any judgment, decree, rule, or order.

We shall proceed, with due diligence, to consider the other matters embraced in Your Majesty's Commission; and we humbly submit to Your Majesty's gracious consideration this our First Report.

CAIRNS. (L.S.)
HATHERLEY. (L.S.)
W. ERLE. (L.S.)
JAMES PLAISTED WILDE. (L.S.)
* ROBERT J. PHILLIMORE. (L.S.)
GEORGE WARD HUNT. (L.S.)
HUGH C. E. CHILDERS. (L.S.)
W. M. JAMES. (L.S.)
† G. BRAMWELL. (L.S.)
COLIN BLACKBURN. (L.S.)
‡ MONTAGUE SMITH. (L.S.)
R. P. COLLIER. (L.S.)
‡ JOHN DUKE COLERIDGE. (L.S.)
ROUNDELL PALMER. (L.S.)
JOHN B. KARSLAKE. (L.S.)
J. R. QUAIN. (L.S.)
H. C. ROTHERY. (L.S.)
§ ACTON S. AYRTON. (L.S.)
WILLIAM G. BATESON. (L.S.)
JOHN HOLLAMS. (L.S.)
FRANCIS D. LOWNDES. (L.S.)

THOS. BRADSHAW, Secretary.
25th March 1869.

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* Agreeing with the general spirit and with most of the recommendations of the Report, I have subscribed it.

There are two subjects on which I desire to guard the expression of my opinion:

(1.) I think it is not expedient to destroy the special jurisdiction of the High Court of Admiralty. That Court has always administered in peace and war maritime international law. To no other Court has the Crown ever granted a commission of prize; and even before the issue of such commission, it has, in the opinion of Lord Stowell, an inherent jurisdiction in these matters. I may observe that the forms of pleading now in use in the High Court of Admiralty are as nearly as possible those which this Report recommends to be generally adopted by all Courts.

(2.) I think that the want of power in the Commission to consider the composition of the Final Court of Appeal has been unfortunate, because it has practically excluded from our consideration—

(*a.*) Whether it be expedient that two Final Courts of Appeal, namely, the House of Lords and the Judicial Committee of the Privy Council, should still continue :

(*b.*) Whether, if so, the composition of either or both should remain unaltered.

Yet the consideration of both these questions ought, in my judgment, to have preceded, and would perhaps have considerably modified the suggestions for the intermediate Court of Appeal made in this report. I think it also very doubtful whether that Appellate Court should be composed for the most part of Judges exercising appellate jurisdiction only.

ROBERT J. PHILLIMORE.

† CIRCUITS: I cannot concur in this recommendation to its full extent.

G. BRAMWELL.

‡ We are not able to concur in the recommendation that several counties should be consolidated for assize purposes to the extent indicated in the Report. Our general view is, either that the present system of holding assizes, which is based on the existing divisions of counties, and which brings justice reasonably near to the homes of suitors, witnesses, and jurymen, should, with some modifications, be retained ; or that the present system of Circuits should be altogether discontinued, and Provincial Courts established with assigned districts, having Judges who should go frequent circuits to convenient places within such districts; and with appeal from the Provincial Courts in certain cases to the Metropolitan Courts of Appeal.

MONTAGUE SMITH.
JOHN DUKE COLERIDGE.

§ I desire to record my opinion, that the following questions should be further considered :—

Whether all proceedings should not be commenced and prosecuted in the County Courts, unless it appears from the nature of the case that it is proper to remove it into the Supreme Court.

Whether it is desirable to allow such facilities for appealing, and repetition of appeals.

Whether, having regard to the unequal means of litigants, the changes proposed might not render it desirable to establish a new system of legal remuneration, and to limit the claims of suitors against each other for costs.

Whether it might not be desirable to substitute for the discretion of the Judges in respect of costs certain rules of positive application.

Whether the qualification of jurymen should not rather be lowered than increased.

Whether sufficient consideration has been given to the other elements in the administration of the law beyond that of excellence of judicial decision, namely, the time of the suit, the expense to the suitor, and the influence of the administration of justice on the social and political condition of the people.

Whether the House of Lords, if it is to continue a Court of Appeal, might not be rendered efficient for the purpose by legal peerages conferred on Judges of a certain standing, so as to make the Bench independent of the pleasure of the Crown, and by constituting a permanent Committee of such Peers, on the principle of the Judicial Committee of the Privy Council.

ACTON S. AYRTON.

FIRST REPORT

OF

THE COMMISSIONERS

APPOINTED TO INQUIRE INTO

THE COURTS OF LAW IN SCOTLAND.

TOGETHER WITH

MINUTES OF EVIDENCE.

Presented to both Houses of Parliament by Command of Her Majesty.

EDINBURGH:
PRINTED BY MURRAY AND GIBB
FOR HER MAJESTY'S STATIONERY OFFICE.

1869.

CONTENTS.

COMMISSION, ... iii

REPORT, ... vii

MINUTES OF EVIDENCE, ... 1

COMMISSION.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith:—To our right trusty and well-beloved Councillor DUNCAN, BARON COLONSAY; our right trusty and well-beloved Councillor JOHN INGLIS, Lord Justice-General, and President of the Court of Session in Scotland; our right trusty and well-beloved Councillor Sir WILLIAM PAGE WOOD, Knight, a Judge of the Court of Appeal in Chancery; our right trusty and well-beloved Councillor GEORGE PATTON, Lord Justice-Clerk; our trusty and well-beloved Sir JAMES SHAW WILLES, Knight, one of the Justices of the Court of Common Pleas; our trusty and well-beloved EDWARD FREDERICK MAITLAND, Esquire, one of the Senators of our College of Justice in Scotland; our trusty and well-beloved EDWARD STRATHEARN GORDON, Esquire, our Advocate in Scotland; our trusty and well-beloved Sir EDWARD COLEBROOKE, Baronet; our trusty and well-beloved Sir ROUNDELL PALMER, Knight, one of our Counsel learned in the Law; our trusty and well-beloved JAMES MONCREIFF, Esquire, one of our Counsel learned in the Law, Dean of the Faculty of Advocates in Scotland; our trusty and well-beloved GEORGE SCLATER BOOTH, Esquire, one of the Secretaries of our Treasury; our trusty and well-beloved ANDREW RUTHERFURD CLARK, Esquire, Sheriff of the County of Berwick; our trusty and well-beloved HUGH BARCLAY, Esquire, Sheriff-substitute of the County of Perth; our trusty and well-beloved JAMES CAMPBELL, Esquire, Sheriff-substitute of Edinburgh; our trusty and well-beloved WILLIAM SMYTHE, of Methven, Esquire, Convener of the County of Perth; our trusty and well-beloved ARCHIBALD ORR EWING, Esquire, Dean of Guild of Glasgow; our trusty and well-beloved GEORGE HARRISON, Esquire, Chairman of the Chamber of Commerce, Edinburgh; our trusty and well-beloved JAMES ADAM, Esquire, Advocate; our trusty and well-beloved ALEXANDER BURNS SHAND, Esquire, Advocate; our trusty and well-beloved THOMAS GRAHAM MURRAY, Esquire, Writer to our Signet; our trusty and well-beloved CHARLES MORTON, Esquire, Writer to our Signet; our trusty and well-beloved JAMES WEBSTER, Esquire, Solicitor before the Supreme Courts; our trusty and well-beloved JOHN BOYD BAXTER, Esquire, President of the Council of Procurators in Scotland; and our trusty and well-beloved ADAM PATERSON, Esquire, Writer in Glasgow, greeting:—WHEREAS, We did, by letters-patent, dated second day of October 1868, made and passed under the Seal appointed by the Treaty of Union to be kept and made use of in place of the Great Seal of Scotland, appoint you, the said Duncan, Baron Colonsay, John Inglis, George Patton, Sir Roundell Palmer, Edward Strathearn Gordon, Edward

Frederick Maitland, James Moncreiff, George Sclater Booth, Andrew Rutherfurd Clark, Hugh Barclay, William Smythe of Methven, Archibald Orr Ewing, George Harrison, Thomas Graham Murray, Charles Morton, James Webster, John Boyd Baxter, and Adam Paterson, together with our right trusty and well-beloved Councillor RICHARD BARON WESTBURY, to be our Commissioners to inquire into the Constitution and Jurisdiction of the various Courts for the Administration of Justice—Civil and Criminal—in Scotland; to wit, the Court of Session, the Court of Justiciary, the Commission for Plantation of Kirks and Valuation of Teinds, the Sheriff Courts, Commissary Courts, Burgh Courts, Dean of Guild Courts, Baron and Regality Courts, Police Courts, and Justice of Peace Courts; and also to inquire into the forms of Writs and Pleadings, and the Rules of Procedure, and the Privileges of Agents in the said several Courts; and also to inquire into the system of Review of, and Appeal from, the Decrees, Interlocutors, and Orders issued by these Courts respectively:

Now, know ye that We have revoked and determined, and do by these presents revoke and determine, the said Commission, bearing date the second day of October 1868, and every matter and thing therein contained:

And We, reposing great trust and confidence in your zeal, ability, and discretion, have authorized and appointed, and do by these presents authorize and appoint you, the said Duncan, Baron Colonsay, John Inglis, Sir William Page Wood, George Patton, Sir James Shaw Willes, Edward Frederick Maitland, Edward Strathearn Gordon, Sir Edward Colebrooke, Sir Roundell Palmer, James Moncreiff, George Sclater Booth, Andrew Rutherfurd Clark, Hugh Barclay, James Campbell, William Smythe of Methven, Archibald Orr Ewing, George Harrison, James Adam, Alexander Burns Shand, Thomas Graham Murray, Charles Morton, James Webster, John Boyd Baxter, and Adam Paterson, or any six or more of you, to make diligent and full inquiry into the constitution and jurisdiction of the said several Courts, and into the forms of writs and pleadings, and the rules of procedure, and the privileges of Agents, at present in use and force in the said several Courts, and into the operation and effect of the existing laws and arrangements for distributing and transacting the judicial business of the said Courts respectively, as well in Court as in the various Offices of the Clerks of the said Courts, and other Offices connected with the said several Courts, and into the duties and emoluments of all Officers acting under us before said Courts, and into the system of review of, and appeal from, the Decrees, Interlocutors, and Orders issued by the said Courts respectively, with a view to ascertaining whether any, and what changes and improvements, either by altering the constitution or jurisdiction of, or the forms of writs and pleadings, and procedure, and privileges of Agents in the said Courts, or any of them, or otherwise, may be advantageously made, so as to provide for the more speedy, economical, and satisfactory despatch of the judicial business now transacted by the said Courts: And for the better discovery of the truth in the premises, WE DO, by these presents, GIVE and GRANT to you, or any six or more of you, full power and authority to call before you, or any six or more of you, such Judges and so many of the Officers and Clerks of our said Courts, and all such other persons as you shall judge necessary, by whom you may be informed of the truth in the premises, and to inquire of the premises by all other lawful ways and means whatsoever: AND WE DO

HEREBY GIVE and GRANT unto you, or any six or more of you, full power and authority to cause all or any of the Officers and Clerks of any of our said Courts to bring and produce before you, or any six or more of you, all records, orders, books, papers, or other writings belonging to any of our said Courts, or in the custody of any of the Officers within the same: AND our further will and pleasure is, that as soon as the same can conveniently be done (using all diligence), you certify unto us, under the hands and seals of you, or any six or more of you, what you shall have done in the premises: AND We further will and command that this, our Commission, shall continue in full force and virtue, and that you our said Commissioners, or any six or more of you, shall and may from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment: And for your assistance in the due execution of this our Commission, we have made choice of our trusty and well-beloved Norman Macpherson, Advocate, Professor of Scots Law in the University of Edinburgh, to be Secretary to this our Commission, and to attend you, whose service and assistance we require you to use from time to time, as occasion may require. IN WITNESS whereof, we have ordered the Seal, appointed by the Treaty of Union to be kept and made use of in place of the Great Seal of Scotland, to be appended hereto. GIVEN at our Court at Saint James's, the nineteenth day of November, in the year One thousand eight hundred and sixty-eight, and in the Thirty-second year of our reign.

Per Signaturam Manu S. D. R. Reginæ supra scriptam.

Written to the Seal, and Registered the twenty-fourth day of November 1868.

(Signed) JOHN M. LINDSAY,
Director of Chancery.

Sealed at Edinburgh the twenty-fourth day of November in the year one thousand eight hundred and sixty-eight.

(Signed) COLIN MACKENZIE,
Deputy Keeper of the Seal.

FIRST REPORT.

TO THE QUEEN'S MOST EXCELLENT MAJESTY.

We, your Majesty's Commissioners, appointed to inquire into the Constitution and Jurisdiction of the various Courts for the administration of Justice—Civil and Criminal—in Scotland, and into the forms of Writs and Pleadings, and the Rules of Procedure, and the Privileges of Agents, at present in use and force in the said several Courts, and into the operation and effect of the existing Laws and Arrangements for distributing and transacting the Judicial Business of the said Courts respectively, as well in Court as in the various Offices of the Clerks of the said Courts, and other Offices connected with the said several Courts, and into the Duties and Emoluments of all Officers acting under your Majesty before said Courts, and into the system of Review of, and Appeal from, the Decrees, Interlocutors, and Orders issued by the said Courts respectively, with a view to ascertaining whether any, and what changes and improvements, either by altering the constitution or jurisdiction of, or the forms of writs and pleadings, and procedure, and privileges of agents in the said Courts, or any of them, or otherwise, may be advantageously made so as to provide for the more speedy, economical, and satisfactory despatch of the judicial business now transacted by the said Courts, have held thirty-two meetings, and humbly beg leave to submit to your Majesty the evidence given before us at our meetings held prior to and upon the 12th day of February 1869.

COLONSAY.

JOHN INGLIS.
HATHERLY.
J. MONCREIFF.
E. F. MAITLAND.
EDWARD S. GORDON.
J. S. WILLES.
ROUNDELL PALMER.
EDW. COLEBROOKE.
GEORGE PATTON.
AND. R. CLARK.
HUGH BARCLAY.
JAMES CAMPBELL.
WILLIAM SMYTHE.
ARCHD. ORR EWING.
GEORGE HARRISON.
JAMES ADAM.
ALEX. BURNS SHAND.
T. G. MURRAY.
CHARLES MORTON.
JAMES WEBSTER.
JOHN B. BAXTER.
ADAM PATERSON.
G. SCLATER BOOTH.

LAW COURTS COMMISSION.

MINUTES OF EVIDENCE.

SATURDAY, 5TH DECEMBER 1868

Members Present:—

LORD COLONSAY.
THE LORD JUSTICE-GENERAL.
LORD BARCAPLE.
THE LORD ADVOCATE (GORDON).
DEAN OF FACULTY (MONCREIFF).
A. R. CLARK, Esq.
JAMES CAMPBELL, Esq.
ARCHD. ORR EWING, Esq.
GEO. HARRISON, Esq.
JAMES ADAM, Esq.
A. B. SHAND, Esq.
THOMAS GRAHAM MURRAY, Esq.
CHARLES MORTON, Esq.
JAMES WEBSTER, Esq.
JOHN BOYD BAXTER, Esq.
ADAM PATERSON, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

HENRY GLASSFORD BELL, Esq., LL.D., Advocate, examined.

Henry Glassford Bell, LL.D.

1. *The Chairman.*—You are the Sheriff of Lanarkshire?—I am.

2. How long have you been so?—For nearly two years.

3. Before that you were one of the Sheriff-substitutes at Glasgow?—Yes, for twenty-six years. I was the senior Sheriff-substitute from 1839 till two years ago.

4. Will you explain to the Commissioners the nature of your duties as Sheriff of Lanarkshire, first in regard to your judicial functions in civil causes?—The duties are very extensive and very multifarious. They are substantially the same in kind as the duties of all the other Sheriffs of Scotland; but in degree they exceed very considerably, I believe, those of any other Sheriff. Of course I need not explain to the Commission the general character of the jurisdiction of the Sheriff Courts of Scotland. I may mention, however, that in Glasgow the Sheriff and the four resident Sheriff-substitutes hold eleven courts every week, which comprise four ordinary courts—viz. the courts held by the respective Sheriff-substitutes, each of whom holds what we call an ordinary court; three appeal courts, which are held by myself, two being appeal courts from judgments pronounced by Sheriff-substitutes of the Lower Ward in Glasgow, and one being an appeal court from judgments pronounced by the Sheriff-substitutes of the Middle and Upper Wards. There are also held weekly one Debts Recovery Court; and weekly all the year round, without any intermission, three Small Debt Courts. Over and above these, we have numerous bankruptcy courts and criminal courts, both for summary trials and trials by jury. I may likewise mention that, in our ordinary courts, in the year from 1st October 1867 to 1st October 1868, 1292 cases (summonses and petitions) were tabled; and there were in addition 209 in which summonses were taken out, but not proceeded with. The decrees in absence were 346, and there were 737 litigated cases. In addition to these, for that year, which is the first year of the institution of the Debts Recovery Court, there were in that court 944 cases, the summonses in which concluded for about £30 on the average; these were sometimes to the full extent of £50 permitted by the Act, and a good many were below the average of £30. In consequence of the business thrown in by the Debts Recovery Court, there has been, in the course of last year, in Glasgow an increase of 860 cases in the sum-total of civil causes above £12. I am not speaking just now of the small debt jurisdiction at all. I may farther mention, that the Sheriff-substitutes, whose duty it is to take, in their own hands, notes of the whole evidence in all causes in which proof is allowed, had occasion to fix, during the course of last year, 1811 diets for taking proof, and they fixed 2142 diets for hearing debates.

5. *Mr. Baxter.*—Is that for the whole county?—No; in Glasgow alone. I wish to explain that while 1811 diets were fixed for taking proofs, some of these diets were continued, proofs not having been actually taken at all of them, so that there must be a deduction of 200 or 300 from the 1811 diets of proof. In the same way some of the 2142 diets for hearing debates were simply diets at which continuations took place. It is right also to explain that whilst it is enacted that the Sheriff-substitutes are to take 'a note of the evidence,' in point of fact they must take the full and complete evidence, because all these cases are subject to appeal both to the Sheriff and to the Court of Session; and it would be in vain to attempt merely to take such notes, or jottings, or memoranda of evidence as might be satisfactory to the Sheriff-substitute's own mind, but would not give a full and complete view of the evidence in the court of appeal. The duty of taking this evidence, which extends, I believe, to not fewer than 1800 or 2000 pages a year for each Sheriff-substitute, is a very laborious one. There have been also during the above year, in the two courts of appeal which I hold twice a week for the Lower Ward alone, 1246 appeals. Of course that includes many appeals upon incidental points, — not appeals from final judgments; but as there are three or four stages of a case at which an appeal may be made to the Sheriff, advantage is taken of that very frequently, and there are a great many appeals upon incidental points. In the courts for the Upper and Middle Wards, which I hold once a week, there were 224 appeals; so that, in all, the number of appeals brought before me last year in my appeal courts was 1470. I have made it a rule in these courts that I will not continue any case more than twice, except upon very special grounds, which must be expressly stated and recorded. I am glad to say that I have been able, though by very incessant labour certainly, to keep abreast of all the appeals; and that at the date when I made a statement

Henry Glassford Bell, LL.D.

of these figures in public court, on 1st October last, I had no case at avizandum. During the year there were 773 final judgments pronounced which admitted of advocation, or nearly all of which admitted of advocation; but caution, with a view to advocation, was found in only 24 of these, and advocation was actually proceeded with in a very few of the 24. By the recent Court of Session Act a change has been made as regards the necessity of finding caution for expenses in advocations, and an unsuccessful litigant may now go at once from the Sheriff Court, on a simple note of appeal, without finding any caution. I thought it very likely that this would very considerably increase the number of appeals to the Court of Session; but the change has only been in operation since October last, and we have not yet had time to ascertain exactly how it will affect the business. I was, however, informed recently by the Sheriff-clerk that there had not been a great many more appeals intimated than there used to be advocations. I am speaking of the ordinary civil business, involving questions in which sums of an unlimited amount may be at stake, and in the Sheriff Court at Glasgow our civil business is often of a high and important class. It is not unusual for the direct conclusions of an action to extend to thousands of pounds, and very frequently to hundreds; while there are other cases which involve indirectly patrimonial interests to a very large extent, and affect various important rights and interests. Then with regard to what is called our summary jurisdiction, we had last year 558 applications, in which deliverances were given in connection with sequestrations for rent, interdicts, lawburrows, and higher class ejections. There were, besides, 1739 applications for ejectment where the rent did not exceed £30, and the premises were let for less than a year. Entirely distinct from these, we had 550 applications under particular statutes, which statutes confer special and different kinds of jurisdiction upon the Sheriff. Of these 550, 108 were at the instance of Inspectors of the Poor, for orders for the removal to England and Ireland of paupers who had become burdensome in Scotland without having acquired a settlement. Four appeal courts were likewise held under the Glasgow Corporation Water Company's Act, in which several hundred appeals were disposed of. Under the Lunacy Statutes there have been 396 petitions for the commitment of persons of unsound mind to asylums. Under the Registration of Births, Deaths, and Marriages Act there were 129 warrants issued, authorizing the correction of entries and the registration of births neglected to be timeously reported. Under the 19 and 20 Vict. c. 96, there were 23 warrants permitting the registration, and thereby affording full legal evidence of the marriage of persons who had entered into irregular marriages. All these required very careful procedure. Forty-four warrants were granted to apprehend persons *in meditatione fugæ*, and some of these persons were brought up and examined. Daily attendance was given by a Sheriff-substitute, at a certain hour, to receive the personal applications of poor persons who were claiming parochial relief, but who had been refused by the Inspectors, and out of these applications orders for relief were given in numerous instances. Then we have a very important and serious jurisdiction under the Bankruptcy Acts, and I believe we do almost as much work in bankruptcy in Glasgow as in all the other bankruptcy courts in Scotland put together. We had, in the course of last year, 178 judicial sequestrations, a large number of appeals against trustees' deliverances and resolutions of creditors, and a good many competitions for the office of trustee. The Sheriff's judgment now, in matters of competition, is final; so that a trusteeship depends on his judgment where there is a competition. His judgments upon appeals from the deliverances of trustees, and resolutions of creditors, are subject to review; but I believe there have not been many appeals taken to the Court of Session from the local courts upon these matters. I may state that ever since jurisdiction in bankruptcy was extended to the Sheriff Courts, I have exclusively taken charge of the working of the Bankruptcy Acts, with the exception of the more formal duty of presiding at bankrupt examinations, which has been shared with the other Sheriffs; but all matters involving argument, or debate, or interpretation of the Acts, I have taken exclusively the charge of. I did so originally as Sheriff-substitute, with the consent and approbation of the late Sheriff, Sir Archibald Alison, and I have continued it since I became Sheriff, upon the footing that from the large experience which I have now acquired, and the knowledge that the agents in Glasgow have of the views I take, there is less chance of any discrepancy in the judgments under these important statutes. Then our Small Debt Court is a very remarkable court, but not more remarkable than perhaps the enormous population of Glasgow might lead one to expect. Last year there were disposed of in the Small Debt Court, 24,688 new cases, and 643 sists, making a total of 25,331, which is a very considerable increase over the preceding year, and that notwithstanding of the introduction of the Debts Recovery Act. The Small Debt Court in Glasgow is now exclusively conducted by the Sheriff-substitutes, who sit alternately in it; but it would be impossible for the four Sheriff-substitutes in Glasgow to overtake the whole of that and their other business, and therefore, for a good many years back, the Sheriff-substitute at Airdrie has had imposed on him the duty of taking a share of the Small Debt Court business in Glasgow, along with the Sheriff-substitutes there. Of course, when any points of nicety or difficulty arise, on which the Sheriff-substitutes who sit in the Small Debt Court may be disposed to take opposite views, they commonly think it right to consult with me, and we consider the whole matter, and come to such a view as makes the judgments in the Small Debt Court of Glasgow uniform. Then our criminal jurisdiction is very large and important. Last year, in the criminal department, there were 341 trials before the Sheriff and a jury, and 113 without a jury. Our *summary* criminal jurisdiction is not so large as in many other counties, because a great deal of it proceeds before the Justice of Peace Court of Glasgow, and I believe the Procurators-fiscal of Glasgow are very well pleased with that arrangement. The criminal trials, however, are very numerous, being for last year, as I have stated, 341 with a jury; and from persons accused of crimes last year there were 671 judicial declarations taken. There were also 154 investigations into cases of sudden death. That is a duty performed under the superintendence of the Sheriff in his capacity as coroner. There has been a good deal of writing lately in the newspapers about the introduction of the English system of coroners' inquests into Scotland; but some of these writers do not seem to be aware of the fact that a coroner's jurisdiction is exercised by the Sheriff, and very much in the same way as it is exercised in England, with this distinction, that in Scotland it is not conducted in open court; it is conducted judicially at the instance of the Procurator-fiscal under the warrant of the Sheriff. If a sudden death takes place, and there is anything suspicious about it, the Sheriff grants his warrant immediately for a medical inspection, and he also grants warrant to the Procurator-fiscal to cite such witnesses as seem to him proper to be examined, in order to investigate into the causes of the death. The precognition is submitted to the Sheriff, and if he is satisfied that there is any ground for making a charge against any one, he grants his warrant for the apprehension of that person; if, on the other hand, he is satisfied that there is no ground for proceeding further, and that the death has been purely accidental, no procedure is instituted. It appears to me that this system is probably fully more congenial to the feelings of the Scotch people than the English system; because, while now and then a case may occur where it is right that publicity should be given to the procedure, I think that in the great majority of cases, it would just harrow the feelings of innocent persons connected with the deceased, to bring the whole particulars of the sudden

death prominently before the public. Then I have to say finally, that the Sheriffs in Scotland do the work of the revising barristers in England, and that we have had, more especially lately, very important duties to perform in the Registration Court in making up the roll of electors. We are also returning officers in elections, and we have the regulation and superintendence of all the arrangements for conducting, in a regular and proper manner, the elections of Members of Parliament. These are the principal duties that we have to attend to in Glasgow, and in a lesser degree they are the duties that all the Sheriffs in Scotland have to perform.

6. *The Chairman.*—Are the duties of the Sheriff-substitutes in Glasgow distributed among them upon any principle?—Yes; they are equalized as far as possible, both as regards civil and criminal business. We find it practically not quite possible to equalize it; but that is the theory on which we proceed.

7. Who makes the distribution?—It is made under the superintendence of the Sheriff, with the consent of the Sheriff-substitutes. I requested the then senior Sheriff-substitute (Mr. Strathern) to draw out a scheme for the proper allocation of the business to the Sheriff-substitutes; we consulted together about it, and it was approved of.

8. After what you have said, I need hardly ask whether your time is very fully occupied in Glasgow?—It is very fully occupied. I go to my work every day at ten o'clock, and I remain almost every day till five, and frequently till six; and at night I am very often obliged to work at home for three or four hours.

9. I presume you have as much to do as you can well accomplish?—Yes; and I think that unless a man had a good constitution he could not do it.

10. Does it appear to you that the number of substitutes you have in Glasgow is more than adequate to the discharge of the duties?—Certainly not.

11. They are fully occupied?—They are; and with a very little additional duty thrown into the Sheriff Court, the number would not be enough.

12. Does it occur to you that any additional duty should be thrown into the Sheriff Court?—Certain heads of subjects of inquiry were submitted to me, and one of these, I see, suggests the question whether there should be an extension of the jurisdiction given to the Sheriffs; but the first matter referred to in these heads or notes, is the constitution of the court as consisting of Sheriffs and Sheriff-substitutes. Of course, if no questions are asked of me on that subject I have nothing to say; but that was at the head of the list of subjects, and I thought it my duty to consider it.

13. What is the result of your consideration of it?—I should wish to be allowed to say, as even anterior to that question, that I think it will be incumbent upon this Commission to make up their minds as to what they should hold of the value and character of the Sheriff Courts generally,—whether they should be promoted, fostered, and strengthened, or whether they have already become too large in jurisdiction, and whether that should be diminished. If they come to be of opinion that they are courts of great utility, and that the country is very much disposed to support and foster these courts, then that view would materially influence the details of the evidence which may be given. I may be permitted to state that from all I have seen of the working of Sheriff Courts, I am of opinion that they are the most useful local courts, as far as I know, that exist in any country, and that they have a very strong hold on the feelings of the community. I mean generally; of course there may be defects in their constitution; but I think that generally that is the feeling in Scotland with reference to them. I should like also to state that there are, in my opinion, no *termini habiles* for making any comparison between the Sheriff Courts of Scotland and the County Courts of England. The jurisdiction of the County Court Judge is an altogether trifling and unimportant matter in comparison with the jurisdiction of the Sheriff, and these courts dispose of matters infinitely inferior in importance to those disposed of by the Sheriff Courts in Scotland. Some years ago I had the pleasure of visiting an old acquaintance of mine who had been in very great local practice as a barrister, and who had afterwards accepted the office of County Court Judge at Preston, and he told me he was ashamed of his office—that it was not an office for an intellectual lawyer at all—and that he had next to nothing to do that was worth a lawyer's doing. I went with him to his court at Wigan, and it fully bore out his representation of the character of the business, for the cases were of the smallest class of our smallest small debt cases; and he told me he had little or nothing to do but decide such cases. I speak of a period ten years ago. Since then, the jurisdiction of the County Courts in England has been increased to a certain extent, and a certain amount of bankruptcy business has been thrown into them; but, as far as I understand, even now these courts can bear no comparison with the Sheriff Courts of Scotland. With regard to the question which your Lordship has put as to the constitution of our Sheriff Courts, a very considerable amount of agitation, I may say, has sprung up of late years on that subject, and I think there are three views entertained. There is a party who have made up their minds very decidedly that what they call the double Sheriffships are unnecessary, and should be abolished; that it is an unnecessary expense to get one gentleman of the same profession, of probably very much the same standing, to review the judgments of the resident Sheriff; and that it is not a court of appeal of sufficient strength to justify the appeal. That is one view which is very strongly entertained by a number of gentlemen. They think it leads to unnecessary delay and expense; and they think it results also in this, that not so good a lawyer as might be got, supposing there was only one Sheriff, is sent down to do the resident business, and that another lawyer, who is often not a superior lawyer, walks up and down the Parliament House in Edinburgh, and acts as the court of review to the resident judge. They think that in all courts of review, *ex facie* of their constitution, there should be a greater weight in the appellate jurisdiction than in the original one, and that this does not exist in the Sheriff Courts as presently constituted. I am merely stating that as one view which is entertained. After getting the heads of inquiry from the Commission, I submitted them to the Sheriff-substitutes in Glasgow, in whose judgment I have very great confidence, for they are all able men. I did not submit them to Mr. Galbraith, for he has at present got leave of absence on account of ill health, unfortunately, and his medical man said that he required total cessation from all labour, and therefore I did not consult him; but the senior Sheriff-substitute, Mr. Dickson, who has had large experience as a lawyer, says, in the memoranda with which he furnished me, 'Two axioms may be laid down with regard to courts of appeal, viz.—1*st*, That they should be, in a decided and marked manner, superior to the courts whose judgments they review; and 2*d*, That they should be so constituted as to secure uniform and authoritative expositions of the law. Neither of these objects, it is thought, is secured under the present system. Considering that frequently the Sheriff-principal is appointed on merely political considerations, with but little practical knowledge of law, it may well be doubted whether, on the average, the Sheriffs who sit on appeal are superior in legal attainments to the substitutes. In some cases, no doubt, they are; but among the accidents of political patronage, it must not unfrequently happen that the substitute is the better trained and more experienced lawyer of the two. Even where it is otherwise, the difference between them cannot be so great that, as a rule, the judgment of the principal is decidedly superior to that of the substitute. Again, a uniform and authoritative exposition of the law is impossible where the courts of review consist of twenty-four single judges, each deciding on his individual responsibility, in general with meagre argument, not unfrequently without any at all. It is no answer to this to say that the Sheriffs confer together in the Parlia-

Henry Glas ford Bell, LL.D.

Henry Glassford Bell, LL.D.

ment House, and that their decisions are often a kind of exposition of the law as generally understood there among the body. Such a practice is useful, and modifies evils which otherwise would be intolerable under the present system. But it is a poor substitute for the deliberate and responsible decision of a properly constituted tribunal, the judges of which would hear the argument together, and decide after joint deliberation and conference.' Then he says: 'The result of the present system is, that among the many hundreds of decisions pronounced every year by the Sheriffs-principal on appeal, none are authoritative. The law is not expounded or explained by them, for the benefit of the profession and the public generally; and there is a vast expenditure of judicial labour in the repeated examination and decision of the same questions of law. It is sometimes said that, in a poor country like ours, there would not be sufficient inducement for men of ability to join the legal profession, and the administration of justice would therefore suffer, if the principal Sheriffships were abolished. This prospective and speculative advantage appears to me not to be a good reason for keeping up a number of ill-constituted courts of appeal, and that, too, at an unnecessarily great expense.' Then he suggests a somewhat middle course,—for I think there are three views entertained on this subject. The one view is that there should be one Sheriff, with a direct appeal from him to the Court of Session; another view is that there should be a new appellate jurisdiction constituted for the Sheriff Courts; and the third view is, that the present system is better than either of these. Now Mr. Dickson makes this suggestion: 'Apart from this, I think that the same end would be much better attained by constituting proper courts of appeal. These courts I think should hold an intermediate place between the courts of first instance and the Court of Session,—deciding finally on matters of fact, but subject to review on matters of law, except in small cases. Each should be constituted of three judges, the country being divided into about four districts. The judges should be well paid, and should give their whole time to their public duties. The effect of such a change would be to diminish considerably the work of the Supreme Court. I would therefore propose that two or three of the present Lords Ordinary should be detached from the Court of Session and made presidents of the several courts of appeal. The resident Sheriffs should be qualified to be appointed to the appellate courts, as well as to sit occasionally to make up a quorum; and the appellate Sheriffs should be qualified for appointments as Lords of Session. Such prospects of promotion would give the local Sheriffs such an inducement to cultivate superior attainments as they do not now possess; and it would help to secure good men for the office. A system of this nature works well in France.' On the same subject Sheriff Murray says: 'While, with regard to the country generally, the double Sheriffship is undoubtedly useless, and even hurtful, the peculiar circumstances of Glasgow render some sort of local review necessary. If the present rule of law, by which a Sheriff-substitute has only power to correct purely clerical errors in his judgments within a limited time, is to be maintained, then the double Sheriffship is, as regards Glasgow, almost a necessity; for, in the great press and rush of work, it is unavoidable but that every now and then there should occur some slip, either in point of form, or in some matter of detail, especially in questions of accounting, for which the best remedy is a rapid review on the spot. But if, as seems expedient, power were given to the Sheriff-substitute himself to correct within a limited time such minor matters, on his attention being called to them, and if, as I think ought also to be the case, the judgment of the Sheriff-substitute were final as regards matter of fact, the best local tribunal of review would be one composed of the various Sheriffs-substitute of the district sitting together to hear appeals.' I go a good deal further than this with reference to the case of Glasgow. It appears to me that Lanarkshire is a case *per se*. It has an enormous population, including Glasgow, and it has an amount of work which is altogether distinct from the work of Sheriff Courts in ordinary rural districts. Therefore, whatever view the Commission may take generally of the subject, I would rather be inclined to expect that it would be necessary to legislate in some separate way for Glasgow. It is quite true that a good deal of the appellate work done by Sheriffs is in correcting slight mistakes, and in putting right something that has intervened since the judgment was pronounced, and which, if the matter were brought before the Sheriff-substitute himself, he would do equally well with the appeal Sheriff; but, unfortunately, under the present system, the Sheriff-substitute has no power of doing anything, except correcting clerical errors. I do not wish to introduce the old form of reclaiming petitions; but I would strongly recommend that, after the Sheriff-substitute has pronounced an interlocutor, he should be entitled, on a motion made by either party, to authorize a rehearing, and to consider that particular interlocutor. That would save the necessity for a great many appeals to put right casual mistakes in a matter which had not been brought under the Sheriff's attention when he pronounced the particular interlocutor. There is undoubtedly a strong party who either wish the double Sheriffship abolished at once, and a good man sent down to do the whole work in the county, and, subject to his right to review himself occasionally, with a direct appeal from him to the Court of Session, or the intermediate system of an appellate court, stronger than a mere appeal from one lawyer to another,—an appellate jurisdiction, consisting perhaps partly of the Sheriffs, and occasionally also of the Sheriff-substitutes themselves. That may work in certain counties; but it would not do in Glasgow. It is utterly impossible to remove the Sheriff-substitutes from their duties as Sheriffs in the first instance, and make them sit also in a court of appeal; but there might be more Sheriffs, or the appeal court might be strengthened in some way if the present system were abolished. On the other hand, it is right to say that some parties do not see any such great objections to the present system as have occurred to other minds. In particular, I find that one of the Sheriff-substitutes of Glasgow, a lawyer of distinction, and author of a very excellent book on *Mercantile Law*, Mr. Clark, takes this view: 'I am of opinion that the existing constitution possesses advantages of a very important kind, and ought not to be changed for any other which would involve the abolition of the principal Sheriffship. I rest this opinion on the following considerations: 1. The office of Sheriff affords an admirable training for such as may afterwards be called to act as judges in the supreme courts. With the exception of the Sheriffs of Midlothian and Lanarkshire, all the Sheriffs in Scotland are practising advocates, and are thus inured to the discharge of the judicial function at the very time when they are in full practice at the bar. The advantages of this combined system of training, in fitting them for the supreme bench, are too obvious to require comment. 2. The system of the double Sheriffship is probably a means of securing greater judicial ability for the local judicatories than could be attained in any other way. Few men of high legal attainments would be got to accept the position of resident Sheriffs, except in large towns, unless their incomes were vastly increased; because not only would they be removed from the society in which they had been accustomed to move, but their families would have to be educated away from home at great expense. As it stands at present, men of the first position at the bar are ready to become principal Sheriffs for comparatively small emoluments, because that office does not injure, but rather improves their position as practising advocates. Now, though their substitutes may not be, and cannot be expected to be, men of the same standing as lawyers, the work is satisfactorily done under the direction and control of the principal Sheriffs. If you were to divide the existing emoluments of the latter among their substitutes, you would add but little to their incomes, and would fail to secure men for the office such as those who at present act as principal Sheriffs. 3. One great cause of proficiency in a judge is the amount and variety

of practice in which he is engaged. Now, with the exception of Glasgow, and one, or perhaps two other localities, the local judicatories in Scotland do not present this variety or amount of practice; so that, if the local judges be originally deficient in experience, they are not likely to improve by the exercise of their function, and if originally men of high attainments, are apt to retrograde instead of improving. By the present practice, men of the highest standing are secured as Sheriffs for the remotest counties in Scotland. 4. The Sheriff-principal forms the connecting link between the central tribunals and the remotest judicatories in the kingdom. He imports the practice of the former in its latest and most improved form into the latter, and tends to arrest the growth of local customs, which, unless checked, are always ready to develope themselves. In this way he does for Scotland very much what the Assizes do for England. Stephen's *Com. on the Laws of England*, vol. iii. pp. 620–21. These are considerations which apply to Scotland generally, but the case of Glasgow is in many respects exceptional; and there seem to be special reasons why the principal Sheriffship should, at all events, be retained in Lanarkshire. There are four substitutes by whom the business of Glasgow is carried on, a fifth from Airdrie assists in the Small Debt Court. The amount of business done in this large centre of trade is enormous; yet there have been greatly fewer advocations from Lanarkshire than from any other county in Scotland, proportionally to the population; and it may therefore be inferred that the public have been satisfied with the local courts. Now one great cause of this is, that the substitutes work under the Sheriff in a uniform manner, which it is probable they would not do if their decisions, instead of being, in the first instance, reviewed by him, were to be taken direct to the supreme court. Again, there are always little inaccuracies in matters of form, and even mistakes in substance, which will creep into interlocutors, be the judge ever so able and careful, and yet which, though trifling in themselves, must be corrected somehow. These, according to the present practice, are set right by an appeal to the Sheriff, which seldom involves the delay of many days, sometimes of only a few hours. Much time and expense are thus saved. Alter the system, and such corrections would have to be made by the Supreme Court, after an amount of expense and delay which, however much the forms may be simplified, must always be considerable. The Sheriff is resident in Glasgow, and therefore it may be said that he has not the advantages to be derived from being an advocate in actual practice. But any one who is acquainted with the amount and variety of the work which he accomplishes will see that, in this respect, he is more advantageously placed than men who enjoy the largest practice in the Supreme Court.' That is the view of Sheriff Clark; and these are substantially the heads of the separate views on this question of the constitution of the Sheriff Courts.

14. Would you give us your own opinion on the subject?—Well I really have not had an opportunity of judging how the matter stands in the several counties. I have not been acquainted with them practically; and I think, whatever legislation may be adopted, Glasgow will require to be treated differently from the rest of Scotland. Whatever changes may be introduced elsewhere, and whatever changes may be introduced with reference to Lanarkshire, they would require to proceed upon a different system. I think that in so far as Lanarkshire is concerned, the system of having the Sheriff to review has hitherto worked satisfactorily. At the same time I quite feel the weight of the argument, that the judgment by the reviewing Sheriff may not be a whit more entitled to public estimation than the judgment by the Sheriff-substitute; and therefore there is a weakness in the court of appeal. All that I can say is, that substantially that weakness has not been much felt, because in most cases, where the Sheriff acts judiciously, if he is satisfied with the soundness of the substitute's judgment, he adheres to it, and the public seem satisfied with the two judgments together. Where there is an alteration, which is greatly the exception, the public have the right of appealing to the Supreme Court.

15. *The Lord Justice-General.*—The appeal to the Sheriff from the Sheriff-substitute is a very cheap process of review, is it not?—Very cheap, and in Glasgow very speedy.

16. Can you state the cost of it?—The expense is merely some trifling clerks' fees, and the expense of attending the debate.

17. What is the amount of the court fees?—They must be very trifling. They do not amount to 10s.

18. *The Lord Advocate.*—Are they not only 1s.?—I am talking of all the fees—fees of noting the judgment, and extracting it afterwards.

19. But does lodging the appeal cost more than about 1s.?—I am not very well versed in the subject of the clerks' fees; but the fee for the debate varies from two to three guineas.

20. *The Dean of Faculty.*—For an oral debate?—Yes. It is in the option of the party appealing not to ask for an oral debate, but to put in a reclaiming petition; and if he does so, it is usual to order it to be answered, and then the fee will be the fee for the reclaiming petition and answers, which will be about the same as the fee for the debate.

21. *Mr. Campbell.*—But the reclaiming petition is quite exceptional?—Yes.

22. *Mr. Webster.*—That is in the Sheriff Court of Glasgow?—Yes. I believe it is not exceptional in other courts; and where the agent wishes to save himself the trouble of coming to Edinburgh to debate orally, he puts in a reclaiming petition; but I cannot speak as to that from personal knowledge.

23. *Mr. Clark.*—The appellant has a right to appeal without asking to be heard, or putting in a reclaiming petition?—Yes.

24. Does that occur very frequently in Glasgow?—No; but this perhaps raises the question of whether, under the present forms of procedure, the appeals are too numerous from the Sheriff-substitute to the Sheriff. I think a very great improvement might be introduced upon that. The existing Sheriff Court Act considerably diminished the number of appeals that were competent, but still it allows four or five appeals before a final judgment. Now, I think, in the first place, it would be an improvement—and I would have perfect confidence in the Sheriff-substitute in regard to that matter—if, until a final judgment, all appeals taken on interlocutory deliverances should be taken with consent of the Sheriff-substitute. There are many cases where the parties are merely fighting for delay, and they state preliminary pleas which are plainly unfounded, on purpose that when they are repelled they may appeal them, and thus create delay. They know they are unfounded; but they invariably appeal against the repelling of these pleas. Now I would leave it very much to the Sheriff-substitute to say whether he would allow the appeal in that case. In the same way they are entitled to appeal in a case where the Sheriff-substitute allows a proof. They are quite aware that a proof is necessary; but they are fighting for delay, and they appeal against the Sheriff-substitute allowing the proof. That also I would leave with the Sheriff-substitute. Every resident Sheriff-substitute, if he saw that there was any nicety in the question, would allow the appeal; but if it was *luce clarius* that the party was merely fighting for delay, he would not allow the appeal. Then there are appeals competent against all judgments pronounced in the course of the proof. In the same way I think the Sheriff-substitute should be allowed to say whether he would allow these appeals or not. I believe some people go further, and say that you might disallow all appeals, except from the final judgment, when the appeal would take up the whole case. I would have some hesitation in going that length, because a really well-founded preliminary plea might be repelled, and then there might be a long and voluminous proof, and a final judgment given on the proof, and if, when it came up to the court of appeal it was held that the preliminary plea was good,—that the case was radically bad *ab initio*, and that the whole

Henry Glassford Bell, LL.D.

subsequent labour had been thrown away, I think it would be a little dangerous to check an appeal there; but I think it would be quite sufficient to allow the Sheriff-substitute to judge of the importance or nicety of the point, and permit an appeal if he thought proper.

25. But whether the appeal be on a preliminary matter, or on the final judgment, the appellant has practically the right to decide whether the judgment shall be reviewed with or without a re-hearing?—He may simply appeal; and then the system in Glasgow invariably is to send the case to the appeal debate roll.

26. But if he appeals, and says that he neither wants to put in a reclaiming petition nor to debate orally, the Sheriff may dispose of the case without hearing parties?—Yes; but I think that almost never occurs in Glasgow, because they almost invariably add that they crave to be heard orally. If they did not crave to be heard orally, or put in a reclaiming petition, I would glance at the case to see the character of the appeal, and if I thought it involved matter of nicety, I would, *proprio motu*, send it to the appeal debate roll.

27. But practically the Sheriff may dispose of a case and alter a judgment without the successful party before the Sheriff-substitute having the power of being heard?—I am not at this moment quite sure about that. It depends on the construction of one of the clauses of the Sheriff Court Act whether the Sheriff is bound to give them an opportunity of being heard or not. Certainly I would never alter a judgment appealed against without hearing the parties.

28. *Mr. Campbell.*—Has it ever occurred in your practice that considerable awkwardness arises from the fact that the Sheriff-substitute has not the power of opening up the record?—That is one matter that I was going to mention. I think there is a great anomaly in that. There is a clause in the Act which says that the Sheriff-depute, at any time when the cause is before him on appeal, may open the record and allow amendments or additions. Cases are occurring every fortnight in Glasgow where the Sheriff-substitute says, 'I consider this summons, as it stands, irrelevant; and if I had power to open up the record and allow an amendment, I would do so, and then sustain the case.' But he has no such power, and must dismiss the action. The case then comes up on appeal to the Sheriff, and he at once proceeds to exercise the power which he has. He opens up the record, allows the amendment, and sends the case back to the Sheriff-substitute. In other words, he does the very thing which the Sheriff-substitute wished to do. Now, why that power should be limited to the Sheriff, and not given to the Sheriff-substitute, I cannot see. Of course, if the Sheriff-substitute went wrong, what he did would be subject to appeal; but his judgment would be acquiesced in in nine cases out of ten.

29. *The Dean of Faculty.*—You have said you think the system a very good one by which, except in the case of Glasgow and Edinburgh, the Sheriff must be a practising advocate. Can you tell me the foundation of the rule, and the reason for it?—I don't know, as a matter of certainty, either the foundation of the rule, or the reason for it.

30. Was there not a statute upon the subject?—I believe so.

31. Can you tell me the principle upon which that enactment proceeded?—I have no doubt it proceeded on this, that it was necessary to limit the choice of Sheriffs to men who had got a good legal education, and belonged to the highest branch of the profession.

32. Would there not be an inconvenience under the present system if the Sheriff-principal were to desert the Parliament House, and go and reside in his county?—I don't exactly understand what may be meant by inconvenience. He would cease to practise in the Parliament House, and he would transfer his practice to the Sheriffship in which he resided.

33. Are you not aware that it was found that in some instances the Sheriff lost his law, became a country gentleman, mixed up with the politics and local associations of the county, and that that was one reason for the passing of the statute?—I have no knowledge of that.

34. Don't you think that might possibly be the result?—If the Sheriffship was devoid of all legal business, that might possibly follow.

35. *The Lord Justice-General.*—But you cannot realize that view?—I have had no experience of it.

36. *The Dean of Faculty.*—Are there not many counties in Scotland where a resident Sheriff might possibly fall into that state?—I have heard certain resident Sheriffs say, when they heard me complaining of the amount of business I had to perform, that they had a much more tedious and irksome duty to discharge in waiting for business which never came.

37. What I meant to put to you was this: Is there not a distinct advantage in having as Sheriff a man who is constantly on the boards of the Parliament House?—There must be certain advantages derived from that. Whether the advantages are equal to the disadvantages in connection with the system of double Sheriffships in these counties, I cannot pretend to say.

38. In one of the papers you read, it seemed to be assumed that the Sheriff-substitute was generally a more experienced man than the principal under the present system?—Often as experienced a man.

39. Does your experience suggest that that is so?—Well, comparisons are rather disagreeable, and I don't like to make them. I think I could mention certain instances where, upon the whole, I would have greater confidence in the judgment of the Sheriff-substitute than of the Sheriff, and a good many instances where it is *vice versa*.

40. But, as a general rule, have the Sheriff-substitutes been taken from men in large practice at the bar?—In a good many instances they have, but not in all.

41. Not on the average?—I think there is a considerable minority who have not been taken from large practice to become Sheriffs of rural counties.

42. But I am speaking of substitutes: Have they, as a rule, been taken from persons in large practice at the bar?—No, not in what you would understand by large practice; but many of them have been rising and promising young barristers.

43. But not men who had risen for the most part?—No. You could hardly expect that such men would accept the office.

44. The greater number of those who are in large practice are Sheriffs-principal at this moment?—Yes.

45. Have you found the new Sheriff Court form of 1853 an improvement upon the former system?—Beyond all doubt a great improvement.

46. On the whole, has it worked well?—Oh yes.

47. *The Chairman.*—Does it appear to you that there ought to be an addition made to the duties of the Sheriffs?—Connecting that with what I formerly remarked, as to what I conceived to be the beneficial and important character of the Sheriff Courts, and that they do a great deal of good in the country in cheapening litigation, and bringing it home to every man's door, I am inclined to think that there should be a very considerable addition given to the jurisdiction of Sheriff Courts. In civil matters I see no reason why they should not have what we understand by a heritable jurisdiction, up, at all events, to a certain amount. It would, probably, not do at once to begin to give them unlimited jurisdiction; but in questions not involving a larger interest than £200 or £300, I think they might safely exercise a heritable jurisdiction. I do not see why there should be any particular difficulty attaching to numerous classes of jurisdictions which are at present excluded from the Sheriff Court,—such as certain classes of reductions—reduction on the ground of fraud, or of minority and lesion, or *ex capite lecti*. Perhaps the same observation would apply there, that in the first instance, if that jurisdiction was conferred, it should be limited in amount, in order that it might be seen how it worked. I apply the same observation to suspensions, and to a certain extent it has been given effect to in suspensions, for to a limited amount they are now competent in Sheriff Courts; but I think they are much too limited in amount. It is only where the interest does not exceed £25 that they are competent; but I do not see why they

should not be competent to a much larger extent. I think questions of aliment might also be safely entrusted to the Sheriffs. I don't see why a proving of the tenor of a lost writ should not also be competent in the Sheriff Court, as well as the taking proof *ope exceptionis* with reference to a lost writ. Nor do I see why, to a limited extent, the Sheriff should not be allowed to have jurisdiction against foreigners, if they are within his jurisdiction at the time, and if the matter arising is one which requires immediate attention. I believe that good claims against foreigners have often been lost in consequence of the rule that they could only be proceeded against in the supreme court. It has led to great vexation and great trouble. Then, as to the bankruptcy jurisdiction, it was thought for many years that it should be exclusively confined to the supreme court; but I am sure everybody feels that it has worked well by being extended to the Sheriff Courts. We have every year imposed upon us statutory jurisdictions, often of very great importance; in point of fact, the Sheriff Court is the court on which all these statutory jurisdictions are thrown in general; and looking at the confidence which has been already reposed in the Sheriff Court, and the confidence which the public seems to have in the manner in which its present jurisdiction is used, I do think it would be a great boon to the public to allow some of those jurisdictions which are at present exclusively in the Court of Session to be extended, at least to a certain extent, to the Sheriff Courts. With reference to criminal jurisdiction, I think there are two things well worth the consideration of this Commission, the first and most important being, whether the Sheriff's criminal jurisdiction should be limited, as it substantially now is, to imprisonment for two years. We almost never inflict a higher punishment than a fine of £50, or imprisonment for a period of two years. On one occasion since I went to Glasgow I inflicted the punishment of imprisonment for three years; but that was a solitary instance. Of course the Sheriff has power to sentence to a longer period of imprisonment; but these long periods of imprisonment are now rather discountenanced; and why the Sheriff should not be entrusted with the power of sentencing to penal servitude for five or seven years, I don't very well see. I think the Sheriff might very well safely be entrusted with that power. He acts under this modification, that it is in the power of the Crown counsel to send a criminal charge either to the Circuit Court, or to the High Court of Justiciary, or to the Sheriff Court; and they not unfrequently, in remitting the case, indicate the character of the offence to be charged, leading very much to the suggestion as to the proper punishment. The common course is this: If a party has been convicted two or three times before the Sheriff Court, he is then commonly sent either to the Circuit Court or to the High Court of Justiciary, where he is sentenced to penal servitude. The judge there tells him that imprisonment has failed in his case, that he has been imprisoned two or three times by the Sheriff, and that he must now be sentenced to penal servitude. In the same way the Sheriff tells the prisoner that he has been sentenced to imprisonment two or three times in the Justice of Peace Court or the Police Court, or in his own court, that these short terms of imprisonment have not reformed him, and that he is now to be imprisoned for a longer period. He comes back a third or a fourth time, and at length gets eighteen months' or two years' imprisonment, and then he is handed over to the Court of Justiciary. A great deal of that might be saved if the Sheriff were allowed to sentence to penal servitude for five or seven years. The other point in criminal jurisdiction is this. At present the Sheriff, in summary trials, can only impose a fine of £10, or imprisonment for sixty days; and it has been suggested to me by some of the Sheriff-substitutes, who take these summary trials, that they might safely be entrusted with the power to imprison for six months. There is some delicacy about that, and I believe that uniformity of opinion does not exist with reference to it. Therefore I merely mention it for consideration. It is said that where the liberty of the subject is involved to the extent of six months, it is safer to go before a jury; but I believe that summary jurisdiction in certain courts extends to imprisonment for six months, and I think it would not be attended with very much evil if that were allowed.

48. *The Lord Justice-General.*—What summary jurisdictions extend to six months?—I mean in England. Then, with reference to forms, I have had one or two suggestions made to me by the Procurators-fiscal in Glasgow on matters of detail as to the form of procedure in the criminal court, which I think worthy of attention. If these suggestions were adopted, they would go greatly to the shortening of the procedure.

49. *The Chairman.*—Before going on to that, when you spoke of giving extended jurisdiction in heritable subjects, did you comprehend in that the power to decide upon titles to land?—Up to a certain extent. For example, I have a case before me just now, in which I have considerable doubt whether I can entertain it at all. It is a mere dispute about a gable. One man says that the gable is on his ground, and he takes half of it down, and the other party brings an action to compel him to restore the gable; it is not an application for interdict; and the defender says, 'You cannot bring that action in the Sheriff Court, because it involves a question of heritable right; if it is on my ground, I was entitled to take it down, and I cannot be found liable by the Sheriff in the expense of rebuilding it.' Perhaps that involves a question of heritable title. There are many instances of that sort about small properties in towns and villages, where people very often quarrel about little bits of ground and small buildings, and it is a great hardship to force them into the Court of Session when the cases could be disposed of at little expense in the Sheriff Courts. I would not, however, make that unlimited.

50. *Lord Barcaple.*—Do you see any way in which the amount could be defined?—I think the jurisdiction might be given to the Sheriff, if both parties admitted that the value did not exceed a certain amount; and if they did not admit the value, the Sheriff might remit it to a valuator.

51. *Mr. Campbell.*—Might not a defender, objecting to the jurisdiction which the pursuer necessarily assents to from the fact of bringing his action, certify that, in his opinion, the case was of more value to him than a specific sum?—I would not exclude the right of the pursuer, by a mere certificate from the defender. I would have the fact ascertained.

52. *The Dean of Faculty.*—You mean that there are many cases of that kind, involving questions of title, where the sum at stake is very small?—Yes.

53. Does that happen very frequently?—Yes.

54. *Mr. Clark.*—Where would you draw the line?—I think it might safely go to £200 or £300; and I think it would be subsequently increased.

55. Do you mean that that is to be the value of the subject interfered with?—Yes.

56. *The Dean of Faculty.*—That is a rental or value of £10 or £15 a year?—Yes; something of that sort.

57. *The Lord Justice-General.*—What do you mean exactly by value? An heritable subject may not be of the marketable value of more than £200 or £300, but it may be worth ten or twenty times that amount to its owner, from its special circumstances.—That would be in exceptional cases, I think. In general, the value of a thing is just as much as it will bring.

58. The question very often arises with reference to a small part of a heritable subject.—I think that would be running too much into the greater question; and perhaps such a case as that ought to be excluded, because it would materially affect the value of the whole.

59. Then would you confine it to cases where the entire estate belonging to the party is of a small value?—If it was a pendicle of a larger property, I should have some doubt about it, because it might be of great value to the owner of the larger property. But I am talking of cottages in small towns, and small places in large towns, where there is only one possession

Henry Glassford Bell, LL.D.

and one property. There are often disputes about them.

60. *Mr. Webster.*—Would you make a distinction between a gable standing on a large estate, and a gable standing on a small property?—I think the value of the whole property on which the gable was standing should not exceed £200 or £300.

61. *The Dean of Faculty.*—From your experience, do you think it would be difficult to establish such a rule with regard to value as could be reasonably and easily worked?—No; I don't think it would be difficult.

62. *Mr. Adam.*—Does any particular reason occur to you why there should be a limitation of the amount in heritable, and not in moveables?—There is this reason: the feudal law is a system by itself, and we have in the supreme court very learned feudalists; and it requires almost a separate study to become perfect feudalists. In the Sheriff Court, at least hitherto, we have not had our attention much directed to feudal law; and therefore, at the commencement, I would hesitate about making it an unlimited jurisdiction.

63. *Mr. Baxter.*—But are not very important titles to extensive estates drawn by the inferior court practitioners?—No doubt.

64. *The Chairman.*—Your object is to save expense?—Yes.

65. *Mr. Baxter.*—Do you see any objection to the Sheriff having power to appoint tutors, curators, and factors *loco tutoris*?—That has been suggested; and I confess I don't see any great objection to it. The Sheriff has at this moment the power of appointing judicial factors under the Bankruptcy Act; and in the Consistorial Court he has the power of appointing factors.

66. *The Chairman.*—Would there be any inconvenience if the tutor or curator was a person resident beyond the jurisdiction of the Sheriff?—That might lead to inconvenience.

67. Then, would the Sheriff, in his choice, not be guided by this—that he must take a person resident within his jurisdiction?—The probability is that as to a local matter of that sort, the person suggested would be resident within the county.

68. *Mr. Baxter.*—You are aware that a married woman, seeking protection for her earnings on account of her husband's desertion, is obliged to go for that purpose to the Court of Session?—Yes.

69. Do you see any objection to give the Sheriff power to protect a married woman in such cases?—I do not see any objection to that. I may say generally, that looking at the vast extent of jurisdiction entrusted to the Sheriff Court just now, I do not see any reason why certain jurisdictions have been kept out of it. With the exception of large heritable questions, they are, generally speaking, not more difficult than the jurisdictions with which we are entrusted.

70. *Mr. Paterson.*—What is your view as to making actions of divorce, declarators of marriage, and actions of that class competent in the Sheriff Court?—I would have a little more doubt about them. They have never been before the Sheriff Court, and they involve very important questions of personal status; and both from its *nobile officium*, and its long-constituted jurisdiction as to all questions materially affecting status, such as the custody of children, and the position of man and wife, the supreme court has reserved these matters to itself. Whilst it might be safe enough to trust them to the Sheriff Court, I am not so clear about doing so.

71. *Mr. Baxter.*—In reviewing the Sheriff-substitute's judgments on the proof, you do not see the witnesses, but merely proceed on their notes?—I am very glad you have put that question, because I have had experience both as Sheriff-substitute and as Sheriff, and I entertain opinions upon it which are not quite coincided in by some of my brethren. I think a great deal too much stress has been laid upon the importance of seeing the witnesses. I think there is as much disadvantage as advantage in that. The Sheriff is not entitled to consider himself a physiognomist, or a Lavater, or a craniologist; he must judge of what the witness says. If the witness gives his evidence in a prevaricating manner, that affects his credibility; but that is made to appear, if the evidence is properly taken down, because the moment a witness is seen to be going to prevaricate, you say, 'Interrogated,' and then you take his answer, which is no answer, and then you say, 'On its being stated to the witness that that is not an answer, and the question being repeated.' You see from the mode in which the evidence is recorded whether the witness was a prevaricating witness. Beyond that, I think the mere question of whether he speaks with hesitation, or whether he is an ugly-looking fellow, is a matter of no moment.

72. Then you do not lay stress on seeing the witnesses?—No, very little stress; and I find, in my own experience, that I did not form a more correct opinion of evidence in a case formerly, when I took the proof myself, and saw all the witnesses, than I do now, when I merely read the proof without having seen the witnesses.

73. Would you like to see the system of jury trials in civil matters extended to the Sheriff Courts?—No. I think this country has decided pretty strongly against trial by jury. It is not a popular system in this country; and if introduced into such a court as the Glasgow Sheriff Court, it would lead to very tedious procedure, and I think would introduce great uncertainty in verdicts. I think the public have greater confidence in facts being decided upon by professional judges, who devote their whole lives to the consideration of evidence, rather than by six or seven, or any number of gentlemen suddenly taken from their shops or counting-houses, and asked to say what contradictory evidence amounts to. I do not think that would be a popular plan, or give satisfaction.

74. *Mr. Campbell.*—From the number of proofs in the Sheriff Court, the tax on the public time would be enormous if these cases were disposed of by juries?—Yes; and if that system were introduced into Glasgow, we would need to have more courts. But there has been no outcry for it, so far as I know; and I have never heard any of the professional gentlemen in Glasgow do otherwise than express their dissatisfaction with the jury system, so far as it is worked in Scotland.

75. *Mr. Clark.*—When you say you think the Sheriff Court ought to be entitled to entertain actions of reduction, do you mean actions to reduce any kind of deed?—With regard to actions to reduce, for example, a deed of entail, or actions which necessarily involve very large heritable questions, I think there should be a limitation in the meantime, in the same way as I would give a limitation with regard to questions of direct heritable right; but I do not see why ordinary reductions on the ground of fraud, or minority and lesion, or even *ex capite lecti*, should not be competent in the Sheriff Court.

76. Suppose a settlement settling £100,000 of money, and another settlement settling an estate worth £100 a year, is the Sheriff to be competent to entertain the one case, and incompetent to entertain the other?—That is not the case I put. I would not much mind what amount the settlement was, if it was a reduction on the ground of fraud or lesion; but if it is a reduction on some technical ground connected with a deed of entail, or any other important deed, I think it would be, perhaps, better to leave it to the Court of Session.

77. *Mr. Baxter.*—There would always be an appeal to the Court of Session from the judgment of the Sheriff in such cases?—Yes.

78. *The Lord Justice-General.*—Would you think it desirable to try, in the Sheriff Court, a reduction of a will upon the ground of the testator's incapacity, or upon the ground of facility and circumvention?—Perhaps there might be a limitation of the amount as to which such reductions were competent. If the will did not involve more than £500, I would make the reduction competent; but if it involved a very large sum, it might be right to reserve that also for the Court of Session. At the same time, when I look at our jurisdiction in mercantile contracts of every description, up to thou-

sands of pounds, and in actions of damages involving often very large questions, I do not see any great distinction between allowing the one jurisdiction, and disallowing the other.

79. You see no distinction between one case and the other, with regard to limiting the amount; but my question had reference rather to the kind of question to be tried. Do you think it would be desirable, assuming that there is no limit in point of amount or value, that reductions of wills on the ground of the incapacity of the testator, or of facility and circumvention, should be tried in the Sheriff Court, and therefore necessarily without a jury?—If that involves the question of whether these questions should still be reserved for juries, it introduces a new element. If it is right that such questions as that should always go to a jury, I should think it not right to introduce them into the Sheriff Courts.

80. *The Dean of Faculty.*—Supposing they were introduced into the Sheriff Courts, would there be any difficulty in summoning a jury for that class of questions?—I don't see it; and in brieves of idiotcy and fatuity, the Sheriff has been in use to decide and investigate with a jury.

81. *The Lord Justice-General.*—Are you aware that that has been altered by the Act of last year?—Yes, I believe it has been altered now.

82. *The Dean of Faculty.*—Is there anything, do you think, in the question of incapacity of which a Sheriff Court is not capable of judging?—No, I don't see it. You must either have confidence in the presiding Sheriffs or not. If you have confidence in them, why entrust them with unlimited jurisdiction in certain branches of the law, and withhold it in others?

83. *Mr. Clark.*—Would that not be a reason for giving the Sheriffs co-extensive jurisdiction with the Court of Session?—If you take a very broad view of it, I don't see why you should not do so.

84. Do you think that would be desirable?—In such a case as Glasgow, no one Sheriff, and no ordinary set of Sheriffs, could do it.

85. *Mr. Baxter.*—But if the staff was supplemented or made sufficient?—Then you would make a Court of Session in Glasgow, and perhaps that would not be a bad thing.

86. *Mr. Webster.*—There is no limit in point of amount, is there, in cases tried before the Sheriff with a jury, under the Lands Clauses Act?—No, these cases may be of any amount. That is a statutory jurisdiction conferred upon Sheriffs, and that is a very good illustration of what I have been saying. I myself have presided in cases of that kind involving very large sums.

87. *Mr. Shand.*—Is it not the case that proceedings against foreigners originate in the Sheriff Courts, applications being usually made there to found jurisdiction by issuing the diligence?—Yes.

88. The jurisdiction is founded within the Sheriffdom?—Yes; but it is a merely ministerial office.

89. Have you often cases of that class for comparatively small amounts?—There are a great many such cases. A great many warrants for arrestment to found jurisdiction are granted for all amounts.

90. And a good many of them for small amounts?—Yes.

91. In such cases do you think it a hardship that the party should be obliged to resort to the Supreme Court in order to get a decree against the debtor?—Yes, it seems to be a hardship.

92. Is there any reason which occurs to you for restricting the jurisdiction of the Sheriff Courts in regard to pecuniary claims against foreigners, where the jurisdiction has been founded in the sheriffdom, or do you think it should be extended?—I have already said I think the jurisdiction, to a certain extent, against foreigners might be safely conferred on the Sheriff Court.

93. But is there any reason why there should be a limit as to ordinary pecuniary claims?—I do not see any reason.

94. *Mr. Baxter.*—Are you aware that there are many small claims against foreigners which are not prosecuted just because of the expense?—I cannot be certain of that, but I think it is very likely.

Henry Glassford Bell, LL.D.

95. *The Chairman.*—In reference to the various classes of cases as to which you would give jurisdiction to the Sheriff, would you give the power which is contained in the 40th section of the Judicature Act, as to advocating to the Court of Session if either party desired it, without reference to the amount at issue, but in relation to the nature of the cause?—I think that might be a very safe thing to do, and I do not see any very great objection to it. I think that in the great majority of cases, if this extended jurisdiction was given, there would be no such proposal made by either party. I think they would be satisfied with the judgment given at their own door; but there might be no great harm in allowing any party in the course of the cause to advocate *de plano*.

96. Do you think that the Sheriff Court ought to be made to absorb the jurisdiction exercised by Justices of the Peace?—No, I am not in favour of that. I think it would throw in such an amount of work that the Sheriffs in Glasgow could not overtake it; but I only speak with reference to Glasgow.

97. Do you think there is any advantage in Justices of the Peace exercising jurisdiction, and accustoming themselves to business of that kind?—I am not unfavourable to the limited jurisdiction possessed by Justices of the Peace in the Justice of Peace Court; but I am very much opposed to its being extended. It is something like the police court jurisdiction of Magistrates in burghs. I am not disposed to take it away from them, nor would I be disposed to take away the limited jurisdiction from the Justices of Peace in counties.

98. There is a Dean of Guild Court in Glasgow?—Yes.

99. It exercises jurisdiction in matters which do not come within the range of the Sheriffs?—Yes.

100. Do you think that any part of that jurisdiction ought to be transferred to the Sheriffs?—I think it would be of no advantage to the public if it were. I believe the Dean of Guild Court in Glasgow is very judiciously conducted. They have very skilful men who act as liners, and make reports on all questions involving buildings and encroachments. The Magistrates in that court are aided by assessors, and good practical men; and in questions of mere building and construction I think it is a safe court, and that no great good would be got by interfering with its jurisdiction.

101. *Mr. Murray.*—Are you aware whether these liners are ever applied to extra-judicially by parties who have cases before the Dean of Guild?—I don't know. I should not be afraid of their being influenced by unfair or underhand motives, because I know that they are men of great respectability and above suspicion.

102. *Mr. Paterson.*—And the Lord Dean is the judge?—Yes.

103. *The Dean of Faculty.*—Would you give the Commission your views as to the executive power of the Sheriff in criminal matters, and generally as to the way in which criminal business is conducted in counties?—I think our system of conducting criminal matters before the Sheriff is a very sound and good one. We have a public prosecutor in every county, who is responsible to the Lord Advocate, as the head public prosecutor of the country; and when an offence is communicated to the Fiscal, it is his duty to prepare a petition and present it to the Sheriff, who grants a warrant to apprehend the party suspected or accused, and bring him up for examination, and that examination takes place, not in public court, but in the fairest way towards all parties. The petition is read to the party accused, and he is told by the Sheriff that he is to be examined on that charge, but that he need not answer any question unless he pleases, and that what he does say may be afterwards used against him. In point of fact, this proceeding is very often in his favour, because at the commencement of criminal procedure there is often a little doubt as to who the real

Henry Glassford Bell, LL.D.

criminal is; and though a certain suspicion attaches to the party brought up, he may be able to make such statements as, on inquiry, satisfy the Procurator-fiscal and the Sheriff that he is not the party amenable to the charge, and he is liberated within a day, or within an hour if he can show his innocence. If he tells a story which is not satisfactory, he is committed for further examination, and during the next eight days the Procurator-fiscal is bound to complete the precognition and to lay it before the Sheriff. If the Sheriff thinks the precognition does not bring home guilt to the party, then he is liberated; if, on the other hand, the Sheriff is of opinion that the precognition is so pregnant against him that he should be sent to trial, he grants warrant to keep him in jail till he shall be liberated in due course of law. Immediately after that, the warrant of the Sheriff and the precognitions are transmitted to Crown counsel; and the Lord Advocate, as the *dominus* of the prosecution, has it in his power to order or to abandon further procedure. If he determines that there shall be further procedure, he has the power of deciding in what shape it shall be. He may either remit to the Sheriff to try the accused summarily, in which case the sentence is not more than a fine of £10, or sixty days' imprisonment; or he may remit him to be tried before the Sheriff and a jury, or the trial may take place at the Circuit Court, or at the High Court of Justiciary. The whole of that proceeding seems to me exceedingly fair and favourable to the party accused, and I don't know any system by which justice is more likely to be done. If he is tried before a jury, the jury judge of the fact, and acquit him or find him guilty; and if he is found guilty, it is left to the discretion of the presiding judge to say what punishment it is proper to impose. With reference to this I may mention that the Procurators-fiscal in Glasgow think that a portion of the form now in use might be simplified and shortened, and they have handed me some notes in which they say that interlocutors of relevancy, and other deliverances which are merely formal, are never read in the Justiciary Court, and that the reading of them, while it serves no purpose, unnecessarily occupies a good deal of time. They also refer to the reading of the criminal libels, which are not now read in the Justiciary Court. In the Sheriff Court they are always read if the party pleads not guilty. It is suggested that there is no occasion for reading the libels, the prisoner having been previously served with the indictment, and that it would be enough to authorize the Sheriff to say, You are charged with so and so; are you guilty or not guilty?

104. *The Chairman.*—Do you approve of these suggestions?—As they are founded on the forms observed in the Justiciary Court, I do not see why they should not be extended to the Sheriff Court. Another suggestion which the Procurators-fiscal make is as to the forms of sentences. The long form of sentence has been abrogated in the Justiciary Court. We have a long technical form, and it has to be engrossed in the books of the court; the Sheriff has to wait till the clerk has written it; and when we have eighteen or twenty cases before us at a pleading diet, it takes three or four hours to go through them. If the forms were shortened as they have been in the Court of Justiciary, there would be a great saving of time.

105. *The Dean of Faculty.*—That is as to the form of criminal procedure; but I wanted your general opinion as to the Sheriff's position as an executive officer in the county, apart from his judicial office. Do you think it important for the public service that that should be maintained,—I mean with reference to his jurisdiction over the police, he being responsible for the peace of the county?—With reference to his responsibility for the peace of the county, unless some other officer were entrusted with that important duty, it must be continued with the Sheriff. With reference to our position in Glasgow, we have no power over the very large and efficient body of police in Glasgow, but we have power over the county police, who are a much smaller body. I do not think I am free from responsibility within Glasgow merely because we have the Provost and Magistrates there, who are also responsible for the peace of the city, and I have sometimes thought that the Sheriff should have a greater power of calling in the services of the police of Glasgow than he has. At the same time, it would not do to introduce two commands over the police. The Provost and Commissioners of Police have that power exclusively at present; but by Act of Parliament it is provided that the Provost may, upon application by the Sheriff, authorize the police, or a portion of them, to go into extra-burghal parts of the county, and that is so far a convenience.

106. As to the county part of your jurisdiction, do you find that you have power enough over the police force?—I have never found that the Superintendent of Police for the county hesitated for a moment to do what I said I thought he ought to do with the police. On the recent occasion of a contested election in South Lanarkshire, where there was a chance of disturbances at some of the polling places, I found it necessary to arrange with the Superintendent of Police where his force should be placed, and I applied to the Provost, and he gave me sixty additional men from the Glasgow force.

107. Do you think it would be beneficial if that power were removed from the Sheriff and confined entirely to the county gentlemen?—Certainly not. The county gentlemen cannot act upon emergencies; there should be one responsible person, and that person is naturally the Sheriff. The county gentlemen have so far the management of the police; they fix their number, and arrange as to their pay.

108. And the Sheriff is conjoined with them in that?—Yes.

109. *The Chairman.*—The Sheriff appoints the Procurators-fiscal, and he works a great deal through them?—Yes, the Procurators-fiscal are appointed by the Sheriff, and are his officers.

110. Is the Procurator-fiscal not a most important officer?—Yes.

111. He takes precognitions, if the Sheriff desires it?—Yes; and the Sheriff is the *dominus precognitionis.*

112. Do you find any clashing between investigations made by the Procurator-fiscal, and investigations made by the police constables?—No; very little. A great many of the cases that come to the Fiscal come through reports by the police, and occasionally the police wish to throw cases on the Fiscal which he does not think important enough to make sheriff cases of, and he tells them they should be made police court cases. In that way there is sometimes a discrepancy as to whether the case should be taken up by the Fiscal or not; but that rarely leads to inconvenience.

113. In any case of importance does the Procurator-fiscal content himself with a precognition by the constables before the case is reported to the Crown?—I don't think he does in cases of importance; but in cases of less importance he very often receives a precognition from the police office, which he thinks sufficient to warrant him in preparing a petition to the Sheriff.

114. But I refer to cases which are intended to go to Crown counsel for consideration?—If the case is a case of importance, the Procurator-fiscal makes a precognition of his own in addition to any precognition which he may receive from the police.

115. Do you consider that to be his duty?—Decidedly.

116. *Mr. Clark.*—Investigation is sometimes made by the Chief Constable into crimes committed in the county?—Yes.

117. Do you hold that the Chief Constable is subject to the orders of the Procurator-fiscal in making these investigations?—That is a matter which has given rise to some investigation recently. I have made inquiry of the Procurators-fiscal of the Upper and Middle Wards, and they inform me that when they intimate to the Head Constable that they wish assistance from him, they invariably get it.

118. Are they not entitled to direct the investigations of the Chief Constable?—Not, I think, except

with reference to a particular offence that has been reported to them.

119. But with reference to that offence?—Yes; I think they are entitled to say to the Chief Constable that a particular offence has been reported, and that they wish him to send men to make inquiries about it; and I understand that the Chief Constable of Lanarkshire never refuses to do so.

120. Is he under an obligation to follow the directions of the Procurator-fiscal?—Our Chief Constable seems to have no doubt about it, for he does it.

121. Do you think it is right that he should do so?—It may depend on the terms of his appointment; but it is right that he should do it, and he does it in Lanarkshire in point of fact.

122. Does not the Sheriff direct the Procurator-fiscal as he thinks proper in the matter of the investigation?—Yes; but he cannot direct the Procurator-fiscal what persons he is to employ.

123. Is the Procurator-fiscal not the officer of the Sheriff in making the investigation?—Yes.

124. And are not the police of the county subject to the Procurator-fiscal in that matter?—I think they are, and they ought to be understood to be so.

125. Does it not follow that the Chief Constable, in regard to investigations as to crime, must follow the directions given him by the Procurator-fiscal?—I believe there has been some little jealousy about that, and that the Chief Constable in some counties has said, 'I will obey an order from the Sheriff, but not from the Procurator-fiscal.' Such a difficulty has never arisen in Lanarkshire.

126. Don't you think it would be proper that the Chief Constable should be subject to the Procurator-fiscal in making those investigations?—Yes, with the sanction of the Sheriff.

127. Is not the Procurator-fiscal in giving these orders acting under the authority of the Sheriff?—He is presumed to be doing so.

128. Do you think it necessary that there should be an order in each particular case from the Sheriff?—No; I think there should be a general understanding that the Chief Constable should give such assistance, in making precognitions, as the Procurator-fiscal desires; and in point of fact that is done in Lanarkshire.

129. *The Chairman.*—Is there more than one Chief Constable in the county?—No.

130. Then in some districts the Chief Constable cannot be got at?—But he has four inspectors under him.

131. *Mr. Adam.*—There are some crimes over which the Sheriff Court has no jurisdiction; would you suggest any alteration in that respect?—The crimes over which the Sheriff Court has no jurisdiction are for the most part crimes of such magnitude that if the accused party is guilty of them, the ordinary power of imprisonment which the Sheriff possesses would not be sufficient punishment; and till the power of awarding punishment by the Sheriff is increased, it is impossible to extend to him jurisdiction over these higher crimes—viz. robbery, murder, fire-raising, and rape.

132. Don't you think that the Sheriff's jurisdiction might be extended?—I think most unquestionably in many cases of robbery the Sheriff's jurisdiction might be extended with safety. Robbery often runs so much into theft that it is difficult to say where the one begins and the other ends; and there are many cases of robbery in Glasgow, remitted to the Circuit Court, which are not a bit more atrocious in their character than many housebreakings and thefts which come every day before the Sheriff. I think, so far as robbery is concerned, there should be an extension of the criminal jurisdiction of the Sheriff; but I would take that along with the proposal to give him a power of sentencing to penal servitude.

133. *Mr. Clark.*—You have said that the preservation of the peace is a very important part of the Sheriff's functions; if the Sheriff-principal was abolished, in whom would you vest that duty?—The abolition of the Sheriff-principal is perhaps an erroneous mode of expressing it. With reference to the question of double sheriffships I have always thought that it is not the abolition of the Sheriff-principal that is contemplated, but the abolition of the Sheriff-substitute. It is the converting of the Sheriff-principal and the Sheriff-substitute into one Sheriff.

134. You don't suppose that one Sheriff could do all the duties in Lanarkshire?—Certainly not.

135. If the head of the present court in Glasgow were abolished, in whom would you vest the responsibility of the preservation of the peace which now rests with him?—If it was thought a good system in Lanarkshire not to have two ranks of Sheriffs—a subordinate and a higher one—but to put them all into one rank, you would need to appoint probably six or eight Sheriffs, and you would have to give them all incomes enabling them to discharge their duties efficiently. They would all be on a par, with this difference, that one would be senior Sheriff, and I presume he would take the administrative duty of maintaining the peace and attending the boards and meetings which the Sheriff must attend; and in his absence, the Sheriff next him in seniority would do so.

136. Take Inverness, a large county, in which there would be several Sheriffs,—who is to be charged with the preservation of the peace of that county?—If there was more than one Sheriff, the senior would be responsible for the preservation of the peace; and in districts where there was only one, that one would be responsible.

137. Do you mean that the senior Sheriff would be responsible for the peace of the entire county?—Yes. In Glasgow, if we had six Sheriffs of the same rank, they would divide the business among them, and they would not only be judges *primæ instantiæ*, but they would have to take proofs in their own hands according to the present system, and to hear parties and to give final judgments, which would then be the final judgments of the Sheriff Court of Glasgow.

138. Do you not think that unless the county were divided into well-defined districts, there would be great difficulty, according to your plan, in securing the proper responsibility for the preservation of the peace?—There might be. It is not my plan; it is only a suggestion. I may mention that I have talked on the subject a good deal with the professional gentlemen of Glasgow, and as far as I know, they are rather in favour of a system of review within the Sheriff Court in Glasgow. They may approve of some alteration in the constitution of the appeal court, but I understand that they are in favour of a system of review within the Sheriff Court itself.

139. *The Dean of Faculty.*—Could that be extended to the smaller counties?—I don't know. I may mention that within Glasgow it appears to me, looking at the mass of work that is to be done, that there would always need to be a class of officials to do one portion of the work, and there must be others to do another portion of the work. I doubt if the system would answer of dividing the whole work among them all, on the footing that they were all equal.

140. *The Lord Justice-General.*—Suppose that in the county of Lanark, including Glasgow, you had Sheriffs all of one rank, and no appeal in the Sheriff Court, would it or would it not be necessary to divide the county into separate jurisdictions?—Very likely that would be done, but not necessarily. In the Lower Ward there is such a mass of work, that a certain number of Sheriffs would be required for it alone; and if the others were to undertake the Middle and Upper Wards, that might lead to a division of the county.

141. At present you have Sheriff-substitutes resident in places in the county out of Glasgow, and with jurisdiction practically limited to the district in which they reside?—Yes; but they are Sheriff-substitutes for the whole county.

142. But they do in point of fact exercise their jurisdiction only within a limited portion of the county?—As a general rule they do; but they occasionally assist each other.

143. In the case which I have supposed, would that continue to be the practice, or would it not?—I think either practice would do: you could divide any county into a number of smaller counties, and put Sheriffs into

Henry Glassford Bell, LL.D.

each; or you may keep a county large, and put in a sufficient number of Sheriffs to do the work.

144. *Mr. Clark.*—But in the district of the county in which Glasgow is situated, you must have a court with a plurality of judges?—That is perfectly clear. Two or three men cannot do the work that must be done in Glasgow.

145. And you could not divide Glasgow into districts?—You could not make separate sheriffships for Glasgow.

146. Do you think it would work conveniently if that plurality of judges were all of equal rank?—I see great difficulties about that. All these men of equal rank would have to divide the original work, and they would have to sit also as appeal judges.

147. *The Lord Justice-General.*—Take the case I have already supposed, of their being all of equal rank and jurisdiction, and that you entrust the senior Sheriff with the responsibility for the peace of the county, would you expect the Sheriff who lived at Airdrie or at Hamilton to take any part of that duty in his own district?—They would probably be bound to do it in all cases of emergency.

148. Would they not act in that way in subordination to the senior Sheriff, if he is alone responsible for the peace of the county?—If the *onus* of keeping the peace of the county were laid on the senior Sheriff, the others must act under him, or in concert with him.

149. Then you would still have a principal Sheriff in that way?—No; it would be very much the same thing as the senior or presiding judge of a court; they would be all very much on the same platform, but the senior would take precedence.

150. But in quelling riots, and employing the police to keep the peace, the Sheriff is not acting as a member of a court?—No; but if you devolve that on the senior Sheriff, he would be bound to attend to it.

151. But he would still require to act through the other Sheriffs in particular localities?—He would communicate with them, as I do at present with the Sheriff-substitute, on all occasions when there was any necessity for it.

152. Would you still require that those who act in that way in particular localities should have the sanction or authority of the senior Sheriff?—Yes, so far as steps to be taken for preserving the peace were concerned, they would be subordinate to the senior Sheriff.

153. Then, in that part of the Sheriff's work, you would, under that system, still have one or two or more Sheriffs subordinate to another Sheriff?—Not exactly subordinate, but not entitled to act unless in the senior Sheriff's absence. If you were to entrust the peace of the county to several men of equal rank, it would be like entrusting it to none.

154. *Mr. Harrison.*—Supposing the addition to the jurisdiction of the Sheriffs suggested by you were made, would it not be necessary to add to their income so as to secure well-qualified lawyers?—I am of opinion that all Sheriffs are underpaid. I think no Sheriff-substitute should receive less than £800 a year. However remote the place to which he is sent, he must live as a gentleman, he must associate with the county people, he has his children to bring up; and to give him less, in the present state of society, than £800 a year, appears to me exceedingly wrong. It leads in some cases to very distressing consequences. With reference to the Sheriffs, if they are to be continued, most of them are in a different situation. They are not removed from their profession, they have their sheriffship as an addition to their professional emoluments, and therefore they are not so much to be pitied.

155. *The Dean of Faculty.*—You have suggested, as one of the three alternatives which have been put, a new court of appeal, with Sheriffs of co-ordinate rank. Now, supposing that were not to be done, do you think it would be for the public interest that the disparity of rank should be abolished, and no appeal left but to the Court of Session?—If that were done, it would be absolutely necessary, as I have already said, to give the single Sheriff the power of reconsidering his own judgment.

156. Would that be so satisfactory as the appeal as it now stands?—The answer to that must depend on whether the appellate jurisdiction would be a higher jurisdiction than the original jurisdiction.

157. Supposing you yourself were sitting as sole Sheriff, with nothing but an appeal from yourself to yourself, would that be as satisfactory as the present system?—It would not be so to me, because I feel that I have immense facilities given me by having a well-digested judgment of the Sheriff-substitute laid before me; and even though I may differ from him, there is no thanks to me for superior intelligence or knowledge of law, because I have an opportunity of considering the case in lights not suggested to him.

158. Would not the public suffer if they had no remedy except going to the Court of Session, in the 1400 cases which you decided last year?—I think it would be absolutely necessary to give to the Sheriff, if there was only one Sheriff, the power of reconsidering his judgments.

159. But if there was no remedy but going to the Court of Session in the 1400 appeals which you decided last year, would you not consider that a very great disadvantage to litigants?—If the Sheriff had no opportunity of reconsidering his judgments, I think it would not work well.

160. But you admit that it would not be so satisfactory as the present system?—Not to me individually.

161. Would not the public or the litigants suffer in these 1400 appeals which you decided last year, if they could only have appealed to the Court of Session instead of appealing to you?—In point of fact they had the advantage of coming to a second judge; and in point of fact they have acquiesced in his judgments.

162. And therefore you may assume that the appellate jurisdiction is satisfactory?—Perhaps one cause of that is, that a great many of these judgments were adherences.

163. Would it have been as satisfactory, in your opinion, if these litigants had had to go to the Court of Session instead of coming to you?—I would rather decline to answer that question.

164. In the first place, would not the expense have been much greater?—Certainly.

165. Would not the delay have been considerably greater?—Yes.

166. Don't you think these are the two greatest evils that can befal a litigant?—These would be great evils.

167. *The Lord Justice-General*—And, on the other hand, as so many of the litigants acquiesced in your judgments, it may fairly be presumed that your judgments are pretty satisfactory?—And it may also be very fairly assumed that a great many would have acquiesced in the first judgment rather than go to the Court of Session, had there been no appeal to me.

168. *Mr. Harrison.*—If the status and incomes of the Sheriff-substitutes were improved, as you suggest, would not an appeal from the Sheriff-substitute to the Sheriff-depute then seem even more unnecessary than it does to many people now?—If steps were taken to improve the position and the legal knowledge of the judge in the first instance, it would become less necessary to have a double set of Sheriffs than it is at present.

169. *The Lord Advocate.*—I suppose you are aware that it is not necessary to take a judgment of the Sheriff-substitute to the Sheriff, but that it may be brought to the Court of Session at once?—Yes.

170. But practically that never is done?—Very rarely; but I have known instances of it.

171. *Lord Justice-General.*—Is it the prevailing rule that the party dissatisfied with the judgment of the Sheriff-substitute, and having the choice of going either to the Court of Session or to the Sheriff-principal, prefers the latter?—I think that is the general rule.

172. Is it not much more than the general rule? Is it not almost universal, that the party dissatisfied with the judgment of the Sheriff-substitute goes by appeal, not to the Court of Session, but to the Sheriff-principal?—Certainly that is the case; and the losing party almost always takes the chance of some alteration that

he may get from the Sheriff, especially as he can do it at a comparatively small cost.

173. Supposing that you had in Lanarkshire, or in the city of Glasgow, Sheriffs all of one rank and jurisdiction, would there not be a great risk of diversity of judgments upon the same question of law arising within the same county?—No doubt. No one Sheriff would be bound by the view which another Sheriff took of any question of law.

174. At present that is avoided by there being an appeal from all the substitutes to one Sheriff-principal?—So far as the county is concerned, it is avoided; and I find it to be the fact that after the Sheriff has in one or two cases indicated his view of the law, the Sheriff-substitutes say, 'We need not persevere in a different view of the law, because we know what is the view of the appeal Sheriff.' No doubt, if it is a case of great importance, and likely to go to the Court of Session, the Sheriff-substitute may not do that.

175. *Mr. Campbell.*—Taking the judgments pronounced in the Sheriff Court, which have been submitted to the review of the Court of Session as a court of appeal, is it not the fact that so far as can be ascertained from the reports of these cases before the public, the judgment of the Sheriff-substitute which was reversed on appeal by the Sheriff has been as frequently set up by the Court of Session, as that a judgment of reversal of the Sheriff-substitute's judgment has been affirmed by the Court of Session?—According to certain statistics which I have seen, that has been as frequently the case.

176. *Dean of Faculty.*—And the judgments that are advocated to the Court of Session, I presume, are those generally which are supposed to be wrong by the party that advocates?—Yes.

177. But is not the result that you have now mentioned the result in every appellate jurisdiction of that kind? If you were to take the Lord Ordinary, the Inner House, and the House of Lords, don't you think that very much the same kind of thing would be found?—There is always the 'glorious uncertainty of the law.'

178. What percentage of your 1400 appeals was taken to the Court of Session?—I don't think that I stated there were 1400 appealable judgments. There were judgments given in 737 cases, and of these, almost all of which were subject to advocation, intimation of advocation was made in 24; but only a very few of these 24 were actually proceeded with.

179. So that hardly one per cent. was advocated?—Not much more.

180. *The Chairman.*—I think you said that the Act of 1853 works well?—Yes.

181. Can you suggest any alterations upon it?—That probably goes into the question of procedure. There are one or two matters of detail which have been frequently pressed upon me. One of these is citation by means of lock-hole executions. There is a very general impression, I think, among the profession in Glasgow, that these have been a source of great abuse. In our Small Debt Court, where we have 24,000 cases in the year, whenever a knowing pursuer wants to get a decree in absence, he instructs the officer, I believe, to resort to a lock-hole execution. The defender is out all day, and his house is shut up, and he goes in the defender's absence, and brings back a lock-hole execution. The case is called in court, and no appearance is made for the defender; decree is taken out against him, and he knows nothing about it till he gets a charge to pay. I believe that is a very common system; and I think it is well worth the attention of this Commission whether some change should not be made in that mode of citation. I believe that in England they have the lock-hole system under this modification, that when the executing officer reports that he found the door locked, and was unable to give service, it is left to the judge to instruct such mode of service as in the whole circumstances may appear best.

182. *The Lord Justice-General.*—How is a lock-hole citation given?—The executing officer reports that after giving three audible knocks, he could not find the party, and that he then puts a service copy into the lock-hole of the door.

183. And anybody from without could get hold of that service copy?—Yes.

184. The officer may do it perfectly honestly, and the pursuer may take it away?—And a dishonest officer may return the lock-hole execution without having left the service copy.

185. *Mr. Campbell.*—Have you considered whether or not it would be advisable to give to Sheriff-substitutes in the large towns, such as Edinburgh, Glasgow, Dundee, and so on, the power of employing the services of a shorthand writer in taking down proofs?—I have never been able to see my way to that. In our court, the Sheriff takes down the answers of the witness in such a way as to be the substantial evidence of that witness. Before he leaves, his evidence is read aloud to him in presence of both agents; and if there is any little slip or omission, it is corrected then and there, and the witness admits that it is his evidence, and signs it. If you have a shorthand writer, of course you cannot read over to the witness the evidence which is to be the record of the proof. The witness goes away; in a day or two the shorthand writer returns the whole evidence, which may have extended over hours; and when the agents come to read it, they object that there is an inaccuracy, and that it is not what the witness said. It may not be possible to bring the witness back; and when he comes back, he may say that it is what he said, or that it is not what he said. If he says it is not what he said, one of the parties objects that he is altering what he did say. I think it would lead to great confusion and difficulty in our courts, more especially as we have not all over Scotland what, I believe, you have in Edinburgh—one or two shorthand writers so accurate that they may be depended on to the utmost extent. I also think that it would save very little trouble to the Sheriff. He may at present dictate to a clerk, instead of writing with his own hand; but what is proposed is, that he shall dictate to the shorthand writer, and that would save him little trouble. Moreover, I do not think it would save much time. I was always able to take evidence as quickly as the witnesses could be examined, and I believe the other Sheriffs do so also.

186. *Mr. Shand.*—Don't you think that the employment of a shorthand writer would be apt to lead to prolixity in taking down the evidence?—Yes.

187. And it would add very much to the copying fees?—Yes. On the whole, I would deprecate the taking of evidence by means of a shorthand writer; but I know that my opinion is not shared in by some other parties.

188. Even supposing the Sheriff were to dictate, would you not expect that with a shorthand writer the proof would be fuller than it would otherwise be?—The Sheriff could control that to a certain extent; but the shorthand writer goes away with it all in his pocket, and nobody knows exactly whether he has taken down what the Sheriff dictated; and when he comes back, there will be a discussion as to whether the witness said a particular thing, and the witness could not be called up at another diet.

189. *The Lord Justice-General.*—If the shorthand writer were to take down every word that is uttered by the examining procurator and by the witness, that would make the proof intolerably long?—Intolerably prolix, and quite unnecessary. There is another matter which is perhaps worthy of the attention of the Commission,—namely, the question of arrestments on the dependence. I think they often lead to very great abuse. A party brings an action of damages against another, laying the amount at £500 or £1000, and immediately on this trumped-up action proceeds to lock up the whole of the defender's funds by arrestment. No doubt the defender has his remedy, by presenting a petition for the loosing of these arrestments on caution; but it is perhaps worthy of consideration, whether there should not be some restriction of the power to arrest on the dependence.

190. *Mr. Webster.*—Has your attention ever been

Henry Glassford Bell, LL.D.

directed to the inconvenience caused by arrestments for founding jurisdiction, where the party whose funds are arrested can have no means whatever of getting the arrestments loosed, as he has no mode of getting access to the warrant, and cannot force the other party to proceed?—My attention has not been directed to that. But my attention has been directed to another very important subject,—namely, whether it is right that a workman's wages should be subject to arrestment.

191. *The Lord Justice-General.*—Before you leave the matter of arrestments on the dependence, have you any suggestions to make as to a remedy?—No, I have not. Very great hardship occasionally occurs; but at the same time, it would perhaps be difficult to hold that the power should be taken away altogether; and there is a safeguard, to a certain extent, in the power which the defender has immediately to present a petition for the loosing or recall of the arrestments. We have many incidental petitions on which we hear parties, and restrict the sum much under the sum covered by the arrestments; but in the meantime great hardship is suffered in a mercantile community by the defender having had his funds locked up upon a fictitious claim.

192. *The Chairman.*—Have you any further suggestions to make as to procedure in civil matters?—A suggestion has been put into my hands by one of the Sheriff-clerks-depute in Glasgow, who is a very intelligent man, to this effect, that there are at present before the Sheriff Court and other inferior courts a very great number of points of form and other matters in which the review of the superior courts is excluded by statute. These points mostly depend upon statutes under which very nice points are perpetually arising, and upon these different Sheriffs come to different opinions, so that on some of the points which are of great importance we find that in different parts of Scotland diametrically opposite views are taken. This is regarded as an evil, which I think it is; and the suggestion of the Sheriff-clerk-depute of Glasgow is, that where such cases occur, and where it is found to be of importance that a uniform interpretation of the Act should be had, the opinion of the Court of Session should be obtained upon it. He states that with reference to certain forms under the Small Debt Act, there is a wide diversity of practice in Scotland, and that the only mode by which the right interpretation of the Act could be got would be by an action of damages against a Sheriff-clerk for doing something in one county which is not done in another county. He also pointed out that under the Sheriff Court Act of 1853, if a process is not moved in for three months it falls asleep, and if it stands over for six months it is *ipso facto* held to be abandoned. For years, and ever since the Sheriff Court Act came into operation, it has been the practice in Glasgow, and I believe in Scotland, to hold that that did not apply to a sequestration for rent *currente termino*, in which very often no movement is made for three or six months. But on 21st February 1868, in the case of *Paterson* v. *Munro*, the Court of Session held that the provision of the Act does apply, and that the sequestration has fallen asleep if it has not been moved in within the three months. In that case a poor man, who thought that he was quite safe, found himself out of court. These are instances of difficult points in the construction of statutes in which the jurisdiction is in the Sheriff Court, but there are no direct means of ascertaining the mind of the Supreme Court as to the proper construction.

193. *The Lord Justice-General.*—The case of *Paterson* v. *Munro* does not seem a good illustration of that?—It is an illustration so far, because no direct appeal could be got, and it was only incidentally and accidentally that the point came up on an appeal recently to the court.

194. But appeal was not excluded there?—In many counties these sequestrations were supposed not to have fallen asleep, and that was thought safe practice; but when somebody did object, it has been found that the practice was altogether wrong. There are other cases in which there is no opportunity of getting the opinion of the Court of Session; and what the Sheriff-clerk suggests is, that it shall be in the power of a Sheriff-clerk of a county, or of any one having a substantial and direct interest in the matter, to report to the Lord Advocate that a certain doubt or difficulty has arisen; and that if the Lord Advocate is of opinion that it is a nice and doubtful point, he should have power to report it to the Court of Session, and get their judgment upon the true interpretation of a particular enactment. I do think that this is worthy of the consideration of the Commission, for I know that there is at this moment a diversity of interpretation of various sections of Acts of Parliament in different counties in Scotland, some of which interpretations must be wrong; and there are certain parties, Sheriff-clerks or others, in these counties liable in damages for wrong interpretation of the statutes. But that can never be cleared up till an action of damages is brought; whereas in the way suggested a rapid remedy would be got by bringing the matter under the notice of the Lord Advocate, with power to him to bring it before the Supreme Court. I can hand in the suggestion of the Sheriff-clerk for consideration.

195. *Mr. Shand.*—Would not a speedier mode be to give the Sheriff the power to state a special case?—But very often it does not come before the Sheriff. It is a duty imposed on the Sheriff-clerk, or some other officer.

196. *Lord Justice-General.*—And this proposal is, that the Sheriff-clerk or other such officer should have the power of consulting the court as to the interpretation of the Act?—Yes, through the Lord Advocate, and with his consent.

197. *The Lord Advocate.*—Would it not be better that he should consult the Sheriff?—But that would give no uniformity of judgment.

198. But the communication to the Lord Advocate might come through the Sheriff?—Yes; that might be easily arranged.

199. *Mr. Shand.*—You stated that the Act of 1853 was working well, and you suggested that power should be given to the Sheriff-substitute to allow the record to be amended, and that there should be fewer opportunities for appeals. Is there any other particular in which you think there should be an alteration in the provisions in the Act of 1853?—I think that every Sheriff-substitute, if that system is to be kept up, should, with reference to all his interlocutors except his final judgment, be bound, on the motion of either party, to give a short *viva voce* hearing as to whether he should make any alteration; and if that were done, it would put an end to a great many appeals to the Sheriff.

200. *The Chairman.*—Do you mean upon the merits?—No, that would be like restoring the old system of reclaiming petitions. I merely allude to interlocutory deliverances in the course of making up the record; and I find every day in my appeal court, that a portion of the appeals just require me to make certain alterations which the Sheriff-substitute would himself have made if the matter had been before him.

201. *Mr Clark.*—Would not the effect of giving that power be to give an opportunity for two re-hearings, and would it not be apt to be abused?—No; I think the motion would not be made unless the party believed that he could point out to the Sheriff something in which he had made a slight mistake; and I am strongly of opinion, that where appeals are to be allowed before the final one, they should in almost every instance be allowed only with the consent of the Sheriff-substitute.

202. *Lord Barcaple.*—Do your Sheriff-substitutes hold that they have power to alter an interlocutory judgment in the way you speak of, with consent of both parties?—I think so. If a minute of consent is put in, they are entitled to alter or recall any interlocutor they pronounce; but that is only with consent of both parties. There is another matter which is perhaps a little sentimental, but still I think it of importance. I know that there is great dislike to the word 'substitute' among the resident Sheriffs. They think it a word which unnecessarily and prominently brings them forward as inferior to the non-resident Sheriff; and when they feel that they are discharging very important and independent duties, they don't think

they should be always represented to the county in which they live as substitutes for another. I think it is desirable to give them such names as gentlemen may bear without feeling that they are put into a position of inferiority. They are not inferior. The one is an appeal judge, whose judgments may or may not be better; but the others have onerous duties to perform, and they are brought more into contact with persons residing in the counties. I would therefore suggest that the name Sheriff-substitute should be altered. Whether they should be called Sheriff and Sheriff-depute, or Sheriff and Sheriff-principal, I do not say.

203. *Mr. Clark.*—Do you mean the principal Sheriff to be called depute?—No; but in some counties the Lord-Lieutenant is described as the Sheriff-principal, and the Sheriff-depute is not entitled to be called Sheriff-principal.

204. *The Chairman.*—Is there not a statute which allows the Sheriff to be addressed as Sheriff without the word 'depute?'—Yes, but not as Sheriff-principal; and when the late Lord Rutherfurd was Lord Advocate, there was a bill before Parliament which he was taking charge of, in one of the sections of which Sheriffs-principal were spoken of, and he ordered a printed circular to be sent from the Crown Office stating that 'principal' had been used by mistake in the section, and that it would be withdrawn.

205. *Dean of Faculty.*—Is there anything degrading in the term Sheriff-depute?—No; but I think it should be Sheriff, and something to distinguish the other Sheriff in some way. I would call the resident Sheriff, Sheriff.

206. You seem to think that calling a man Sheriff-substitute is humiliating. Does the same thing occur to you as to the term 'depute?'—No; he is known to be superior to the Sheriff-substitute, and he can submit to be called depute with a better grace.

207. *The Chairman.*—Although the Sheriff may be addressed as Sheriff, and not Sheriff-depute, he is often described as Sheriff-depute; and the reason of the change was, that it was an erroneous representation of his position, for he is not a depute of the Sheriff-principal.—The form of the writ is, 'You being brought before me or one of my substitutes;' and that suggests a feeling of inferiority.

208. *The Lord Justice-General.*—What would you propose? What would you say to 'one of my deputes?'—I think that would be better, because that has acquired a certain recognition; but I admit that the matter is a little sentimental.

209. *The Chairman.*—Have you any other suggestion to make as to procedure in civil matters?—No; I don't think so.

210. As to review in civil matters, is there any mode of obtaining a review that you think would be better than the present note of appeal?—No; I think it is very short and simple. In our Sheriff Court the agent just writes under the interlocutor, 'I appeal against the above interlocutor.'

211. As to review by the superior court, have you anything to suggest?—No. The doing away with the finding of caution for expenses has been in existence for about six months. On the one hand, it was said to be a great hardship that an honest litigant should be prevented from getting into the Court of Session till he can find caution for expenses, which he may not be able to do; and, on the other hand, such a provision gives great facility to a dishonest litigant to protract a case, and drag his adversary into the Court of Session.

212. *Mr. Webster.*—Would you not propose a limit as regards amount at which the judgment in the Sheriff Court should be final, in the same way that you have final judgments in the Small Debt Courts?—They are final at this moment up to £25, and it might be worthy of consideration whether the finality should not be extended to a considerably larger sum.

213. *Mr. Shand.*—Have you formed any opinion as to that?—I cannot say that I have; but I have frequently heard mercantile men say that they would like to see the finality of the Sheriff's judgments largely extended.

214. *The Chairman.*—Have you anything to say about costs?—The only remark I have to make on that is applicable to the Debts Recovery Act. In that Act there is a table of fees, and these are not according to the actual trouble, but according to the amount sued for. If appearance is entered to defend, suppose the amount sued for is £40, the defender may only object to a single item of ten shillings or a pound, and the expenses are £4; whereas if there is a decree in absence, the expenses are only ten shillings. It has been suggested to me that that is a hardship,—that it is not according to the trouble that the fee of £4 is allowed, but according to the sum concluded for, and that that should be remedied. The whole question of the mode in which expenses are disposed of under the Debts Recovery Act is perhaps worthy of reconsideration. I know that agents are not satisfied with the allowance made to them under that Act. Apparently it is an Act of which the public are going to avail themselves considerably, for we had in Glasgow during the first year upwards of 900 cases, and the number is increasing.

215. *The Chairman.*—Have you any suggestion of your own to offer?—No.

216. *The Lord Justice-General.*—The table of fees is constructed on the principle of having fees of definite amount for every step, is it not?—No; if the sum concluded for is under £30, the fees for the whole procedure are so much; if it is above £30, the fees are so much more.

217. *Mr. Murray.*—It is an *ad valorem* scale?—Yes.

218. *The Lord Justice-General.*—Do you object to that?—Yes; it is objected to.

219. *Mr. Murray.*—Does not the same objection apply to all business paid for according to an *ad valorem* scale?—I don't know that we have such a scale in in any other form of process.

220. *The Lord Advocate.*—Are you aware of the rules regulating fees in County Courts in England?—No.

221. *Mr. Campbell.*—Does not this occur frequently in the case of a litigated action brought under the Debts Recovery Act, that there is first a short complaint and a note of pleas in law, and in the event of one of the litigants asking the Sheriff-substitute to make a note of the evidence, then from the time a record is made up by writing out the pleas in law by the Sheriff, the procedure is identical with what it would be in the ordinary roll?—Yes.

222. And notes for the purpose of appeal are just as full as they would be if the case were in the ordinary roll?—Yes.

223. And there may be several diets of proof, and the agent may attend for many hours, while under the Debts Recovery Act he will receive for his trouble only £2, 2s., whereas he would probably have had an account of £10 if the case had been in the ordinary roll?—That is true.

224. Is it not the case that the better class of agents decline to act in cases of that kind?—I know they complain that the scale of remuneration in that court is not sufficient.

225. *The Chairman.*—Is not the economy of expense in that court partly the cause of its popularity and utility?—No doubt of it. I think the only matter for consideration is, whether the *ad valorem* calculation of the expenses is a fair one, putting out of sight altogether the amount of procedure that may have taken place in the case. Twenty minutes may dispose of one case, while another may last over two or three weeks, and yet the fee is the same.

226. *Mr. Harrison.*—Don't you think the present *ad valorem* system more satisfactory to litigants, and perhaps to some agents, than any other that could be suggested?—I don't think it is so agreeable to agents.

227. Would a system by which fees were proportioned to the work done, not frighten a large portion of suitors out of court altogether?—One of the great attractions of that form of procedure to suitors is its cheapness.

228. *The Lord Advocate.*—Without wishing to express any opinion as to the mode of remuneration,

Henry Glassford Bell, LL.D.

allow me to ask you, whether agents may not receive as great remuneration when they are paid for this kind of business on an *ad valorem* scale, applicable to all cases, as they would otherwise do? May the fee not be larger than they would be entitled to in many of the cases, though smaller than they would be entitled to in others?—I daresay that is the fact.

229. Is it not a sort of satisfaction to the litigant to know that there is a limit to the costs of litigation?—Yes.

230. You say there has been a large increase of Sheriff Court business since that Act was passed?—There has been a large number of cases entered upon that roll.

231. Has there been a corresponding diminution in the other rolls?—Nothing like it. To make up for the decrease of 80 ordinary actions, there was an increase of 900 debts recovery cases, and there was also a considerable increase in the small debt cases.

232. *Mr. Campbell.*—If the Act is working well with reference to the enumerated class of cases, is there any reason why other pecuniary claims which do not exceed £50 in amount, should not be competently brought under the Debts Recovery Act, where the litigant is desirous that it should be so?—The class of cases that can be brought under that Act is limited. If it had been made to include the class of cases competent in the Small Debt Court, and extended them to £50, it would have saved discussion as to the competency of cases in that court; and I don't see why cases above £12 competent in the Small Debt Court should be excluded from the Debts Recovery Act. A bill debt may be recovered in the Small Debt Court, but not in the Debts Recovery Court.

233. Might not many demands, which are practically of the nature of demands *ad facta præstanda*, actions for delivery, etc., be brought in the summary form, with an option on the part of the defender, if he thinks the value exceeds £50, to state that in his defences, so as to have the case remitted to the ordinary roll as matter of right?—With reference to all actions *ad facta præstanda*, I prefer the present form of a summary petition, which is always proceeded with rapidly, and which distinctly states what you want the defender to do. I think that is better than making up a record under the Debts Recovery Act.

234. *The Chairman.*—Have you anything to say as to the privileges of agents?—I have had a memorandum put into my hand on that subject, in which it is said: 'Under this head a discussion will probably arise as to the propriety of establishing one general body of practitioners, authorized to plead in any inferior court in Scotland. But apart from questions of the vested rights of local bodies, the matter is beset with many difficulties. For instance, one evil would result to the larger towns: that is to say, practitioners in the smaller towns, who, when their character had become known, could not maintain a respectable position, would be driven into the larger cities, such as Glasgow or Edinburgh, where they would have greater facilities for conducting a pettifogging business, and become allies and colleagues to unlicensed practitioners and parties of inferior character, who are already present there in sufficient numbers.' These are thrown out as suggestions, if it is proposed, and I believe it is a favourite notion of some parties, that local practitioners all over Scotland should be entitled to practise in any Sheriff Court or other inferior court in Scotland, and that all exclusive rights and privileges should be done away with. This writer suggests that that might lead to serious evils, and that it would interfere very much with existing vested rights. At present, the practitioners of Glasgow act under a charter, which enables them to prevent any one from any other county practising in Glasgow. There are high fees charged for admission to the body; they undergo careful examinations; and to admit procurators all over the country to practise in Glasgow, would unquestionably inundate our courts with practitioners whom we would rather be without.

235. Is your opinion adverse to giving practitioners in Sheriff Courts the power to practise in all Sheriff Courts?—I have not fully considered the question. I merely throw out these as difficulties in the way.

236. *Mr. Baxter.*—The solicitors in Glasgow have exclusive privileges under their charter?—Yes.

237. What are they?—The exclusive privilege of their members practising before any courts in Glasgow or the Lower Ward.

238. What is the qualification for admission?—They have to undergo certain examinations.

239. Do they require to serve an apprenticeship?—Yes.

240. For how long?—I cannot say.

241. Have they to pay a certain sum of money to the body?—Yes.

242. *The Chairman.*—Have you anything to say as to agents in the Sheriff Courts following their causes into the Court of Session?—No, I have no suggestion to make upon that point.

243. *The Lord Justice-General.*—Do you think it desirable that they should be empowered to follow their causes when they come by appeal to the Court of Session, and to be in the Court of Session the sole agents in these appeals?—I see no harm in giving them that power; but, in point of fact, I don't believe it would be exercised. I know that it is a power which is not valued or cared for much by the procurators in Glasgow.

244. *The Chairman.*—Would it not require some person in Edinburgh to represent such distant procurators, and to be responsible for the process?—Certainly; and that is the reason why it would be inoperative. A procurator in good practice in Glasgow would not leave his practice to come to Edinburgh and look after a case here; he would have to communicate with some one in Edinburgh. He has now his correspondent in Edinburgh, and I think that system would be followed still; but a power might be given to the country practitioner to come to Edinburgh if he liked.

245. Do you think it expedient to remove the obstacle that is considered to exist as to the communication of profits between the Edinburgh agent and the country agent?—I really am ignorant on that subject. I don't know what the ordinary arrangements between the Edinburgh agent and the country agent are, and I cannot make any suggestion about it.

246. *Mr. Baxter.*—Is your principal Sheriff-clerk resident, and does he perform the duty of Sheriff-clerk?—No.

247. *The Chairman.*—When was he appointed?—A number of years ago, at the time when it was not imperative on the Sheriff-clerk to reside in the county.

248. Then he does not fall within the operation of the Act of Parliament on that subject?—No; and he is one of the few remaining Sheriff-clerks remunerated by fees, and not by salary.

249. *Mr. Baxter.*—Does he do the duty by deputy?—Yes.

250. How many deputies has he?—Four in Glasgow, besides three others.

251. *The Lord Justice-General.*—Is he the only Sheriff-clerk in Scotland who holds his office on that tenure?—There may be another, but there are not more.

252. *The Chairman.*—Have you any other suggestions to make?—No; and I should just like to say, in conclusion, that I trust no portion of the evidence I have given has suggested the idea that I have come here with any particular *nostrum*, or special predilection for some branch of law reform. I would wish to guard myself against that supposition. I have been so thoroughly occupied for many years in administering the law as it exists, that I have not had time to consider, with the care it demands, the large subject of proposed improvements either in practice or principle.

Adjourned.

MONDAY, 7TH DECEMBER 1868.

Members Present:—

LORD COLONSAY.
THE LORD JUSTICE-GENERAL.
LORD BARCAPLE.
THE LORD ADVOCATE (GORDON).
A. R. CLARK, Esq.
JAMES CAMPBELL, Esq.
ARCHD. ORR EWING, Esq.
GEORGE HARRISON, Esq.
JAMES ADAM, Esq.
A. B. SHAND, Esq.
T. G. MURRAY, Esq.
CHARLES MORTON, Esq.
JAMES WEBSTER, Esq.
J. B. BAXTER, Esq.
ADAM PATERSON, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

DONALD MACKENZIE, Esq. examined.

Donald Mackenzie.

253. *The Chairman.*—You are the Sheriff of Fifeshire?—I am.

254. How long have you been so?—Since January 1861.

255. For how many years have you been a practising advocate?—Since May or June 1842. I may mention that I was an advocate-depute for about seven years.

256. The county of Fife is a county of large extent and population?—It is. The population, which I got from the almanac, is 153,180, and the rental is £829,982. Its extent is about 503 square miles.

257. How many substitutes have you?—Two, one at Cupar, and the other at Dunfermline.

258. What is the number of causes brought into your ordinary court?—I am afraid I cannot answer that question; but I do not think there has been a large increase in the number of ordinary causes since the last Law Report. If time had permitted, it was my intention to have got full returns on this and other points; but I have not had time since I received notice that I was to be examined.

259. There is an appeal from the Sheriff-substitute to your judgment?—There is; and that appeal may be had without any charge, where the parties do not lodge a reclaiming petition, or crave an oral hearing.

260. *The Lord Advocate.*—Except the clerk's fee?—There is a clerk's fee of 6d. or 1s.

261. *Mr. Baxter.*—Is it the general practice to ask for an oral hearing?—It is in Fife.

262. *Lord Barcaple.*—May either party ask it?—No, only the appellant.

263. *Mr. Baxter.*—But the other party is heard?—Not if the appellant does not crave an oral hearing.

264. But if he does?—Then both parties are heard. Where the sum sued for is below £25, the fee for an oral hearing is 20s.

265. *The Chairman.*—Who does that fee go to?—It is the procurator's fee. Where the sum is under £100, it is 30s.; above £100, £2; and there is no higher fee allowed by the last Act of Sederunt.

266. Is it more usual to have a reclaiming petition or an oral hearing?—It is much more usual to have an oral hearing in the courts of Fife; and reclaiming petitions are the exception. I find that in cases where the litigant is doubtful of success in his appeal, a reclaiming petition is sometimes lodged, as it is my practice not to order Answers where I am satisfied that the judgment is right. There is thus only the expense of one side incurred. I should mention also that, so far as I know, every case almost is appealed. There are few exceptions.

267. *Mr. Baxter.*—Do you mean on the merits?—Yes, on the final judgment of the Sheriff-substitute.

268. Are there often intermediate appeals?—There are a good many on the points allowed by the last Sheriff Court Act of 1853.

269. *The Chairman.*—Do you know the proportion of the cases appealed where the judgment by you has been an affirmance of the judgment by the Sheriff-substitute?—I cannot tell your lordship that. I have two able substitutes; and there are not many reversals.

270. Do you know the number of advocations?—They are very small. I cannot give the number; but I doubt very much if they are 2 per cent. of the decided causes since I have been appointed Sheriff. I may be wrong in that, but that is my impression. I judge from what I see in the rolls of the Court of Session.

271. Have you any observations to make to the Commissioners as to the present constitution of the Sheriff Court, as consisting of a Sheriff and substitutes?—As regards the present constitution, namely whether the Sheriff-substitute should be abolished, I am of opinion that he should not, but that the present constitution of Sheriff and Sheriff-substitute should be maintained. It is my opinion that if greater facilities were afforded for the despatch of business, not only might the territory of the Sheriff be enlarged, but the territory of the Sheriff-substitute might also be enlarged. Thus, for example, I think the whole of Fife and Kinross might, if a shorthand writer were employed for the taking of proofs, be with advantage placed under the jurisdiction of one Sheriff-substitute, with a larger salary than is at present allowed to any of the three present substitutes. I believe that would tend to the better administration of justice, because that single Sheriff-substitute having more to do, his mind would be more constantly engaged in the practice of law, and he would be better qualified to discharge the duties of his office. I do not think he would be overworked.

272. Do you think any inconvenience would arise from that arrangement in regard to the distances that parties would be removed from the Sheriff-substitute, in cases of summary application?—I think the means of communication are so very ample between the extreme east of Fife and the extreme west of Fife and Kinross, by means of railways, that there would not be much difficulty arising on that account. The chief difficulty that has impressed itself on my mind is in regard to the disposal of summary criminal complaints which are tried before the Sheriff; but I think that looking to the facilities of railway communication, there is nothing to prevent the Sheriff-substitute from going from Cupar to Dunfermline and Kinross, at stated intervals, to try these summary cases. Besides the saving to the Exchequer of two substitutes, there would be a saving to the county of Fife of a prison at Dunfermline, and to the county of Kinross of one prison,—of course, the two counties paying their share of the general assessment for one prison.

273. You would have the seat of the court at Cupar?—I would. I think also, that the territory of the Sheriff might with advantage be enlarged. I think there are many sheriffdoms which are too small.

274. Have you any other observations to make upon the constitution of the court?—I think the present mode of appointing the Sheriff-substitutes ought to be adhered to; and I cannot add anything to what is contained in the Law Report of 1854 upon that subject.

Donald Mackenzie.

I think the interest of the Sheriff is so very great in the appointment of an efficient substitute, that the appointment ought to be left in his hands.

275. *Mr. Baxter.*—You would prefer that to an appointment by the Crown?—Yes. My own experience, since I came to the bar, is that the Sheriffs, without regard to social or party ties, look out for the best men they can get. An inefficient substitute, in consequence of the forms of our judgment, in which the grounds are stated, and otherwise, would entail a large amount of labour and responsibility on his Sheriff.

276. *Lord Barcaple.*—You have spoken of the saving of time to be attained by having proofs taken by a shorthand writer. Have you, as a judge, had any experience of that?—I have not. It is allowed in the Debts Recovery Act. I have seen it only in the Court of Session. I would not, in the general case, adopt the practice which is followed in the Court of Session, of allowing the shorthand writer to take down the evidence as it comes from the mouth of the witness. I would make it imperative on the judge to dictate the combined result of the question and answer to the shorthand writer, and, in important parts of the evidence, to take down the question and answer *ad longum*. I believe there would be a saving of expense from that procedure, in consequence of the shortening of the period employed in taking proofs.

277. *Mr. Paterson.*—Would you, in that case, dispense with the witnesses signing the depositions?—Surely.

278. That would obviate the inconvenience of their remaining till the shorthand writer's notes were extended?—Yes.

279. *Mr. Baxter.*—Would you read over the depositions to the witnesses?—The shorthand writer could do that if it were found necessary. My experience in the practice of the Court of Session has been, that there is no difficulty, when we want information upon any part of the evidence, in the shorthand writer turning it up, and reading what has been said. I do not propose that it shall be imperative to employ a shorthand writer. I only propose that it shall be in the power of the Sheriff to do it where he can get a good shorthand writer; and I believe that in most of the county towns there are good shorthand writers, in consequence of there being newspapers there.

280. *Mr. Shand.*—Is it according to your experience in the Court of Session that the use of a shorthand writer adds very much to the length of the evidence,—I mean to what is written down?—It is; but my remedy for that is, that the judge should dictate the combined result of the question and answer to the shorthand writer. I think that would not add to the length of it at all.

281. Is it not a provision in the Court of Session Act that the judge shall dictate?—He may, if he think fit.

282. *Mr. Adam.*—Supposing you were still to have two substitutes, do you think that the present territorial division of the county is a right one?—Do you mean, would I re-divide the districts?

283. Yes?—No; I think great disadvantage and inconvenience might follow from that. I would adhere to the present division of the county. The Sheriff-substitute at Cupar is not overworked. I may mention that Clackmannan and part of Perth lie immediately to the west of Fife and Kinross, and I think that this part of Perth ought to be absorbed either into Fife or Clackmannan, and not left as it is at present. There would be no difficulty as regards that detached part of Perthshire, because it is well known and defined.

284. *The Chairman.*—Would you make that alteration of boundary apply merely to the jurisdiction of the Sheriff, or would you make it applicable to other matters?—I would make it applicable to other matters coming under his cognisance.

285. But only as regards the Sheriff?—Only as regards the Sheriff.

286. Not as regards the assessments, or matters of that kind?—No, I think not; I think that is a matter which is more properly for the Commissioners of Supply to decide as to whether it would be for their advantage.

287. Or the registration of writs?—Yes; I think the registration of writs falls under the cognisance of the Sheriff; and I think it would be proper that they should be all brought into the county town, whatever it may be.

288. Sasines, or what comes in place of them?—A recent statute provides for the abolition of the Particular Registers of Sasines.

289. Would you have the Commissioners of Supply to belong to each county?—Unless the Commissioners of Supply, under powers given to them by Parliament, resolved to join the two counties, I would have them to remain as at present; but that is a matter which falls more under their province.

290. Police committee?—I think matters of police ought to be under the Sheriff; and the assessment, of course, would fall to be made rateably, according to the respective valuations of the two counties.

291. Would that involve an alteration of the law, as to who constitute the police committee?—It might, or it might not. The police committee, for example, of one of the counties might appoint their constables, and the police committee for the other might appoint their constables, and yet they would all be under the orders of one Sheriff and one Chief Constable, and the combined committees might elect that Chief Constable.

292. In that view, the police committees would remain separate?—Yes.

293. They would not be combined?—I do not see any great advantage or disadvantage that would follow from adopting either course.

294. Does anything else occur to you as to the constitution of the Sheriff Courts?—No.

295. *The Lord Advocate.*—It seems to be your opinion that since the last adjustment of the extent of the jurisdictions of the Sheriffs, and the districts of the Sheriff-substitutes, there have been such facilities of locomotion, by means of railways, that you could unite counties and districts that are at present under separate Sheriff-substitutes?—I am of that opinion; and I think that might be carried to a very considerable extent.

296. *Mr. Adam.*—In taking judicial declarations, would you take the prisoner to the Sheriff, or the Sheriff to the prisoner, under that system?—I would take the prisoner to the Sheriff for various reasons; and among others, that if he is committed to prison, the prison is at the place where the Sheriff takes the declaration.

297. *The Chairman.*—Does anything occur to you as to the jurisdiction of Sheriff Courts in civil matters, as to whether they might be extended or limited, and if so, with regard to what subjects?—I think the jurisdiction of the Sheriff in various civil matters might be extended; I think that as regards suspension, reduction, and declarator, his jurisdiction in regard to moveables should be extended so as to include all matters on which he could adjudicate in an ordinary action. For example, it is not competent, by the present procedure, for the Sheriff to entertain an action of reduction of a moveable writ under the Act 1696. I am of opinion that that ought to be made competent.

298. Whatever might be the ground of reduction?—Whatever might be the ground of reduction. I think that his jurisdiction should also be extended to actions of separation and aliment between husband and wife, and to actions of divorce. I think it is a very great hardship at present, that the poorer classes of society have, in cases which would warrant a separation or a divorce, no other court to go to than the Court of Session, where the expense is considerable.

299. *Mr. Baxter.*—Would you apply that to questions under the Conjugal Rights Act, such as protection of the wife's earnings, and provision to be made for her in the case of desertion?—Yes; I do not see any objection to these being committed to the Sheriff.

300. Extraordinary removings?—Yes, and extraordinary removings. I see no reason why they should not be quite competent to the Sheriff. I know of no ground on which they should be privative to the Court of Session.

301. *The Lord Justice-General.*—What do you say as to declarators of marriage?—I am of opinion that

declarators of marriage ought not to be made competent to the Sheriff Courts; I think the rights at issue there are so vast that they ought only to be adjudicated on in the Court of Session.

302. I suppose the same observation applies to declarators of legitimacy and bastardy?—It does.

303. *Mr. Baxter.*—What is your opinion as to the appointment of trustees under lapsed trusts, factors *loco tutoris*, or curators *bonis*?—I am of opinion that it ought to remain with the Court of Session, as at present. I am aware that occasionally the commissaries have appointed factors; but that is not common.

304. Are you aware that in the case of small estates, there is often very heavy expense incurred in the appointment of factors?—The remedy for that would be to cut down the expense.

305. But I mean expenses in the Court of Session?—In some cases that may be so, but not in all cases. I think it very important that a party holding the office of judicial factor, should discharge that office under the control of the Court, and the Accountant of the Court of Session,—he is so completely master of the subject committed to his charge.

306. *The Chairman.*—Do these exhaust the points as to which you would extend the Sheriff's jurisdiction in civil matters?—Yes.

307. What is your opinion as to heritage?—I think that divisions of commonty might with advantage be committed to the Sheriff, with an immediate right of appeal to the Court of Session upon a decision on the title to insist in the action, if the title should be objected to. I can see no reason why the procedure in divisions of commonty should not take place before the Sheriff instead of a commissioner as at present, but rather the reverse. I think it will be as well, if not better done by the Sheriff. There will be a great saving of expense to the litigants; and the appeal from the decision of the Sheriff can be at once to the Inner House, where it can be adjudicated on as it now is upon the report of the commissioner. I think also that provings of the tenor might with advantage be allowed in the Sheriff Court. I think there would be a saving in taking the proof there; and if a State were dispensed with, which humbly appears to me to be unnecessary, the appeal against the Sheriff's decision at once to the Inner House would be a saving of expense and of time. I think that all questions touching heritable rights between conterminous proprietors, and between a proprietor and the public, ought to be made competent before the Sheriff. These questions generally are, in so far as regards the right of possession, brought before the Sheriff, and frequently the parties remain satisfied with his decision upon the question of possession, and the case goes no further. I think the Sheriff ought to have full right to decide the question of title, the appeal to the Court of Session being, as at present, by a simple note of appeal.

308. *Lord Barcaple.*—Do you refer to cases where the question is entirely one of boundary?—Yes. I have a case at this moment in the Court of Session where the question at issue is as regards the property of a very considerable amount of hill ground, the simple question being whether the march or boundary is on one side of a hill or the other. It originated in interdicts in the Sheriff Court. A proof of 300 or 400 pages was taken, and that proof was informal, because it was taken by a commissioner, contrary to statute. A declarator was raised in the Court of Session, which is now depending before one of the Lords Ordinary, and in that declarator the Sheriff Court proof has, by consent, been adopted as part of the evidence. I think that case might with advantage have been decided by the Sheriff at once, and on his notes of evidence brought up to the Court of Session.

309. *The Lord Advocate.*—Does your observation apply also to rights of way?—Yes, I said so,—all questions between a proprietor and the public.

310. And it would be competent for either party, who wished a jury trial, to advocate with a view to jury trial?—Yes, if that clause in the Act of Parliament were not abolished. I think it would be a great advantage to the community if all questions touching heritable rights of a certain small value, as appearing in the valuation roll, were made competent to the Sheriff, because I think it a great hardship, particularly in counties like Fife, where properties are much subdivided, and there is a large amount of urban subjects, that parties cannot try the right to a subject of the value of £200 or £300 without the necessity of a declarator in the Court of Session. It humbly appears to me, to use an old French proverb—*que le jeu ne vaut pas la chandelle*—the expense is frequently greater than the value of the subject. I should have stated that, as regards moveable rights, it appears to me that the process of *cessio* should always originate in the Sheriff Court. There is another matter which I think might with advantage be altered, and that is the right to use inhibition in a form similar to that conferred by the recent Court of Session Act in actions above a certain amount, say £150 or £200. It seems to me also that adjudication in regard to subjects of small value, as appearing in the valuation roll of the county, ought to be made competent in the Sheriff Court for the purpose of saving expense.

311. *Mr. Baxter.*—Have you formed any idea of the limit?—I would be inclined to carry it to about £500, taking that as a sort of average of the value of the small properties throughout the county.

312. *The Lord Advocate.*—How would you propose to ascertain the value?—By the valuation roll of the county. I do not think it would be advisable to allow such actions to proceed unless the value of the subjects appeared in the valuation roll, because that would give rise to constant questions as to value.

313. *The Chairman.*—Where would you record an inhibition?—In the register in Edinburgh.

314. *The Lord Advocate.*—You say you would ascertain the value by reference to the valuation roll; but suppose the question was with regard to the gable of a house, would you take the value of the whole property on which the house belonging to that person is situated, or merely the value of the house?—That would fall under the former question which I answered—namely, questions between conterminous proprietors. That is a question of boundary.

315. *The Lord Justice-General.*—No; it is a question of property?—But I stated formerly that it was my opinion that all questions touching heritable rights between conterminous proprietors, and between proprietors and the public, ought to be adjudicated on in the Sheriff Court,—that a co-ordinate jurisdiction in regard to these should be conferred upon that court and the Court of Session.

316. *Lord Barcaple.*—You mean by that, in cases where there is a question of boundary?—As to property.

317. You mean whether on one side or other of a certain line, the property belongs to A. or to B., which of course is a question of heritable property, but it turns on a dispute as to boundary between two neighbouring proprietors?—Yes.

318. *Mr. Shand.*—Does the valuation roll show anything except annual value?—It does not.

319. Then is it annual value you would look to, or the real value of the subject?—I had not adverted to that, but I think no difficulty would thence arise. You could take so many years' value of the subject.

320. *The Chairman.*—When you spoke of value according to the valuation roll, you meant the price or value?—Yes; it had escaped my recollection at the time that the valuation roll only gave the yearly value. Then I think the jurisdiction of the Sheriff in regard to feu-duties, conferred by the 32d section of the Sheriff Court Act of 1853, ought to be extended to at least £50.

321. *The Lord Justice-General.*—What is it now?—£25.

322. *The Chairman.*—Have you any other suggestions to make on this point?—No.

323. *The Lord Advocate.*—Have there been many actions under the Debts Recovery Act in your Sheriff Court?—There has not been a very great number. I

Donald Mackenzie.

may mention, that the last time I went the Small Debt Circuit during October, I think I had two cases at Kirkcaldy for sums falling under that statute, and one case at Anstruther which did not fall under the statute. It was brought as falling under the statute; but I satisfied the party that it did not do so, and he withdrew it.

324. Have there been many cases before your substitutes?—I should think that illustration which I have given is very much what takes place at each circuit.

325. Then you destroy the procedure under that Act altogether?—In my humble opinion that Act ought to be repealed. I think, in the first place, that the remuneration given to the procurators of court is not sufficient, and I think it very inexpedient to have three forms of process in the Sheriff Court. I think that the form of process instituted by the Act of 1853, if properly worked, would give all the advantages, as regards despatch and economy, which a litigant is fairly entitled to expect.

326. *Mr. Baxter.*—Before leaving the matter of heritable jurisdiction, I understand you think that except in the case of conterminous proprietors, or questions between a proprietor and the public, the Sheriff should have no jurisdiction in heritable matters, and that he should have no jurisdiction in determining the right to a property, supposing it does not arise between conterminous proprietors?—I would extend his jurisdiction to heritable subjects of small value up to £500 in all cases.

327. *Mr. Clark.*—Do you propose that the Sheriff should have power to reduce all deeds disposing of moveables?—I think he ought.

328. All deeds?—All deeds disposing of moveables.

329. Wills, whatever may be the amount that may be disposed of by them?—I think so. I would, in civil matters, allow the Sheriff to try every cause which would have been competent in his court by ordinary action, including suspension, reduction, and declarator, with the exception of suspensions of decrees of other courts.

330. You think the Sheriff should try reductions on the head of fraud or of incapacity?—Yes, and cases under the Bankrupt Acts.

331. Would you propose that these should be tried by the Sheriff himself, or by the Sheriff and a jury?—I would not propose that they should be tried before the Sheriff and a jury. I think such a form of procedure would be attended with great expense. I think the mode of taking evidence in the Sheriff Court at present is far more advantageous than trial by jury would be.

332. And if a settlement, disposing of moveables alone, was challenged on the ground of incapacity, or of facility and fraud, you would allow that question to be determined in the first instance by the Sheriff?—Yes; I can see no reason why it should be competent to the Sheriff to adjudicate on an action for a sum of money, even £100,000, and incompetent for him to adjudicate in such cases as these.

333. *Mr. Campbell.*—If either party thought proper, he might have the remedy provided by the 40th section of the Judicature Act?—Yes.

334. *Mr. Clark.*—You would propose to leave that remedy existing?—I think that except in a very limited class of actions, trial by jury ought not to be maintained. By the Jury Court Act, power is given to the Court to set aside the verdict of a jury if contrary to evidence, thereby proceeding on the implication that the Court is a better judge of evidence than the jury; and it appears to me inconsistent with sound common sense not to avail one's self of the best tribunal for the decision of fact. I think a tribunal of twelve jurymen, unaccustomed to consider questions of disputed fact, and unaccustomed to consider questions of law as applied to disputed facts, is not a tribunal from which such accuracy can be expected as we ought to have in the decision of the causes submitted to them; and I would have far more confidence in the opinion of a tribunal of judges, who would find the facts, and apply the law to the decision of the cause, and whose judgment, if it were not sound, could be set aside in the court of appeal.

335. *The Chairman.*—You said, with the exception of certain cases; what are these cases?—Actions of damages for slander, oral and written. That is one class of cases that occurs to me at this moment.

336. *Mr. Baxter.*—Actions of damages generally?—No; I think many actions of damages would be much better adjudicated upon by a judge than by a jury.

337. *The Lord Advocate.*—When they are founded on fraud?—Yes. I think the judge would not be led away by feeling, but would deal strictly with the evidence, and with the actual injury inflicted.

338. *The Chairman.*—Is the only illustration of cases that you would except actions of damages for slander?—I have not the cases before me at this moment.

339. *Mr. Clark.*—Assault?—Yes; actions of damages for assault.

340. *Lord Barcaple.*—Seduction?—Yes.

341. *Crim. con.*?—Yes.

342. *The Chairman.*—Railway accidents?—Railway accidents too.

343. *The Lord Justice-General.*—What do you say of them?—I think I would leave them to be tried by a jury.

344. *Mr. Campbell.*—But all of these can be tried before the Sheriff Court?—Yes. I think if trial by jury is to be maintained in the Court of Session, these ought to be left to a jury. I think if I had a case of my own to try, I would rather have the opinion of a judge than of a jury upon it.

345. *Mr. Shand.*—Including the amount of damages?—Yes.

346. Have you not very frequently to assess damages in actions brought in your own court as Sheriff?—I have had to do that several times; and I have found the assessing of damages attended with very great difficulty indeed, thereby showing me that it is not such an easy matter as people think.

347. *Mr. Adam.*—Do you mean that you would rather have the opinion of a single judge than the opinion of a judge and jury?—I would; but I would rather have the opinion of three judges than of a single judge, because *humanum est errare;* I should have more confidence in the three than in the one.

348. *Mr. Harrison.*—Even in the cases you have excepted, you don't think the decision of a jury would be better than that of a single well-trained judge, or more likely to be correct?—I think if the jury were sensible men, they would read the mind of the judge, and give their verdict accordingly.

349. *Mr. Paterson.*—I think you said you would give the Sheriff jurisdiction in actions of divorce?—I would.

350. But you would continue the privative jurisdiction of the Supreme Court in actions of declarator of marriage and legitimacy?—I would.

351. I suppose you would do so on the ground that these questions, besides involving patrimonial interests of great extent, involve also the status of the parties?—I would. Generally speaking, these actions are not brought except where there are large patrimonial interests at stake.

352. May that not be so in an action of divorce?—I think it is not nearly so frequent. I cannot understand why it should not be competent to the Sheriff to decide on a question of criminal intercourse, while it is competent for him to decide on other criminal matters of great importance.

353. *Mr. Baxter.*—I suppose you think that if the action of divorce is made privative to the Court of Session, many poor people are deprived of a remedy?—I have no doubt whatever that it is so; and I think it would be for the benefit of public morals that actions of divorce should be rendered competent in the Sheriff Court.

354. The husband has to pay the expenses in these cases?—Yes.

355. *Mr. Clark.*—Would you allow review?—I would make the judgment of the Sheriff subject to review.

356. Do you think you would get the judgment much cheaper in that case, than if you began in the Court of Session?—I think so. I think returns from the Sheriff Courts would show that investigation into facts there is

not expensive, whereas in the Court of Session it is so from various causes, and in particular from the fact that counsel and agents have to be employed.

357. *Mr. Campbell.*—In such cases, I presume, you would not propose that there should be an advocation to the Lord Ordinary, but that such cases should go direct to the Inner House?—I meant that; and the recent statute makes that imperative. I think also that it is a matter deserving of the consideration of this Commission, whether in a case which commences in the Sheriff Court, a right of appeal to the House of Lords should be allowed. There must be an end at some time of the right of appealing. One difficulty which has occurred to me was started in consequence of a case in which I was employed to draw defences in an action raised in the Sheriff Court of Glasgow, where the sum at stake was about £12,000; and to meet a difficulty of that kind I would allow the defender, either when the record was closed or when the proof was closed, before taking the judgment of the Sheriff, to advocate to the Court of Session with the view of preserving his right of appeal. Of course it is no hardship to the pursuer to be shut out of an appeal, because he has chosen his court.

358. *The Lord Justice-General.*—I understand you to say, that if a pursuer adopts the course of raising his action in the Sheriff Court, and then an appeal is taken to the Court of Session, you would allow no appeal in that case to the House of Lords?—Quite so.

359. By either party?—Yes.

360. But subject to this condition, that before judgment in the Sheriff Court, either party might remove the case into the Court of Session, with the view of preserving his right of appeal to the House of Lords?—Instead of either party, I said the defender, because I don't think the pursuer can complain of being shut out of his appeal when he himself has originated the action in the Sheriff Court, with full knowledge that the consequence of his doing so is to prevent him appealing to the House of Lords.

361. You would not allow him to change his mind?—No. I think that would obviate what has been found to be an evil, viz. a rich litigant carrying a poor litigant to the House of Lords.

362. *Mr. Shand.*—Do you think that many cases which originate in the Sheriff Court now reach the House of Lords?—They are very few.

363. And they only reach the House of Lords now on matters of law, the findings in fact of the Court below being conclusive?—Yes.

364. *The Lord Justice-General.*—Have you any idea of the number of appeals in such cases to the House of Lords?—They are very few.

365. Do they amount to one or two in the course of a year?—I don't think they amount to so many.

366. *Mr. Campbell.*—Some important questions involving the principles of the poor-law, and some questions with reference to possession between coterminous proprietors, originating in the Sheriff Court within the last few years, have been tried and determined in the House of Lords; for instance, *Barbour* v. *Adamson*, and *Tennent* v. *The Earl of Glasgow*. These originated in the Sheriff Court?—Yes.

367. *The Lord Justice-General.*—I understand your reason for making the suggestion that there should be no appeal to the House of Lords where the case originates in the Sheriff Court, is because of the extension of the Sheriff's jurisdiction which you are suggesting?—Yes; and also because I think it is not sound to allow an appeal to a court where the expense is so great, in matters which in general are much below the amount of the cost.

368. But your reason for making the suggestion is because you recommend the extension of the Sheriff's jurisdiction in the way you have already stated. Is that not what makes the suggestion of more importance?—It would make it undoubtedly of more importance.

369. One of your objections to the Debts Recovery Act is the excessively small remuneration of the procurators. Do you think that that part of the statute has operated to prevent its being so much used as it might otherwise have been?—I can only speak from hearsay on that point. I have heard that in one county in Scotland the procurators as a body have refused to work it, and I know there is a general feeling of dissatisfaction in regard to the remuneration allowed. There is also hearsay in the Parliament House, as to the remuneration in one of the causes appealed to the court having been, considering the time employed, actually below that of a labourer.

370. Have you any objection to mention the county to which you have referred?—I understand that in Ayrshire the procurators have not worked the Act, but that is merely hearsay.

371. I understand your other objection is, that it introduces a third form of process into the Sheriff Court?—Yes; and it introduces a form of process which the Sheriff has difficulty in working, because at the end of the small debt cases of the day, at Kirkcaldy for example, when he is worn out and exhausted, he is obliged to sit down and draw a note of the pleas of the parties. He has no library at hand to assist him in that, and every one knows that in the actions mentioned in the Debts Recovery Act nice questions of law may arise.

372. You said you thought that under the Act of 1853 there was a very excellent form of process applicable to all such cases, if it was properly worked?—I think so.

373. With reference to that qualification as to its being properly worked, do you think it is well worked or not?—I think that in some counties it is well worked, and it is becoming daily better worked. But I think that Condescendences and Defences, as a rule, are more frequently ordered than they might be, even in the best counties. I have frequently myself called the attention of the procurators to that, and I have said that at the end of the litigation I would find the party who had moved for the order not entitled to the expense of them if he won the case.

374. *Mr. Baxter.*—Has the Sheriff power to order a record to be made up either by condescendence and answers or by a short minute?—He has.

375. *Mr. Campbell.*—Is it the duty of the Sheriff to be satisfied, before he orders a record, that such is *prima facie* a proper course in the circumstances of the case?—It is so.

376. And he takes the responsibility of the record, so that there is never any record in process of the fact that there has been a desire expressed by either of the parties that that particular form should be adopted?—That is generally the case. The usual record in the interlocutor sheet is, 'Appoints condescendence and defences in terms of the statute;' and except by inquiry at the parties themselves, it is difficult to ascertain the grounds on which, or the party at whose instance it has been done.

377. *The Lord Justice-General.*—But I understand you to be of opinion that condescendence and answers are too often ordered in practice?—I think they might be dispensed with in the great majority of causes in which they are now ordered, or in the great majority of causes which come into court.

378. *Lord Barcaple.*—I suppose there is pressure put on the judge by the procurators, who say that they think condescendence and answers will really turn out to be advantageous, and at the end of the cause the judge is disappointed as to that?—Yes; and it is oftener done in the case of a judge who has administered the old forms of process, and who has a natural bias in that direction.

379. *Mr. Baxter.*—Does it not invariably happen that where condescendence and answers are ordered, there are also revisals?—In only one or two cases in Fife have I seen a revisal of the condescendence and defences. The condescendence is put in, and then the defences; if there is a statement of facts in the defences, that is answered on the condescendence, and the record is closed. I ought to state that there are very good records prepared in the Sheriff Courts of Fife, and that is entirely the result of Mr. Taylor's and Mr. Bell's knowledge of law and of the forms of process.

Donald Mackenzie.

380. *Mr Clark.*—Do you find in your Sheriff Court that the absence of a condescendence—that is to say, the closing of a record on the short minute—gives occasion to adjournments of the proof in the course of taking the proof?—I have, I think, only in two cases since I was appointed Sheriff, found it necessary to allow proof in replication. There is no adjournment of the proof allowed; but at the close of the defender's proof, the question may arise, Has the pursuer been taken by surprise on a certain point? And I think I have been twice called on to allow proof in replication. One of these was in an affiliation case, and the other in an ordinary action.

381. But I mean on points arising in the examination of the witnesses?—No, it comes up on a motion for a proof in replication.

382. *Mr. Baxter.*—Have you often appeals in the course of a proof?—There is only one appeal allowed by the 17th section of the Act of 1853, and it is at the close of the proof.

383. *The Lord Justice-General.*—There is one part of the Act of 1853 regarding the proofs, which makes a very special provision for the proof being taken continuously and without adjournment as far as possible, and requiring that wherever adjournment takes place it shall be on special cause shown and set forth in the interlocutor making the adjournment. Do you think that has been attended to in practice?—In the county of Fife it has in practice been attended to, with one or two exceptions. So far as my experience goes, in litigations from other counties in which I have acted as counsel in the Court of Session, I should say the practice was the other way, and that it has not been attended to; but that is only an inference of mine from what I have seen in these few cases.

384. Do you think it very desirable that that part of the Act should be strictly worked?—I do. I think it very desirable that the forms of process from the commencement of the action down to the decision of it should be strictly worked. With that view, I think that no condescendence and defences ought to be allowed except on very special cause shown and stated in the interlocutor of the Sheriff. I think the moment the record is closed, a day within a week should be appointed for hearing parties on it, if they will not renounce probation; and at that meeting, or immediately thereafter, the Sheriff-substitute should appoint a diet of proof, and he should take that proof consecutively, and give his decision in the cause. I would then limit the right of appeal and the right to crave an oral hearing to eight days instead of fifteen days as at present; and I would appoint the Sheriff to go down to his county more frequently than he does at present, to dispose of these oral hearings. The statute only requires quarterly sittings. I would also dispense with reclaiming petitions, except when ordered by the Sheriff, and in causes allowed by the statute. In that way I think more despatch would be got. I think there is great misapprehension on the part of the public as to the appeal to the Sheriff creating delay and expense. The delay, in my humble opinion, is caused by the litigants themselves. The expense, for the reasons I have already stated, is not caused by any appeal to the Sheriff, for the highest fees allowed in actions above £100 is £2 on each side; and my experience is that the decision of the Sheriff is generally got within a month after the decision of the Sheriff-substitute, and frequently less.

385. *Lord Barcaple.*—Where an appeal is taken without a reclaiming petition or a re-hearing being asked, can the Sheriff competently dispose of the appeal, to the effect of altering the judgment without a re-hearing?—He can.

386. Where the appeal is taken without a hearing being asked, or a reclaiming petition being lodged, has the Sheriff power at present to order a hearing if he thinks proper?—He has. The words of the statute are, that he may proceed to dispose of the appeal without further argument, thereby inferring that he may order further argument.

387. In point of practice, does the Sheriff ever alter the judgment without hearing parties or having written argument?—I think I have done it when I had no difficulty, and the judgment appeared to me so clearly wrong as to require no further argument.

388. But what argument had you before you in these cases?—I have put the case in the motion roll, to get explanations from the parties, and any authorities they had to cite, being unwilling to put them to the expense of an oral hearing. In that way I got the benefit of their remarks, and all the authorities they had to cite in regard to the judgment. It is generally in cases of small value, or where the interlocutor is clearly right, that a simple appeal, without oral hearing or reclaiming petition, is taken.

389. *Mr. Campbell.*—Is such an appeal generally taken for the purposes of delay?—I rather think so.

390. *Mr. Clark.*—Would you limit the number of appeals competent before final judgment?—I cannot see how that could be done. I think the Act of 1853 cut them as low as they could be.

391. *Mr. Webster.*—Would you still leave it in the power of the parties to have a reclaiming petition and answers?—I would not leave it in the power of the parties, but in the power of the Sheriff, in special cases requiring extraordinary despatch.

392. *The Lord Advocate.*—Suppose an appeal is taken and supported by reclaiming petition, would you order answers or a hearing?—In that case I would order answers, as authorized by statute. But I never order answers as a matter of course; I read the reclaiming petition first.

393. *Mr. Clark.*—Suppose both parties appeal against the judgment, and one craves an oral hearing, and the other lodges a reclaiming petition, what do you do in that case?—That has occurred to me, and I think it a blot in the statute. I think it ought not to be allowed; and it would be prevented by dispensing with reclaiming petitions except by order of the court. Very recently one party reclaimed on the merits, and another appealed on the question of expenses, and craved an oral hearing, so that in that way the procurators got double expenses out of the same appeal.

394. *The Lord Advocate.*—Are there not some procurators who feel considerable difficulty in arguing orally, and who prefer written pleadings?—I have not found that the case in Fife.

395. *Mr. Shand.*—Have you found that quarterly courts for oral hearings are at all sufficient in your county?—I have not found it so.

396. In practice, how many times have you such hearings?—I made up my return of statutory courts the other day, and I think it was six for Dunfermline, and seven for Cupar, besides occasions which were not regular sittings, and also besides criminal jury trials, the trials in which I generally take myself.

397. Are you very frequently in your county on business?—As a rule, I take the second diets or trials of all criminal jury trials.

398. *Mr. Campbell.*—That is not common through out Scotland?—I cannot speak in regard to any other county except Perthshire. But if I recollect rightly, Lord Ardmillan was in the practice of doing so when he was Sheriff of Perthshire.

399. *Mr. Shand.*—Is it not the case that all actions against foreigners originate in the Sheriff Court by letters of arrestment to found jurisdiction?—As a rule they do.

400. Are you of opinion that there is any reason why such actions should not also be sued in the Sheriff Courts upon their merits?—Where there was jurisdiction otherwise.

401. But take the case of jurisdiction founded upon arrestment of funds within the Sheriff's jurisdiction, is it your opinion that a Sheriff should have jurisdiction against foreigners in such cases?—I see no reason why he should not.

402. *Mr. Webster.*—Supposing the foreigner had funds arrested in three or four counties, would you permit his creditor to sue him in each of these different counties?—I don't see any hardship arising from that; because each of the creditors, if obliged to go to the

Court of Session, would have separate actions in the Court of Session.

403. But I was taking the case of one creditor. Each Sheriff has jurisdiction over the funds within his own county, and no more; the funds within his territory are attached by arrestment. Having that in view, would you still subject the foreigner to the jurisdiction of any Sheriff within whose territory funds were arrested?—I would make the creditor raise his action in the county in which he resided, and used arrestments. If he did not use arrestments in the territory where he resided, he should go to the other county and raise his action. I think he would satisfy himself with going to the county and attaching the funds, and then raising his action.

404. If there were sufficient funds?—But I don't think that should be taken into account in the question of jurisdiction. Any matter arrested raises jurisdiction.

405. *The Chairman.*—Have you anything to say with reference to criminal matters?—There is only one other point with reference to civil matters which I would mention, and that is, that in my opinion, where shorthand writers can be obtained, the Sheriff should be authorized to employ a shorthand writer in taking the proof, dictating it to him. I also think that the provision at the end of section 10 of the Sheriff Court Act of 1853 should be enlarged to the effect of making it competent to the Sheriff to remit to persons of skill, so as to bind both parties, except upon cause shown with reference to the report of that neutral person of skill; I mean in a certain class of cases which might be defined. The provision at present is, that he may make that remit; and it is final, only if both parties consent to the remit.

406. *Mr. Shand.*—You said you thought that one of the substitutes might be dispensed with in your county; but you coupled it with the expression, if shorthand writing were introduced in taking the proofs. Suppose shorthand writing were not introduced in taking the proofs, do you think it would be possible to put so large a territory as you have mentioned under one substitute?—I think a good man could do the business of both the counties of Fife and Kinross.

407. *The Chairman.*—What class of cases would you remit to men of skill?—Among others, actions for damage done by game. I think a remit to a neutral person skilled in these matters is more likely to give a fair estimate of value than could be obtained by the decision of a judge upon a proof led by both parties.

408. *The Lord Justice-General.*—Would you expect to have any difficulty in finding a neutral party who was also skilled in such questions?—There is a case reported in the books, in which Admiral Wemyss was defender, and the damages awarded by the person of skill appeared to be reasonable.

409. Were they small in amount?—Yes.

410. May he not probably have been biassed in favour of the defender?—No, I think not. He was a farmer, and such men, far above bias, are to be found in every county.

411. *Mr. Campbell.*—Take the case where danger is said to be threatened owing to the condition of a building, and the Sheriff is moved by the petitioner to remit to a man of skill, and he is disposed to do so, but the respondent objects that there is no necessity for any remit, and refuses to hold himself foreclosed by anything the reporter may say, but insists on going to proof?—In such a case the Sheriff might not make the remit, because it would not be binding from want of consent.

412. Do you think that is a disadvantage?—In that case I, as Sheriff, would make the remit, if the safety of the lieges was involved, and leave the parties to appeal to the court if they thought I was wrong, but it would only be in a pressing case that I would do that.

413. *The Chairman.*—Is that one of the class of cases to which you have been referring?—Yes.

414. Would you authorize the person of skill to take evidence?—I would leave him to make all inquiry that he thought proper, as he does at present. I may instance another case which occurs to me at this moment. An action is brought by a tenant against his landlord for payment on account of drainage and trenching operations on the farm under the stipulations of the lease. Surely the inquiry as to the amount due by the landlord to the tenant in these circumstances can be much better ascertained by a skilled person or persons than by a proof before the Sheriff. I have a case of that kind before the Court of Session, where there has been an interlocutor appointing proof to be taken. The sum concluded for is upwards of £1000. Now I cannot see how the cost, and whether the work has been done in terms of the lease, can be so well ascertained as by a remit to a skilled person, who in regard to cost of tiles, the making of the drains, and the trenching, would from his own professional skill, the vouchers, and inquiry, arrive at the sum that should be paid.

415. Would you make the report of the person of skill conclusive, and exclude review?—I think it ought to be conclusive, except on special cause shown.

416. What do you mean by special cause?—I mean if it could be shown that the party had acted without sufficient information, or had not taken the proper means to inform himself with reference to the subject in dispute.

417. *Mr. Paterson.*—Would you put the person of skill upon oath?—Surely.

418. *The Chairman.*—Is there any other point you have to mention in regard to civil matters?—I think power ought to be conferred upon the Sheriff to allow additional proof after a proof has been closed, without any other restriction than that which the matter of expenses imposes. If I recollect rightly, the provision of the Act of Sederunt of 1839 is that it must be on very weighty cause shown. The pursuer may, in leading his proof, omit an important point, and he may lose his case owing to that omission. I would also, following the provision in the recent Court of Session Act, allow productions to be made at any time, subject to the penalty of expenses.

419. *The Lord Justice-General.*—There is a clause in the Act of 1853 which allows the Sheriff, where the cause is before him on appeal on any point, to open up the record *ex proprio motu*. Do you think it desirable to extend that allowance to the Sheriff-substitute also?—I do. That is one of the points I had noted. I would allow both the Sheriff-substitute and the Sheriff to amend the record at any stage.

420. On such conditions as to expenses as he thought reasonable?—Yes. In decrees in absence in the Sheriff Court, a party, even when the decree has been partially implemented, may get reponed in so far as it has not been implemented, by a reponing note. I think no reponing note should be allowed where there has been personal service of the summons, after say twenty-one days from the final decree, or where there has not been personal service, after twenty-one days from personal service of the decree.

421. Personal execution and charge?—Yes; or a service where a charge could not be given on the decree. I think it would be very advisable, too, that provisions should be inserted in any statute to be passed to compel the litigants to proceed without delay, so as to obtain the object which the pursuer had in raising the action; and failing their doing so, the Sheriff should be entitled, after the lapse of a certain period, to dismiss the cause; and I think there should be no right of revival.

422. *Mr. Webster.*—Would that not prevent parties from settling, or from improving in the state of temper which has often led to the litigation?—No. I think the best compulsitor to settling is, that the parties should be compelled to go on with the litigation. If they have unlimited time to settle, they are no nearer it at the end than if they took it up at once.

423. *Mr. Clark.*—Do you think the clause about actions being asleep in three months, and being dismissed after six months, has worked well?—It is evaded by parties putting in a minute of consent.

424. If it had been worked properly, do you think it would have been a beneficial clause?—I do not think it a good clause. I think it gives too much latitude to the litigants. I would make it much more peremptory

Donald Mackenzie.

than it is. I may illustrate that by a case which recently came before me. One of my substitutes pronounced a judgment on 22d June; the losing party took his appeal without availing himself of the fifteen days allowed by the statute. I went to Fife to hear the cause on 6th July. The procurators asked me to delay the cause, on the ground that before I had intimated the diet for oral hearing, they had arranged to attend an important arbitration. I agreed, and appointed a reclaiming petition. That reclaiming petition was not put in at the expiry of eight days as ordered, and the cause went to sleep. It was revived; the reclaiming petition was not put in till near the end of October, and the answers were not put in till November, so that nearly six months elapsed before that appeal was decided. I don't think that is a proper administration of a suit at all.

425. *Mr. Webster.*—Did the elections take place in the meantime?—Yes, during part of the time.

426. Was there any injury to the parties from the delay?—There was injury to the pursuer, who did not get his judgment confirmed.

427. *Lord Barcaple.*—Which of the parties had complained in that case?—The pursuer obtained decree from the Sheriff-substitute, and I affirmed the judgment.

428. But which party had cause of complaint on the ground of the delay?—The pursuer.

429. Could he not have prevented the delay?—His agent might.

430. *The Lord Justice-General.*—If both parties desire a cause to be delayed for any period, say for twelve months, is there any reason why that request should not be complied with?—I do not think that the courts of law, which are maintained for the purpose of deciding causes, should be prevented from proceeding to the decision of a cause when once it has been laid before them.

431. What is the evil consequence resulting from such a proceeding?—One of the evil consequences is, that frequently, after a case has been disposed of on one point, it comes up before the judge after the lapse of a great many months, when it has gone completely out of his mind.

432. It entails additional labour and trouble on the judge?—Yes, and delay is a cause of expense.

433. Both parties being willing to incur that expense, you still think it not reasonable to allow them to do it?—I am not satisfied that the parties themselves are willing. I very much fear that it is to some extent the agents accommodating each other.

434. My question assumed that the parties were both desirous of delay?—I think that parties should not embark in a litigation if they do not desire the judgment of the court at once on it.

435. You cannot conceive any case in which, the parties having come into court and joined issue, it may not be expedient for the interests of both of them that a delay of twelve months should take place?—Such a case may occur, and I would allow a sist on cause shown; but the judge is at present helpless.

436. You would not allow the parties to concur in creating such delay without the consent of the judge?—I would not.

437. *Mr. Orr Ewing.*—You think the party is in the hands of his agent, and that while the client wishes a decision, the agent prevents him from getting it?—I have no means of knowing the wish of the client; but I suppose a client is completely in the hands of his agent.

438. *Lord Barcaple.*—In what respect is it that delay by itself causes additional expense?—I cannot very well illustrate that; but I know that it is so. It does not diminish the expense; and the delay frequently renders it necessary to do certain acts which would not otherwise be done.

439. Take the case you gave us a little ago, of your having ordered a reclaiming petition to be lodged in eight days, and it was not lodged for several months, did that cause additional expense?—It caused the additional expense connected with the revival of the process.

440. *The Lord Justice-General.*—How much would that be?—It would not be great.

441. How much?—I would require to look at the Act of Sederunt before I could state that.

442. *Mr. Baxter.*—Suppose there had been no statutory enactment as to the case falling asleep, there would have been no need for a minute of consent?—Then it would have gone to sleep at the end of a year.

443. *Mr. Shand.*—Are not such delays as you have referred to in the case you have mentioned, productive of statistics which create discontent against the court?—They have undoubtedly been used by writers in the newspapers as one of the great objections to the maintenance of what is called the double Sheriffship,—I think very improperly used, because, as far as my experience has gone, there is no delay occasioned by that, which is deserving of any such comment.

444. *The Lord Justice-General.*—Then it would appear that the evils arising from these delays are confined very much to throwing discredit on the court undeservedly?—That is one of the consequences.

445. *Mr. Webster.*—Is not that merely drawing a wrong inference as to the cause of delay?—Surely. It is proceeding upon the assumption that the court is the cause of the delay.

446. *Mr. Shand.*—And upon the assumption that the litigants themselves are not parties to these delays, but that the delays take place for the convenience of the agents, there is an injury to the clients?—Yes.

447. That is a serious evil on that assumption?—I think so.

448. *The Lord Justice-General.*—Do you think the evil just referred to prevails extensively,—I mean the existence of delays for the convenience of procurators?—I can only infer that, and my own feeling is that it is so. My own feeling is, that procurators do not press on causes as they ought to do.

449. But is it your conclusion, that the greater part of the delay of which you have been speaking is caused by procurators for their own convenience, and not by the parties, or for the interest of the parties?—My opinion, from experience, is that delay in causes, in which there was no prospect of a settlement, has arisen either from the procurators accommodating each other, or, what is more frequently the case, from the procurators just leaving the case to lie over till it was convenient for them to take it up. Cases continue sometimes two years in court, which might have been out of court in three months.

450. *The Chairman.*—Then it is an evil, generally speaking, caused by the practitioners, and which you would propose to cure in the manner you have described?—Yes.

451. *Mr. Baxter.*—Is that your mere inference, or do you know as matter of fact that the procurators are to blame?—I can only infer; I cannot know what goes on without the walls of the court. I can only infer that there must be some such reason as that, when I see cases delayed which ought to be proceeded with at once,—no cause whatever appearing for that delay. I take the case where upon an appeal with regard to the proof, the judgment of the Sheriff-substitute having been affirmed, that case may not come up for judgment on the merits for months. I need not say that in a case of that kind the mind of the judge is not so impressed with the evidence as it was immediately after the close of the proof. In fact, it has faded from his mind, and he approaches it very much as a new case.

452. *Mr. Orr Ewing.*—It is the interest of one of the parties to get a decision as speedily as possible?—If the pursuer is in earnest, as it must be presumed he is, it is undoubtedly his interest to get his cause decided one way or other, and the best means of bringing his adversary to a compromise is to push his cause.

453. *Lord Barcaple.*—Do you think there is any ground for holding that the pursuer is more in earnest than the defender? Is there any distinction between the two parties in that respect?—Generally none.

454. They are precisely *in pari casu* in that respect, so far as assumption can go?—I think so.

455. *Mr. Orr Ewing.*—The pursuer generally has a greater interest in despatch?—I think so.

456. *Lord Barcaple.*—Do you think it can be assumed that the pursuer has a greater interest in despatch than the defender?—In the beginning of the litigation he has; but as the cause goes on, and it goes against him, he may not have a greater interest.

457. Does the pursuer never raise his action for the purpose of delay in the settlement of something which he sees he must settle?—I can imagine such a case. I can conceive that he might have recourse to an action of that kind.

458. Do you think there is any ground for assuming that the pursuer is more frequently in the right, and acting in good faith in the action, than the defender?—I think, generally speaking, the pursuer is oftener in the right than the defender. I see no reason why both parties are not to be held to be acting in good faith.

459. Do you state that opinion as the result of your experience as a lawyer and a judge?—I think so. That is the result of my experience since I came to the bar.

460. I ask the question with regard to litigated causes, not decrees in absence?—I mean litigated causes.

461. And is that your experience?—Yes; and my experience is confirmed by what I have generally found to be the case in practice—that the pursuer seldom raises an action unless he has good grounds for supposing himself to be in the right.—I would suggest that a provision should be inserted in any statute that may be introduced, whereby, when one interlocutor is appealed, all the previous interlocutors shall be held to be under appeal at the instance of both parties.

462. *The Lord Justice-General.*—You would borrow that from the late Court of Session Act?—Yes. It has in practice in the Sheriff Court been so worked; but there has always been a doubt whether this was proper, and I think all doubt on that question ought to be removed.

463. *The Chairman.*—Have you any further suggestions to make?—Not upon the form of procedure.

464. Have you any further suggestions in regard to criminal matters?—I think that the jurisdiction of the Sheriff should be extended to cases of robbery, but not to the other pleas of the Crown,—murder, rape, and wilful fire-raising. It appears to me that it would be of advantage in many ways if the smaller class of cases of robbery which are met by the punishment of imprisonment were remitted to the Sheriff. We have in Scotland a check on the abuse of any such power, in the admirable way in which the criminal business of the country is administered by Crown counsel. I do not think the Sheriff should have power to award penal servitude.

465. *Mr. Shand.*—Is it not the case that stipendiary magistrates in England have that power?—I believe it is; but I don't think it is expedient. I think that where we have the High and Circuit Courts of Justiciary, it is much better that the supreme judges should award the highest penalty, with the exception of death, which is awarded for crime, and not the local judges. That is especially the case where, from the distance from Edinburgh, all the diets are conducted by Sheriff-substitutes. I know, speaking for myself, that I would rather not have the power of awarding penal servitude. It is a severe punishment, and ought to be kept for very grave offences, and these ought to be tried in the High Court or Circuit Court of Justiciary.

466. *Mr. Baxter.*—Suppose that you tried a man for a serious case of theft, and sentenced him to twelve or eighteen months' imprisonment, and that he comes up again for another theft, there is no more difficulty in trying the one case than the other?—No; but I think the inferior judge should not award the superior punishment. My practice as an advocate-depute was to indict the man in such a case before the High or Circuit Court.

467. *The Lord Justice-General.*—Do you see any advantage in giving the Sheriff the power of awarding penal servitude?—No. I see no possible advantage, and I can see possible disadvantages.

468. *Mr. Adam.*—Might he not be sooner tried by the Sheriff?—I am aware that when a person commits a crime immediately after the close of a Circuit, he may be left in prison till the next Circuit six months afterwards; but I think the way to meet that difficulty is, that either the Circuit should be held oftener, or that the prisoner should be brought to the High Court in Edinburgh for trial.

469. *The Lord Justice-General.*—If you were to give Sheriffs the power of awarding penal servitude, might there not be a considerable risk of great variance in the sentences?—There might.

470. And that would have a bad effect on the public mind?—I think that would have a bad effect on the public mind; and I think it would do away with the impression on the criminal class which the awarding of sentences by the Court of Justiciary undoubtedly has. There is always a greater stigma and a greater importance attached to the sentence of the Court of Justiciary than to that of the Sheriff. It carries greater weight, as it ought to do.

471. When you speak of the possibility of the Circuits being held oftener, do you sufficiently keep in view, that in most of the Circuit towns the amount of criminal business is very small?—I would not make these stated Circuits. I would only require one or two judges to go down to a large town where there might be the accumulation of cases I refer to.

472. You would make it occasional?—Yes. I know a recent case where a party committed a crime immediately after the Perth Autumn Circuit, and he was not tried till the following spring. He was charged with murder. It was made matter of complaint against the Lord Advocate of the day, that he allowed the case to lie over to the Circuit. It did not occur to me that there was any peculiar hardship in that case, because the evidence was very clear; and the question for the jury was, whether the party was guilty of murder or of culpable homicide; but it showed the advantage of a judge going down to Perth, and trying that case as soon as it was ready for trial.

473. *Mr. Baxter.*—Does that not happen almost every Circuit?—My experience is that it does not happen very often, at least in a case of such grave crime.

474. But I was alluding to a person remaining in prison for six months?—My experience is that that does not happen often. In cases that admitted of it, such a man was generally sent to the Sheriff, if possible; and it was rare that any case occurred of a person who had committed a crime which required to be tried before the Circuit or High Court, committing it immediately after the close of the Circuit.

475. *Mr. Adam.*—Would you give a prisoner out on bail the benefit of running his letters?—I think so. I do not see why a man should have a charge hanging over him for a longer period than that referred to in the statute.

476. *The Lord Justice-General.*—In short, you would extend the Act 1701 to the case of prisoners on bail?—I would.

477. *Mr. Campbell.*—Are there not many criminal cases tried before you and a jury in which, if you had the power, you would be disposed to inflict the punishment of penal servitude?—I never had such a case; and the simple reason is, as I said before, the criminal business of the country, under the charge of Crown counsel, is so well administered, that cases of that kind are never sent to the Sheriff Court if it can be possibly avoided. They are reserved for the Court of Justiciary. I think that is a great advantage which we have in Scotland over England and Ireland. There is a regular rule in these cases, and that rule has received its first impression from the judgments of the Court of Justiciary.

478. *Mr. Baxter.*—Do you think the matter of bail is on a proper footing? Should the judge not have the power of refusing bail in certain cases?—I think it is a pity to restrict it as it is at present; but so far as I have been obliged to interfere, it has been to bring

Donald Mackenzie.

it up to the statutory amount. Too little bail is generally fixed by the judge.

479. Do you think he should have the power of refusing bail in very serious cases?—I think so, subject to appeal to the Court of Justiciary. I have only once had to award bail since I was a Sheriff; and from what took place at that time, it was evident that I fixed a much higher amount of bail than would have been fixed by my substitute. As an advocate-depute, I had occasion to complain of the very small amount of bail sometimes fixed.

480. *The Chairman.*—In the class of cases in which a party is entitled to bail, ought the Sheriff to have the power of refusing bail altogether?—I think he ought; and I would not limit the amount of bail, as it is by statute. I would leave it to the discretion of the judge, with a right of appeal to the Court of Justiciary.

481. Have you anything to suggest as to the mode of investigating crimes preparatory to trial?—No, I have nothing to suggest upon that.

482. Do you think the existing system works well?—I think so. There are efficient Procurators-fiscal, superintended by the Advocates-depute and by the Sheriffs.

483. *Mr. Adam.*—Do you see any objection to allowing a criminal judge to amend the libel in certain cases of error?—That is a very delicate matter. If it was perfectly clear that it could be done without prejudice to the prisoner, it might be done.

484. *Mr. Baxter.*—Suppose a case of theft, in which the property was libelled as belonging to John Anderson, and it turned out to belong to John Anderson & Co.?—I would not allow amendment in that case. A new libel should be brought. The prisoner might have come prepared to meet the case of having stolen the property from John Anderson, and not from John Anderson & Co. If the prisoner consented to the amendment, I would not object to it.

485. Suppose it was libelled that the act was committed near a certain close, and that it actually took place within the close, would you not allow an amendment in such a case?—I would not be inclined to allow the Procurator-fiscal to amend his own slovenliness. I cannot conceive such a case. The words of style are so clear, that the Procurator-fiscal always uses the words 'in or near.'

486. *The Chairman.*—You would think that in such a case the libel was carelessly drawn?—Yes.

487. Do you think the power of amending a libel would lead to slovenliness in the preparation of libels?—I think it might.

488. *Mr. Baxter.*—Are you aware that it is done in England?—I know nothing of the practice in England in this respect, and I should be sorry that we should follow some of their practice in criminal matters.

489. *Mr. Shand.*—Do you think, if the broad facts are stated to a prisoner, that there is any reason whatever for preventing the Procurator-fiscal from altering expressions either as to the person whose property has been stolen, or as to the place, which do not materially alter the broad facts, so as to enable the court to get on with the case which they are met to try?—If the prisoner consents, I see no objection.

490. But without his consent?—I do not think there should be any alteration in such important matters as the property of the subject, or the *locus*.

491. With consent, you think that the alteration should be allowed?—Yes.

492. Would that not be an innovation so far on our present practice?—I don't know that it would. I think that in a non-essential matter the judge would allow any alteration to which the prisoner consented; and if it was an essential matter, I think he would look to keeping up strictness in regard to the preparation of the libel.

493. *The Lord Justice-General.*—If you allowed the Procurator-fiscal to amend his libel, would you do so on any condition as to his paying expenses?—I do not see why the present system as regards expenses should be altered, unless expenses are to be awarded to the winning party as a matter of course.

494. *The Chairman.*—Would you allow an amendment of the libel, but with a delay of the trial, without the necessity of serving it over again?—I think that might with advantage be done. It would save expense, and do no injury to the criminal.

495. Would you require that amendment to be made at the first diet for pleading?—I think it ought not to be confined to the first diet for pleading. I think it ought to be at both diets, if there is to be any amendment at all. The first diet is generally attended by a procurator, and the Sheriff-substitute takes it. The second diet is sometimes attended by counsel, and by the Sheriff; and difficulties might occur to them which did not occur to the Procurator or to the Sheriff-substitute. I think it expedient to allow these amendments to be made at both diets; and the delay necessary to enable the prisoner to make new inquiry should be allowed.

496. At that second diet witnesses are in attendance?—They are.

497. And if you delay, there is a considerable expense created?—There is.

498. Would you subject the party who had committed the error in the expense, or would you hold him to be a public officer doing his duty to the best of his ability, though he may have committed an error, and who was therefore not to be subjected in expenses in such a case?—I would apply the latter part of your Lordship's observation to the case. I would hold him to be a public officer doing his duty to the best of his ability, and not to be subjected in expenses.

499. Would you subject him in the expenses to which the prisoner was put, supposing the prisoner and his counsel in attendance, and the trial delayed to another day?—I would not.

500. *Mr. Baxter.*—You would make it the same as if he had deserted the diet?—Precisely the same. In cases of hardship, Crown counsel have been in the practice of entertaining applications for reimbursement of actual expense and outlay; and I think the power of Crown counsel to meet these expenses is quite sufficient.

501. *The Chairman.*—In the investigation of crime, do you consider it the duty of your Procurator-fiscal to make the investigation, or do you consider that he ought to leave that to the constabulary of the district?—I have a very clear opinion on that. I was in office as an Advocate-depute at the time the General Police Act was passed, and I always checked any attempt on the part of the Procurators-fiscal to leave the investigation of crime to the constabulary. I think the Procurator-fiscal should investigate crime himself. He is employed and paid for it. The use of the constabulary is to obtain the preliminary information, so as to aid him in his inquiries.

502. Do you think that the Procurator-fiscal's investigation ought not to be in any way excluded, unless he thought it superfluous, by the intervention of the constabulary?—I think it ought not.

503. Do you think the Sheriff is entitled, and the Procurator-fiscal as his officer is entitled, to the aid of the constabulary in investigating crime?—In making the preliminary inquiry, undoubtedly; and I know that there is a very great saving of expense to the community, as well as despatch in the business, by that being done. I have had my attention particularly directed to that within the last month; and I have been not only during the last month, but during my service as an Advocate-depute, particularly struck with the able manner in which common constables reported crimes, and the names of the parties who could speak to the commission of them, and also the names of parties who could speak in favour of the accused.

504. You have said that the constitution of the court by a Sheriff and substitute is one you approve of?—Yes.

505. That implies a review by the Sheriff of the judgment of the Sheriff-substitutes?—Yes.—Would your Lordship allow me to state, that I do not feel disposed to extend the summary jurisdiction of the Sheriff in criminal matters.

506. *Mr. Baxter.*—Would you recommend any al-

teration to be made in the form of indictment?—No, I would not.

507. You would maintain the major and minor propositions as they are?—I think the major and minor propositions must be perfectly distinct, to enable the party to know what he is charged with; and the subsumption must be equally distinct, so as to enable him to know the details of the crime. You may shorten it in unimportant particulars; but I see no reason for altering it. It appears to me to have worked admirably in time past, and to be well drawn for the punishment of criminals and the protection of innocent parties.

508. *The Chairman.*—In regard to review, do you think it an advantage that the review should be by a person different from the person who has pronounced the first judgment?—I do. I think a fresh mind is always of advantage.

509. *Mr. Baxter.*—Are your present Sheriff-substitutes taken from the bar?—One of them was not taken from the bar.

510. Is it not generally the case that they are taken from the bar?—Yes; but one of them was brought from Ross-shire, where he was a Sheriff-substitute, on the recommendation of two Sheriffs, who were afterwards judges in the Court of Session; and I believe he was not a procurator. He was brought from Tain, on account of his qualifications. The other is a member of the bar.

511. But they are generally taken from the bar?—They are generally.

512. The Sheriff-substitutes take the evidence, and they hear and see the witnesses?—They do.

513. And I understand that your review takes place upon their notes?—Yes.

514. You do not see or hear the witnesses?—No, I do not.

515. Do you think that the judge seeing and hearing the witnesses is more able to form an opinion as to their credibility than one who does not see or hear them, on account of the manner in which the witness answers, his readiness, his evident intelligence and open bearing, and his clear and intimate knowledge of what he is speaking about? Do you think that the Sheriff-substitute taking the evidence, and having those opportunities of judging, is better able to form an opinion as to the credibility of the witnesses than one who merely reads the notes?—I think too much importance is attached to these matters.

516. But do you think he has any advantage?—Yes; but he can give the benefit of that by a note at the end of the examination of the witness.

517. Is it not an objection that the present appeal within the Sheriff Court is from one judge to another of the same rank, though possibly with a higher name, —that appeal being not only on matters of fact, but on matters of law, and frequently from a judge better informed to a judge worse informed, because he has merely read the notes of evidence instead of seeing the witnesses?—I think that if the notes are correctly taken, and the impression on the mind of the Sheriff-substitute as to the demeanour of the witness is stated as it ought to be, the Sheriff,—who is a non-resident judge, in the practice of his profession at the bar, and having a number of legal points passing under his notice,—is in general better qualified to give his judgment on the evidence than the Sheriff-substitute.

518. *Mr. Campbell.*—You mentioned that you have generally occasion to adhere to the judgments of your substitutes. Do you mean in the case of final judgments?—In the majority of cases.

519. In the large majority of cases?—In the majority, but I cannot say how many.

520. *Mr. Baxter.*—Can you suggest a stronger appellate court, in order to meet the opinion of many parties in the country as to the weakness of the present appellate jurisdiction?—I do not think that is the feeling in the country. I think the feeling is in favour of the appellate jurisdiction; and I think that in the great mass of cases which are litigated, where the subject at issue is not large, it would be a very great hardship indeed to the litigants to be compelled to submit to the decision of a single judge, if they did not choose to incur the expense of an appeal to the Court of Session. As far as I have met with any expression of opinion in the county of Fife since I became Sheriff, it has been in favour of the present system; and my own views of the matter cannot be better stated than they were by the able lawyers who prepared the Law Report of 1834.

521. Do you not think it would be expedient to give an appeal from the Sheriff-substitute direct to the Court of Session?—My best answer to that is, that though it is at present competent, it has only been done in one case.

522. What would you think of grouping the Sheriffs into courts of two or three, and making these appellate courts?—I can see no advantage in that. There would be no saving of expense; and if we are to have a court of several judges, we had better have the Supreme Court at once. I think the great advantage of the Sheriff of an important territory is that he superintends his Sheriff-substitutes; and the very fact that the substitute's judgment comes under the review of the Sheriff, who, generally speaking, is an advocate in practice at the bar, keeps the Sheriff-substitute more alive to the necessity of conducting the cause in strict accordance with law, and to the very best of his ability.

523. *Mr. Campbell.*—What proportion of the Sheriffs of counties are in active practice at the bar at the present time? Do you think there is one-fourth of them who are so?—Oh yes, I think there is more. There are twenty-three Sheriffs at present, two of whom are resident; and I know that there are much more than one-fourth of the others in active practice.

524. *The Chairman.*—There is one county in which the Sheriff does not fall within the rule as to attendance in court?—There are two counties.

525. I am alluding to other counties, not Lanarkshire or Midlothian?—Yes, the county of Roxburgh. I think there are five Sheriffs in counties to the south of the Forth who are in active practice.

526. *Mr. Campbell.*—I did not refer merely to counsel in attendance in the Parliament House, but to counsel who may be described as in active practice at the bar. Is there more than a fourth of the Sheriffs holding office who are in active practice at the bar?—I think there are ten of the Sheriffs in active practice at present. One of the most distinguished members of the bar, who from bad health gave up a large practice a few years ago, resigned his Sheriffship within the last few days, and some of the others who are not now in practice were in practice when appointed, and are still in attendance at the Parliament House, and ready to take any practice sent to them.

527. Are they not bound by Act of Parliament to be in attendance at the Parliament House?—Yes.

528. *Mr. Adam.*—Suppose there was to be only one Sheriff, do you consider that there should be more facilities given for review—I mean as to amount? Would you retain the prohibition of review in cases below £25?—I think one of the great advantages to the community is that a litigant in causes below £25 gets, without cost, the opinion of a new mind upon his case.

529. Supposing he had not that, would it be necessary for him to appeal to the Court of Session?—I think so.

530. *Mr. Harrison.*—Do you consider that an appeal from a judge who is in active practice, to a judge who is virtually not in active practice, is a satisfactory system of review?—I think the premises of that question are not correct. The appeal is from a judge who is not in active practice.

531. But the Sheriff-substitute is in constant practice within his jurisdiction, and the appeal lies in half the counties of Scotland from the Sheriff-substitute in that position to a judge who is not in active practice? —My experience has been that there is an appeal in almost every cause, so that the Sheriff has as much practice as his substitute, even although not in active practice at the bar, and he has the additional advantage of having access to a much better library than any substitute can have. He has also the advantage of coming daily into communication with practising lawyers, and

Donald Mackenzie.

he has the benefit of their advice and assistance in difficult legal points. Even though I have been in practice since I came to the bar, I have frequently had occasion to ask the views and the assistance of some of my brethren, to enable me to come to a right decision; and I think that is a very great advantage.

532. *Mr. Shand.*—Do you think the keeping up of the Sheriff and Sheriff-substitute tends to a uniformity of decision which you would not have if you held mere local courts?—I think it does.

533. *Mr. Baxter.*—But you would still have the appeal to the Supreme Court?—I would not have an appeal to the Supreme Court in cases under £25, where the expenses on each side would be nearly double that amount.

534. *The Chairman.*—Apart from the appeal to the Supreme Court, is there not such intercommunication between the Sheriffs who are in attendance in the Parliament House, with reference to difficult points that arise, as leads to greater uniformity of decision?—There is. Points continually occur of new practice in each Sheriffdom; and the Sheriffs, by communicating with one another, find that these have been adjudicated upon in some counties in a particular manner, and that practice is followed if it commends itself to the opinion of the other Sheriffs.

535. Or if it is a new point, they come to some decision upon it?—Yes.

536. *Mr. Orr Ewing.*—You have stated that your judgments are generally confirming those of your Sheriff-substitutes?—Yes.

537. Supposing there was not the present facility of appealing to the Sheriff-depute from the Sheriff-substitute, would the parties not be satisfied with the decision of the substitute, without appealing to any court?—I don't think so, and I am by no means satisfied that you would have the judgment of the Sheriff-substitute given in the satisfactory way in which it has been hitherto, because the very fact that there is an immediate appeal to another judge from the decision of the Sheriff-substitute is of advantage. In my own case I always feel that my judgment is a judgment which, if above £25, may be brought under the review of the Court of Session; and I am anxious, in every case, that I should not only pronounce a sound judgment, but that I should put it on its soundest foundation.

538. *Mr. Campbell.*—Assuming that the only judicial appointments of Sheriffs in Scotland were those of single Sheriffs for each county, don't you think you would obtain a class of judges superior to those that are now to be met with?—The question at issue is whether the Sheriff-substitute shall be abolished, and the Sheriff shall be sent down to his county as a resident judge. I think that being sent away from the Court of Session, he would in time get rusted in his law, and not be able to discharge the duty so efficiently as he now does, while he is a practising lawyer in the Court of Session. He would not only have less to do, but he would be, so to speak, out of the atmosphere of the law; and there is the saying of an old lawyer, that he always found himself a much worse lawyer at the end of the long vacation than he was at the end of the summer session.

539. *Mr. Baxter.*—Then your opinion is against the Sheriffs being resident in their counties?—It is. I ought to add, in answer to Mr. Campbell's question, that I think there would be no saving effected, because, if you were to send down the Sheriffs to their counties as single judges, you would, in order to secure the services of men in large practice at the bar for these offices, require to give each Sheriff as great a salary as he and his substitutes at present have.

540. *Mr. Clark.*—But would you get the Sheriffs to go to their counties as resident judges?—I don't think so.

541. *The Lord Justice-General.*—Some of them you certainly could not?—Certainly not.

542. And therefore, upon the whole, the class of men who would, in the case supposed, be sent down as resident Sheriffs, would be inferior in standing at the bar to those who are now Sheriff-deputes?—I think they would.

543. *Mr. Shand.*—If it be a sound objection to the present system that it is unsatisfactory to appeal from a single judge to a single judge, do you think that no intermediate arrangement could be made which would save a litigant the expense of a Court of Session case, and yet give him a mode of review?—The only other way would be by causing three Sheriffs to hold a court together.

544. Or two Sheriffs?—Yes; and if they did not agree, the Sheriff-substitute's judgment would then stand.

545. Are you aware that the present system of review by two Lords Justices in England is a very satisfactory system?—I am not aware.

546. Do you not think that if any arrangement could be made by which two Sheriffs could review the judgment of one Sheriff-substitute, it would be satisfactory?—I don't think it would be more satisfactory than the present form. I think the responsibility which a single judge feels, makes him discharge his duty all the more anxiously and efficiently.

547. Don't you think that one of two judges would feel quite as much responsibility as one sitting alone, while he would have the benefit of discussing the matter with another judge? Are not these obvious advantages?—I am not sure of that.

548. Don't you think it would be an advantage to have a review by two?—I don't think it would be a greater advantage than the present system. I rather think that adhering to the present form would be better.

549. My question was put on the assumption that the review by one man is unsatisfactory. Don't you think that if that be objectionable in itself, it could be cured by some such system?—That is one way of meeting the difficulty.

550. But does that arrangement not commend itself to you?—No, I think not.

551. *Mr. Baxter.*—Don't you think a court consisting of two judges would be a very deliberative court?—No, I don't think it would be more so than the court of one judge.

552. If they differed, would they try to come to an agreement?—I think it would be disadvantageous to come to an agreement, because the man who was right might compromise his opinion in favour of the other.

553. Is the court of the Lord Justices in England not an excellent court?—I have no experience of it.

554. *The Lord Justice-General.*—Have you any acquaintance with the state of opinion of the Chancery bar in England, as to the working of the court of the Lord Justices?—No; I know nothing personally about it.

555. You were asked whether there was not a great advantage in seeing the witnesses, and whether the Sheriff-substitute had not a great advantage over the Sheriff-depute in that respect. Won't the difference of advantage depend in a great measure on the way in which the notes of evidence are taken?—It will.

556. If a witness is prevaricating, or otherwise conducting himself so as to shake his credit, may it not be very easy to represent that upon the face of the notes?—I think it may.

557. If you find a witness prevaricating, or having a tendency to prevarication, would you not take down the very words of the question and answer, for the purpose of representing the exact state of what passed?—I would.

558. And that would represent to the judge who reviewed the evidence, although he did not see the witness, what actually took place in the presence of the judge who examined him?—It would; and that would all the more easily be correctly done if, as I have suggested, a shorthand writer were employed.

559. Then I understand you are in favour of the evidence being taken by a shorthand writer?—Where a good shorthand writer can be got, which I believe is the case in almost all the county towns.

560. Do you contemplate that the shorthand writer shall take down every word of the question and answer throughout the whole evidence?—No, I would not allow him to do that. I would make the Sheriff dictate

every word that he is to take down. In short, the result of the Sheriff's and the shorthand writer's labours would be that which an able judge's notes would be of the evidence taken at a trial. Every word of importance would be taken down, and with question and answer where there was prevarication on the part of the witness.

561. Do you think that would be an advantage in the way of saving time or saving expense, or producing a better record of the evidence?—I think all three. I don't think it would make a better record of the evidence than would be taken by a judge thoroughly practised in criminal and jury causes; but I think it would save time and expense, and it would be a means of obtaining a better record of the evidence, because a person not much accustomed to the taking of evidence would more than likely, if he had to take the notes himself, miss points in writing it down, which he would not miss if he had to dictate it to a shorthand writer.

562. *Mr. Campbell.*—In that way the record would be as good as the best notes of a Sheriff-substitute, and would be taken in a shorter time?—I think so.

563. *Mr. Clark.*—Do you ask the Sheriff-substitute in your county to note anything special about the demeanour of a witness?—I don't ask him, but I understand that it is the rule to do so in every case; and I generally find in every note to a judgment, an intimation of the manner in which a particular witness has given his evidence, if the Sheriff-substitute has thought it right to disregard it.

564. Or to give credit to it?—Yes.

565. *The Chairman.*—As to the advantage of seeing a witness and hearing him give his evidence, that, if it be an advantage, is an advantage which the judge in the first instance has, but which in every case of appellate jurisdiction the court of appeal has not?—Undoubtedly; and if weight is to be attached to it, as the question of Mr. Baxter seems to imply, then the Sheriff-substitute is a much better judge of the facts than the Supreme Court, and no appeal ought to be allowed.

566. *Mr Baxter.*—On matters of fact?—Yes. Because on the assumption of the question, it would be going from a good tribunal to a bad tribunal.

567. *Mr. Paterson.*—I understand that it is your practice to go to your county to hear appeals?—Every Sheriff must do so by Act of Parliament.

568. Then there is no hearing in chambers in Edinburgh?—In rare cases, where counsel have been employed, the parties have requested as a favour that I would hear them in Edinburgh; but I would much rather have heard them in the county at a regular sitting.

569. Then the hearing in Edinburgh is a rare and exceptional thing, so far as your experience goes?—Yes. If counsel in large practice at the bar are employed in the case, it has been done, but I think only in a few cases from Fife in my experience. I have always done it when asked.

570. *Mr. Webster.*—Are written proceedings common in appeals?—Not in Fife. I may state that the practitioners in Fife are many of them able men, who speak well.

571. *Mr. Paterson.* — Would you approve of its being required that every Sheriff-principal should go to his county to hear the procurators who have debated the case before the Sheriff-substitute?—The Sheriff is bound to go to his county; and by the Act of 1853, section 46, he is bound to hold quarterly sittings. My opinion is that he ought to hold sittings much oftener, so that there should be no delay in the decision of causes. The hearing of causes in Edinburgh imposes additional labour on the Sheriff, and I would far rather hear them in my ordinary court.

572. *The Chairman.*—As to the form of review by the Supreme Court, is that satisfactory to you?—It is.

573. Have you any improvements to suggest?—I think the right of appeal should be limited. It is at present six months, but I think in decrees *in foro* on the merits it should be made twenty-one days, thereby assimilating it to the Court of Session practice. In regard to decrees in absence, where there has been personal service, I think these twenty-one days should run from the charge, or from a service of the decree where a charge is not competent.

574. Do you think that the appeal to the superior court ought to be limited to twenty-one days?—I do. I think six months is too long a period to tie up a cause. It may be taken advantage of by litigants for the sake of delay.

575. And you think it should be done by note of appeal, as lately provided?—In all cases I think so. Where there has been no personal service in the manner referred to, as in the case of a sailor away on a foreign voyage for six months, but still having his domicile in the county, he would have a longer time to appeal, there having been no personal service on him. In that case, I think the restriction I have pointed at would prevent hardship.

576. Have you any suggestion to make as to review in criminal matters?—I think there ought to be a saving of the expense which I understand prevails as regards the fees in the Court of Justiciary, though I don't know that from experience, as it is not in my department. But I think the procedure should be simplified, and the dues of court diminished. I think also it would be advisable that there should be an appeal to the Court of Justiciary against the ruling in matters of law of the Sheriff presiding at a jury trial in criminal causes, the law called for or objected to being taken down by the Sheriff before the jury retire, exactly as in jury trials in civil causes. I think that would be satisfactory to the Sheriffs themselves.

577. Supposing the Sheriff's ruling was altered, would you hold that to be a ground for upsetting the verdict entirely, so that the party should be altogether acquitted?—That would depend on the cause.

578. In criminal matters, would the result not be that the party would be acquitted?—I would make regulations to the contrary. I would put it in the power of the Supreme Court to direct an acquittal, or to direct that the party should be tried again. I would, in short, repeal the old law, that a party who has tholed one trial should not be tried again.

579. Would you allow the appeal court to judge of the materiality of the objection in such a case?—Yes. I would assimilate it to the practice in civil jury trials.

580. Supposing it was an objection which went to exclude certain evidence that had been tendered, what then?—There is a right of appeal at present. Under the Act of Adjournal, objections in the course of the proceedings with the answers must be entered on the record, and the result is in the hands of the court, with this difference, that there can be no new trial.

581. Where evidence is excluded, how would you ascertain the materiality of that evidence?—The court would ascertain it from the judge's notes.

582. But the evidence has been excluded, and therefore you have not got it?—I would leave the court to make up their own mind on that, upon a consideration of the whole evidence in the cause, and of the question, objection, and answers.

583. *Mr. Webster.*—Then you would furnish the evidence along with the exceptions?—I would have the objection to the evidence taken down, and the answer.

584. *The Chairman.*—But if the judge ruled that the evidence was not to be received, you would not have the evidence?—But the import of it would be made to appear. The question and statement of the party wishing to lead the evidence would appear.

585. *The Lord Justice-General.*—I rather think that what you are indicating as the mode of obtaining review in criminal cases from the Sheriff would present to the Court of Justiciary something very like the bill of exceptions, as we had it in civil cases before the Act of 1868?—Yes.

586. Is not that rather a cumbrous procedure?—It is, to some extent. I don't think it would be very frequently followed; but it would meet those cases of hardship where a party has been convicted upon a certain ruling in regard to law, which conviction might not have been got if the ruling had been otherwise.

587. *Mr. Paterson.*—In the course of your experience,

Donald Mackenzie.

have you ever found that any practical hardship has arisen from Sheriffs administering criminal justice, as is done at present?—I cannot recall any case to my mind. I recollect of speaking of the matter to a member of this Commission some time ago; and I thought, in the particular case which I had in hand, that the judge might obtain a verdict by laying down certain law, and that would be a hardship to the party; and I made up my mind in that case to do what I was not required to do by the Act of Adjournal, viz. to take down any objection that was taken to the law which I stated to the jury. No objection was taken. That was the only case of the kind which I have had; and it would rarely happen.

588. *The Lord Justice-General.*—Supposing a case to be brought under review of the Court of Justiciary in the manner you have suggested, you would, I suppose, provide for the pursuer undergoing his sentence of imprisonment in the meantime, or would you liberate him?—If it were a bailable offence, he might be liberated on caution; and provision would require to be made as to the time from which the imprisonment should begin to run if the sentence was affirmed.

589. Would you in any case have a new trial?—Whenever the Court of Justiciary were of opinion that a new trial should take place, I would.

590. In what class of cases do you think they ought to order a new trial?—Where material evidence had been improperly refused, or where wrong law had been laid down in an essential matter, evidently leading to the verdict of the jury.

591. But in the event of wrong law being laid down in the opinion of the Justiciary Court, and their seeing further on the face of the evidence, that without that wrong law there could not have been a verdict, you would not have a new trial?—No. Wherever the judges were satisfied, on the merits of the cause, that substantial justice had been done, and that the verdict was in accordance with the facts as appearing on the judge's notes of evidence, I would give them power to disregard what was erroneous in the procedure.

592. *The Chairman.*—Would you give that power of review to the public or private prosecutor, as well as to the defender in the cause?—I would. It would be rarely taken advantage of by the public prosecutor, except in very important causes.

593. *Mr. Webster.*—Would that apply only to one trial, or to a third or fourth trial, as has happened in civil causes?—I don't think that would happen in criminal cases. It is very rarely that objections are taken; and the judge, if he has a doubt as to the soundness of the law or the evidence, leans in favour of the prisoner.

594. *The Chairman.*—Have you anything to suggest as to the mode of fixing costs?—Nothing, but that if the Debts Recovery Act is to be maintained as part of our procedure, the costs should be raised. They are utterly inadequate to the labour. Frequently the questions involved are so nice, and the evidence taken so long, that the amount allowed is utterly inadequate to the labour.

595. Do you object to the *ad valorem* principle on which the costs are fixed?—I do. I think it is erroneous to affix an *ad valorem* principle to the labour of an agent in a civil cause. It must be by time or by the length of the written pleadings.

596. Do you think it is an advantage to the suitor, in that class of cases, of limited amount, to have a knowledge, before they enter upon them, of the utmost extent of their liability for costs?—Yes.

597. They would not have that on the principle you have mentioned?—I rather misunderstood your Lordship's previous question.

598. My question was, whether the suitors should have a full knowledge of the extent of the liability in costs to which they are subjecting themselves when they enter into a litigation?—They should have full knowledge that if they are unsuccessful in the litigation, they will be found liable in the costs which it is thought proper should be paid by the losing party.

599. But my question relates to the knowledge of the amount to which it could go?—No. I don't think a litigant has any right to know the amount of costs that he will have to pay. If he embarks in a litigation, he must take the consequences. He is not entitled to litigate with his adversary with a hard and fast line as to costs, dragging his adversary into litigation it may be at great cost and labour to him.

600. *Mr. Paterson.*—Would you adopt the same scale of charge under the Debts Recovery Act which rules in the ordinary court, leaving it of course to the auditor?—I think the Debts Recovery Act ought to be abolished entirely. I see no necessity for it. The Sheriff Court Act of 1853 makes provisions under which a cause can be tried as rapidly as under the Debts Recovery Act; and I think the leading object of that Act was to cut down procurators' fees, and to get cheap law.

601. Supposing the Act were abolished, what fees would you suggest?—I would apply the Act of Sederunt of 1st March 1861; and if you did that, I think you would not find many cases brought under the Debts Recovery Act.

602. *The Chairman.*—You object entirely to the principle of the *ad valorem* charge?—I do.

603. In oral hearings on appeal to the Sheriff, the award is made to depend on the amount sued for, and not on the amount of the labour?—It is.

604. Do you approve of that principle?—I don't see how you can apply any other principle to that fee. We know, from our practice in the Court of Session, that the fees taken individually are occasionally not commensurate to the labour, but as a whole that they are sufficient. Frequently we get a much larger fee than we are entitled to expect in one case, while in others we get smaller fees than our labour would entitle us to; but as a whole, we are fairly remunerated.

605. That is, as a rule for counsel; but this is as a rule for the party?—I cannot pitch on any other rule than the rule of the Act of Sederunt. You cannot *ab ante* decide the amount of the labour that a party will have in pleading any particular cause, and you must get at it in some rough and round way.

606. Is not the Debts Recovery Act an attempt to get at it in a rough and round way?—But it is very inadequately applied.

607. Have you any suggestion to make as to the privileges of agents?—I see no reason for altering the present position of that matter.

608. It has been suggested that procurators in one Sheriff Court should be allowed to practise in any other Sheriff Court,—that members of the general body of procurators should be allowed to practise in any court. Do you approve of that suggestion?—No, I do not. I think it is much better that the procurators of each county should practise in their own courts.

609. Do you think the procurators of the Sheriff Court ought to be allowed to follow their causes into the Supreme Court, and to conduct them there?—I think not, particularly as caution has been abolished in appeals from the inferior court.

610. *Mr. Baxter.*—Why would you object to me coming from Dundee and pleading a case before you?—I would have great pleasure in seeing you personally; but I don't think it is a sound principle, that the procurator whose privileges are confined to a particular district of the country, should come and carry on practice in the courts of other agents. It might be attended with disadvantage to the clients. In your case I am sure it would not, but in many cases it would be.

611. Have your procurators in Cupar any exclusive privileges?—No; they are not incorporated.

612. *Mr. Webster.*—In your county are all the procurators admitted by the Sheriff?—Yes.

613. And the Sheriff has the control of how long they are to remain on the roll?—He can only take them off for cause shown.

614. *Mr. Orr Ewing.*—Would it not be an advantage to a client that he should have a legal gentleman in whom he has confidence to represent him in court, rather than that he should give instructions to his usual agent, and that that agent should employ a total

stranger in another part of the country?—I don't think he would derive any advantage from it. He would find no difficulty in getting a man as well qualified to conduct his case.

615. Don't you think an agent derives a certain amount of advantage from getting instructions directly from his client?—I think not, in the case put.

616. Does it not divide the responsibility?—I don't think that is an advantage.

617. Is it not a disadvantage to be a total stranger to the client?—I cannot see how a man can properly conduct a litigation at a distant court.

618. *Mr. Baxter.*—Don't you know that a number of the procurators of Forfarshire have been admitted into your court?—I am aware of that; and it is the practice all over Scotland to do so, where there are no charters. If I had had the disposal of that in the first instance, and there had been no such practice, I would not have admitted them.

619. Do you know that there is a considerable population nearer to Dundee than to Cupar?—I know that a number of the procurators of Dundee reside in Newport, Fife, and some of them are procurators in Fife.

620. And their clients are nearer them?—The county town is Cupar, and everybody connected with commerce and agriculture comes there.

621. *Mr. Webster.*—If a procurator is not resident within the county, can you explain in what way the borrowing and control of the processes could be managed?—It could not be managed. These gentlemen employ a Cupar procurator to do all that part of the labour, and we seldom see them except when there is an oral hearing. I must frankly say that I would rather have the business conducted in Fife by Fife procurators than by those of other counties.

622. *Mr. Paterson.*—Suppose the practitioners in the larger towns fence admission to their bodies by requiring an apprenticeship of a certain duration, and certificates of attendance at certain classes, would you place a party admitted on such qualifications on the same footing with all procurators who might come from any other county?—I would not.

623. Do you believe that there are any members of your bar who would avail themselves of the privilege, if they had it, of following their cases to the Court of Session?—I don't think the best men would do it, because I may mention that they are gentlemen largely engaged in business, and who are making such an income as to render the small amount of fees which they would get in the Court of Session so trifling an object, that the labour would not be worth the money to them.

624. *Mr. Clark.*—In every case they would require to go special to Edinburgh,—would that be of much advantage to the client?—No. They might charge £3, 3s. a-day, and their travelling expenses and hotel bill. That would entail great expense on the clients, without any corresponding advantage. And besides, when the case comes into the Court of Session, counsel have charge of it.

625. *Mr. Webster.*—Is there any absolute certainty that a case will be decided the day it is on the roll of the Court of Session?—On the contrary, it may not come on for days, owing to some heavy case before it.

626. *Mr. Shand.*—Under the present system, are there not double agency fees?—To some extent that is so; but the client is so far the blame of that. He need not employ double agency unless he likes. He can correspond with the Court of Session agent alone.

627. Is it not often necessary that local inquiries shall be made?—I think the expenses of these local inquiries are allowed to the local agent. I believe the country agents think that the auditor and the court deal with them much more severely than they ought to do in the matter of expenses. That must stand on its own merits; and if that complaint is unfounded, I see no reason why the system should be altered.

628. *Mr. Orr Ewing.*—If, practically, no procurator from one part of the country would appear before a Sheriff in another part of the country, would there be any harm in altering the law so that they could do so if their clients wished it?—I think it would encourage litigation in many causes where it should not be encouraged; and the client might be taken into a losing litigation, which would be a hardship.

629. *The Lord Justice-General.*—Might it not do harm in this way, that it might encourage rather an inferior class of practitioners to go from one Sheriffdom to another, seeking practice?—Undoubtedly it would.

630. *Mr. Baxter.*—Do you think it a right thing that the inferior court agent's expenses should all be disallowed in the Court of Session?—But they are not all disallowed. That is a matter of principle for the decision of the Supreme Court, and I am sure it will be dealt with on a sound footing. If it can be shown that they are improperly struck off, that is a matter for the court.

631. *Mr. Shand.*—Would not the admission of a number of such charges as are alluded to, admit double agency?—It is on the ground of double agency that these are struck off.

632. *Mr. Webster.*—Is it, or is it not, in your opinion expedient that the agent who has conducted the whole proceedings in the Sheriff Court shall continue to give his assistance in the conduct of the case after it is removed to the Court of Session?—I don't think it is expedient. The cause stands on the record and concluded proof; and he cannot throw any light on it if he employs a good agent and counsel in Edinburgh, more than they can see for themselves.

633. *Mr. Orr Ewing.*—Is it not the fact, that in cases of importance, agents from Glasgow invariably come to Edinburgh to instruct an agent there, and so incur double expense to the client?—But at what stage do they come?

634. At all hearings?—I don't think the country agent is of use at a hearing. He can draw the memorial for the instruction of counsel if he thinks proper, and he will be paid for it. He states everything necessary for the case in that memorial; and what good his presence at the hearing can do I do not know, because in the statement of facts, the pleas in law, and the proof, everything is included on which the court is to adjudicate, and parties cannot go beyond these; so that he cannot give any additional information.

635. *Mr. Paterson.*—Suppose that in a case in the Court of Session, the Edinburgh agent corresponds as far as possible with his client, but that, instead of going to the west of Scotland to take precognitions or to make inquiries, he employs a country practitioner to do that for him, are you of opinion that the auditor should allow that expense?—I understand that the auditor in all such cases does so. The fees are allowed for taking the precognitions, whether they are taken by the Edinburgh agent or the country agent.

636. Do you think that, if they are not allowed, they ought to be?—Yes. I may also mention that, so far as my experience goes, the country procurators in large business do not, except in very weighty cases, come through to the hearings, but leave these entirely in the charge of the Edinburgh agent.

637. *The Chairman.*—It has been said that an understanding between the country practitioner and the agent in the Court of Session as to participation in fees is of the nature of *pactum illicitum*. Do you think it would be an advantage, or not, to do away with that?—I am not inclined to alter the law on that matter.

638. *Mr. Paterson.*—Are you aware that the practice is different in England?—I am; but the facts are different there. There you have one body of practitioners, all attorneys, and each is entitled to conduct his cause if he chooses. But here the country agent is not entitled to practise in the Court of Session; and I don't see why the Edinburgh agent, who has the sole right to practise here, should communicate part of his profits to the country agent. I may add, that I don't think the English practice is of advantage.

639. Suppose I were to enter into partnership with an Edinburgh agent, should I get no part of the profit?—That is a different matter.

640. *The Lord Justice-General.*—What is the objection to that?—I think it would encourage the lower

Donald Mackenzie.

class of country agents to advise appeals in many cases which ought not to proceed further. I should be afraid of it working in that way. With respectable agents, it would not have any such effect, and in their case there would be no demand on the Edinburgh agents to communicate a share of their profits.

641. Do you think it indispensable to the morality of the country agent, that he should have no interest in his case going to the Court of Session?—I think it much better that he should have no interest.

642. *The Chairman.*—You think it is a protection to the Edinburgh agent against being pressed to go into such arrangements?—I think so.

643. *Mr. Paterson.*—Would you be surprised to be told that not a few cases, which would otherwise find their way into the Court of Session, are brought in the Sheriff Court, just because the country agent is not remunerated for his work in the Court of Session?—Does that mean that the non-communication of fees prevents parties recommending clients to take their cases to the Court of Session?

644. No; I mean on account of the taxing off of the provincial agent's charges?—I believe it has that effect, but I believe there are other causes which operate very strongly in keeping business in the Sheriff Court instead of going to the Court of Session; and these are, that there is very great dissatisfaction with trial by jury in many causes, and also that each practitioner who thinks himself qualified to conduct the litigation will prefer to carry it on in his own court.

645. *Mr. Shand.*—Have you heard that many important matters are settled by arbitration which, but for the fact that the local agent is deprived of remuneration, would find their way to the Court of Session?—I have heard that as matter of common remark; and I have heard that it occurs particularly in Glasgow, but to what extent I do not know.

646. *Mr. Webster.*—Besides the Sheriff Court, as to which you have spoken, are there in your county Burgh Courts in several of the burghs?—So far as I am aware, the Burgh Courts only exercise police jurisdiction in the various burghs in Fife. I have never seen or heard of a civil cause in any of them, or in a Dean of Guild Court. But I think that where Burgh Courts or Dean of Guild Courts exercise civil jurisdiction, that ought to be abolished.

647. You mean civil jurisdiction in pecuniary matters?—Yes; and also in the Dean of Guild Courts, as regards the rights of coterminous proprietors.

648. Would you abolish the jurisdiction of the Dean of Guild?—Yes, in all such matters. In the town of St. Andrews I had a case with reference to the alteration of a tenement, and I found that the idea of appealing to the Dean of Guild Court had never occurred to any of the parties.

649. Would you abolish the Dean of Guild in St. Andrews?—I made the remark with regard to all Scotland. I would abolish the Dean of Guild Court all over Scotland.

650. *The Chairman.*—Would you abolish it in Glasgow?—I would.

651. What would you do with the jurisdiction?—I would transfer it to the Sheriff.

652. Have you any opinion as to the amount of labour that would impose on the Sheriff?—I think that in Glasgow and Edinburgh, and probably in Aberdeen and Dundee, it would impose a good deal of labour on the Sheriff; but I think it is for the benefit of the community, that a person skilled in judicial matters should administer the jurisdiction. It would give uniformity of decision.

653. *Mr. Baxter.*—You do not approve of an assessor?—I do not approve of an assessor, because he is irresponsible, and his opinion the court is not bound to follow.

654. *Mr. Paterson.*—If the jurisdiction were transferred in Glasgow, you think it should be brought under the Act of 1853?—Or a new form of procedure might be adopted.

655. *Mr. Orr Ewing.*—What would your object be in abolishing it?—My object would be to have a responsible judge. You would have a man skilled in the administration of justice and law; whereas at present you have a man unskilled in the administration of justice and law. You would have the whole responsibility thrown on him, whereas it is now divided between that officer and an assessor whose opinion he is not bound to take.

656. Is not the test of the good working of a court, the confidence which the public repose in it, and the correctness of its decisions as shown by their never being appealed from?—It is.

657. If you found that, in an important court such as the Dean of Guild Court in Glasgow, there had been, during the last eight or ten years, only one case appealed, and that in that case the decision of the assessor was affirmed, would that not give you confidence that that court was well constituted?—For the time it would, but I think it would be constituted better under a judge.

658. Would you attach to the Sheriff Court a body of liners and tradesmen to advise with the Sheriff?—I would have the Sheriff to investigate the facts very much as done by the Dean of Guild Court at present.

659. *Mr. Paterson.*—Would it affect your opinion if you found it on inquiry to be the fact that in the vast majority of applications to the Dean of Guild Court there never was any record at all, except the petition?—It would. That came within my own knowledge within the last few years. I believe that formerly there was no record in the Dean of Guild Court; and in old cases, where alterations had been carried through at the sight of the Dean of Guild, no proof of his authority can be obtained, or a copy of the plans. I may mention the case of *Muirhead* v. *The Glasgow Highland Society*, in which it would have been of great importance to the Highland Society had the proceedings and the plans to which the Dean of Guild's authority was interposed been at once obtained. It would have settled the cause. The Highland Society were ultimately successful, but after a long and expensive litigation.

660. *Mr. Orr Ewing.*—Are you aware that that objection exists no longer?—So I have been told.

661. *Mr. Clark.*—The Dean of Guild can determine no question of heritable title at present?—No.

662. And when you say you would transfer his jurisdiction to the Sheriff, you mean to the Sheriff who is able to determine questions of boundary between coterminous proprietors?—Yes.

663. *Mr. Orr Ewing.*—You are aware that the efficiency of buildings—the plans and sanitary questions connected with the buildings—come before the Dean of Guild. Do you think the Sheriff more competent to give an opinion on these than the gentlemen who generally occupy the position of Dean of Guild?—The Dean of Guild is a civic office-bearer who only holds his situation for a short time; the Sheriff is a permanent officer. The Dean of Guild is a tradesman or merchant; the Sheriff is a lawyer skilled in the administration of the law. I would therefore prefer the latter to the former.

664. Don't you think it is an advantage for him to be a merchant or a manufacturer, in respect that he understands these matters?—On the contrary, I cannot think that a knowledge of merchandise or manufactures would qualify a person for the administration of the law.

665. But in regard to questions of the construction of buildings?—I don't think so.

666. *Mr. Clark.*—Your objection is, that the Dean of Guild is a temporary judge?—That is one objection.

667. And therefore he can never have great experience of the matters coming before the court?—Quite so; and everything is left to the assessor, who is an irresponsible person.

668. *Mr. Paterson.*—Are you aware that a great part of the sanitary jurisdiction of Glasgow under the new Police Act rests with the Dean of Guild Court?—I believe so.

669. *Mr Shand.*—Is there any particular matter on which you are aware that there is a strong feeling against the jurisdiction of Justices of Peace in Scot-

land?—There is a strong feeling against their jurisdiction in game cases.

670. Do you think it desirable that any change should be made in that respect?—I think the Justices themselves desire that such a change should be made.

671. What change should be made, in your opinion?—I think that the jurisdiction of the Justices ought to be transferred to the Sheriff.

672. In trials for poaching and other game cases?—Yes; trespass and poaching.

673. Do you think the feeling that you say exists is founded on good reasons?—I believe not. The Justices are in general gentlemen; and the feeling which they have, that they may rather lean against the prisoner, tends to make them lean the other way.

674. Is not that a reason why there should be a change?—It is. While on the question of Justices of the Peace, I may say that, except in petty police cases, I think the jurisdiction of the Justices in civil causes ought to be abolished. It is an anomalous thing that there should be a small debt jurisdiction vested in Justices of the Peace.

Donald Mackenzie.

675. *The Chairman.*—What do you mean by anomalous?—Because it is committing the judgment of a cause depending on fact, and frequently on nice questions of law, to gentlemen who are not experienced in the administration of the law, or in the expiscation of fact. I am in the judgment of many of the Commissioners, if they do not sometimes find the administration of the small debt jurisdiction attended with great difficulty.

SATURDAY, 12TH DECEMBER 1868.

Members Present:—

LORD COLONSAY.
THE LORD JUSTICE-GENERAL.
THE LORD JUSTICE-CLERK.
LORD BARCAPLE.
EDWARD S. GORDON, Esq.
A. R. CLARK, Esq.
HUGH BARCLAY, Esq., LL.D.
JAMES CAMPBELL, Esq.
GEORGE HARRISON, Esq.
JAMES ADAM, Esq.
A. B. SHAND, Esq.
THOMAS GRAHAM MURRAY, Esq.
CHARLES MORTON, Esq.
JAMES WEBSTER, Esq.
JOHN BOYD BAXTER, Esq.
ADAM PATERSON, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

ARCHIBALD DAVIDSON, Esq., examined.

Archibald Davidson.

676. *The Chairman.*—You are Sheriff of the county of Edinburgh?—I am.

677. How many years have you been so?—Since October 1865.

678. Before that, you were Sheriff of Aberdeenshire?—I was for about seventeen years.

679. Have you any suggestion to make as to the constitution of the Sheriff Courts, as consisting of a Sheriff and substitutes?—I don't think I have any suggestion to make as to alteration. I have a very clear opinion of the advantages of the present constitution.

680. You think there ought to be a Sheriff with substitutes to aid him, and an appeal from the Sheriff-substitute to the Sheriff?—I do. It would be impossible to carry on the business unless the Sheriff had the power of appointing substitutes. He could not do the whole work himself, even in small counties, unless he was resident. In large counties he could not do it at all. I am strongly against a local resident judge, isolated by himself and independent of all control. The visits of the non-resident Sheriff to his county, and his holding courts in it, are of the utmost value. Those only can understand this thoroughly who have seen and felt the effect. Then, the whole executive department, which should always be under the immediate charge of the Sheriff himself, is infinitely better managed by him as a non-resident magistrate.

681. Do you think that the system of an appeal within the court—that is, an appeal from the Sheriff-substitute, who considers the case first, to a Sheriff as a court of review—is a good system in practice?—I do indeed.

682. You speak with reference to the result of your experience and observation as a Sheriff non-resident in Aberdeenshire, and as a Sheriff resident in Edinburghshire?—I do. I think the appeal is not only very much liked by the practitioners, but that it is popular with the public; and I found that not merely on what I have observed and heard, but also upon the experience of the number of cases which have come from the Sheriff-substitute to the Sheriff on appeal, and the few cases that have gone from the court of the Sheriff to the Court of Session upon advocation. I should say that when I was Sheriff in Aberdeenshire, I had sometimes above forty appeals in a month. Upon an average, I should say it is not overstated at twenty-eight or thirty a-month. These were not all appeals on final judgments; but they were appeals. I cannot state the number on final judgments in a year; but all the time I was Sheriff of Aberdeenshire, I don't think there were six cases of advocation in any year. In some years there were not three, so far as I recollect; and these were not cases to any large extent, in which the parties were not quite capable, so far as being persons of position and substance was concerned, of carrying them by advocation to the Court of Session.

683. You mean that the cases acquiesced in were between parties whose means were sufficient to enable them to advocate them to the Court of Session?—That is my meaning.

684. Do you think it would be an advantage, as a general rule, to require that the Sheriff as well as the Sheriff-substitute should be resident within the county? or are you satisfied with the rule which at present exists, of having as Sheriff a lawyer who attends on the courts in Edinburgh?—I think the present system is very preferable to what the other would be.

685. Have you examined the report of the Commissioners of 1834 in regard to the constitution of the Sheriff Courts, the Commission of which Mr. Bell was the head, and of which Mr. Jameson and others were members?—Not recently.

686. Do you recollect generally the bearing of it on this question?—I cannot say that I do, so as to speak upon the subject.

687. Then you state your own opinion, independent altogether of that report?—I speak entirely upon my own experience.

688. What is your opinion as to extending the jurisdiction of the Sheriff Courts?—The jurisdiction of the Sheriff Courts has been so very much extended of late years, that it is impossible to say that you have just got

Archibald Davidson.

at the precise point at which it ought to remain. I have very great difficulty in saying that it ought to be extended, or that it ought not to be extended. The Sheriff deals with a great number of cases incidentally that he cannot deal with in a final way—such as heritable subjects, for example, in regard to interdict—and every year there is an extension of jurisdiction. Last year it has been extended in more than one important particular in regard to heritable rights; for instance, under the new Entail Act, in which great power is given to the Sheriff, and his judgment cannot be appealed from. There is the Ecclesiastical Buildings Act also, which deals with heritable rights. There are actions of maills and duties; the irritancy of feus, to a certain extent, under the Act of 1853; rights of servitude, both as to their constitution and their exercise. In short, it is impossible to say that any extension of the jurisdiction that can be stated almost, might not beneficially take place; and there is no reason either for saying that it should take place, in my opinion.

689. Do you think that any inconvenience or grievance exists from the want of a power in the Sheriff to deal with heritable rights of small value, such as questions about houses in villages, and so forth?—It is very difficult to say that if he has the power of dealing with a personal matter to the extent of a million of money, he should not have the power also of dealing with the right to a house which is worth £20; but I don't see the principle on which he is to be limited according to the value of the subject he is dealing with. The question of who that house belongs to may be as difficult as if it was a very large estate, and I don't quite see any principle of limitation upon the mere ground of value in any of these cases.

690. Have you considered the question of whether the jurisdiction of the Sheriff should be extended to questions of status, such as declarators of marriage, actions of divorce, declarators of legitimacy, and so forth?—I should make the same answer to that which I made to the former question. For example, a married woman brings an action for the aliment of a child against a man who is not her husband; in that case the Sheriff may have to consider whether the child is legitimate. There he is dealing with a subject in regard to which he might decide the point of the legitimacy of the child directly; but whether it would be advisable that he should have that power I am not prepared to say. He does deal with consistorial matters to a certain extent now.

691. Do I understand that you are not disposed or prepared to express any opinion as to the extension of the jurisdiction of the Sheriff in these matters?—I am not prepared to say that the public might not be very well pleased to have the power of bringing certain actions before the Sheriff which they cannot now bring, instead of going to the Court of Session. I am not prepared to say that that is not the case; but the difficulty that occurs to me is to say what it is that ought to be given to the Sheriff, and what ought not. I don't see any intelligible distinction which enables me to say that this particular jurisdiction should be given to him, and that particular jurisdiction should not.

692. *Mr. Murray.*—Would you give the Sheriff jurisdiction in matters of divorce?—If you mean, do I desire that that extension should take place, I answer no.

693. But would you consider it expedient?—I have no doubt that in the Sheriff Court we could decide these cases very well.

694. *Mr. Baxter.*—Do you know that it is almost a prohibition of justice to poor men that they cannot bring an action of divorce in the Sheriff Court?—Certainly it is.

695. *Dr. Barclay.*—Do you think it might not be advisable to give the Sheriff jurisdiction in questions of separation *a mensa et thoro* on proof of maltreatment, though not in divorce?—I see no difficulty in that whatever.

696. Are you aware that the inferior commissaries had that jurisdiction before 1826?—I am. It is understood, I presume, that in all these cases there should be an appeal to the Court of Session.

697. *The Chairman.*—Do you take the same view also as to the protection of the earnings or property of married women?—Certainly. I should think that falls within the same category.

698. *The Lord Justice-Clerk.*—And cases of legitimacy?—Yes.

699. *Mr. Campbell.*—As a practical matter, would the question as to allowing the Sheriff to decide in small cases of heritable right, and excluding his jurisdiction where the subject was very large, such as a large estate, not be settled by the practice of the public? If the question of heritable right were made competent to be tried before the Sheriff, would questions with reference to small subjects not usually be brought in his court?—It is very likely.

700. And would not litigants contesting the right to a large estate resort to the Supreme Court at once?—Very likely.

701. So that the extension of the jurisdiction of the Sheriff to questions of heritable right would not in the ordinary case be attended with any great practical difficulty?—It would still come to this, that if you extend the power of dealing with such subjects to the Sheriff, it is very hard to say that a man should not have the privilege of going, if he likes, to the Court of Session.

702. In the case of a foreigner whose funds have been attached within a sheriffdom by arrestment *jurisdictionis fundandæ causa*, do you think it should be made competent to sue that foreigner in the jurisdiction of the Sheriff where his funds were arrested?—Yes; I should say so.

703. *Mr. Baxter.*—What is your opinion as to giving the Sheriff power to appoint factors *loco tutoris*, curators *bonis*, and trustees in lapsed trusts?—I make the same answer as to the other questions with regard to the propriety of extending the Sheriff's jurisdiction. I don't see any objection to it; but I don't see any great call for its being done. In fact, these questions come to this, whether the Sheriff should have the power, if parties desire it, of dealing with their cases in regard to matters as to which he has not jurisdiction at present.

704. *Mr. Murray.*—Then you would practically reserve nothing whatever from the jurisdiction of the Sheriff?—I am very far from saying so; I am aware that hitherto the jurisdiction of the Sheriff in many particulars has been limited as to the value of the subject he is dealing with. I say, I don't see the principle on which that limitation should be fixed.

705. But you see no principle on which anything whatever should be excepted from the jurisdiction of the Sheriff?—Except it be the principle of expediency, if that is a principle. If it is thought inexpedient that certain jurisdictions should be given to the Sheriff, that is a different matter; but if you come to what the Sheriff ought to be able to deal with, and what he is competent to deal with, I have great difficulty in regard to the limitation.

706. *Mr. Clark.*—If you extended the jurisdiction of the Sheriff, so as to make him competent to decide on any question of heritable property, whatever the amount, would you give power to either party to remove the case to the Court of Session?—Yes, I would give full power of appeal.

707. But to remove the cause before judgment?—Yes, that might be done.

708. To either party?—Yes; I should be inclined to do so.

709. Would you do that in a case where the value of the heritable subject was £20?—I don't see the principle of the limitation on the ground of value, and therefore I would give the parties that power.

710. Either party?—Yes; that is to say, I think it might be done, for I am not advocating its being done. I am not advocating the extension of the jurisdiction.

711. *Dr. Barclay.*—What Mr. Clark has said occurs just now, in the right of either party to remove a case above £40. Are you aware that that right has been often abused, by a rich person availing himself of it, so as to extinguish a case, by advocating the cause as soon as the Sheriff has allowed probation?—I under-

stood Mr. Clark to mean, whether there should be a power of removal at the very first stage of the cause. I don't think it is proper that a party should go on with a cause, to see, for example, how the record is made up, and how the thing looks, and then to remove it.

712. *Mr. Harrison.*—Would it be an improvement if the appellant were bound to find caution for costs, in reference to what you have stated as to a rich man having the power of extinguishing a poor client?—That might be an advantage.

713. *Mr. Webster.*—Have you considered the expediency of limiting the right of review of the Sheriff's judgments to cases which are above a certain pecuniary amount or value,—not permitting an appeal to the Court of Session where the amount is below £100 or £50?—I am not in favour of that limitation.

714. *Mr. Clark.*—By appeal after final judgment, do you think you have the same means of properly trying a case as if it was originally brought before the Court of Session?—I don't quite understand the question.

715. Do you think the case is as likely to be well disposed of on appeal from the Sheriff Court, as if the case was originally brought before the Court of Session?—That is to say, either that there should be no appeal at all, or that parties should be entitled to bring their cases in the first place in the Court of Session.

716. Do you think that an appeal gives all the remedy that could be got, by allowing the Court of Session to adjudicate on a case in the first instance?—I don't see why it should not.

717. Do you think nothing is lost in the preparation of the cause?—Nothing that may not be amended.

718. In the preparation of the pleadings, and in the taking of the evidence?—It would only come to this, that if, in the opinion of the Court of Session, something had miscarried, that could be put right.

719. Do you think that would be sufficient?—I don't think that a case which comes from the inferior court to the superior court is the same case as a case which in the first place comes before the superior court. It is not; but the result of taking away the appeal, or holding that to be an objection to the appeal, would be that there should be no cases in the Sheriff Court, at all events none which should be appealed, because the parties who take the appeal come to the Court of Session in an unfavourable position.

720. *Dr. Barclay.*—At present the Sheriff can entertain suspensions of charges on bills and obligations up to £25. Do you see any reason why that limitation should exist?—No. All that falls within what I said before. I see no reason against extension. In the circular sent to me, I am asked whether I see any evils or inconveniences at present existing. Now I see no evils or inconveniences which are very prominent in the present system. No doubt the jurisdiction may be extended, if it is thought prudent.

721. *The Lord Justice-Clerk.*—You have said that in your opinion the Sheriff may judge in questions of legitimacy; what Sheriff would you vest with that power?—The Sheriff and the Sheriff-substitute.

722. But the Sheriff-substitute of what county?—That makes a difficulty in disposing of the case.

723. And in a case of divorce?—The difficulty is the same there; but why not bring the defender into the court of his sheriffdom?

724. In the case of legitimacy, where a man is pursuer, what would you do?—Then it would be the Sheriff of the county in which the woman resides.

725. *Mr. Webster.*—The wife's domicile being that of her husband, the husband would always have the selection of the tribunal in which to raise an action of divorce against his wife?—Yes.

726. *The Lord Justice-Clerk.*—If the parties changed their domicile, and the question were revived?—I should say in that case it ought to remain in the court in which it was first instituted. That would require to be provided for. The case would come to the Sheriff on appeal.

727. *Mr. Webster.*—Do you approve of the finality system introduced by all the Small Debt Acts?—I have in general a great dislike to finality in inferior courts, whether it be given to the Sheriff on appeal from his substitute, or to the substitute without appeal to the Sheriff.

728. Would you permit review by a higher tribunal in cases of the smallest amount?—If such a change were made in the law, it certainly would not be disapproved of by me. The matter of the small debt £8, 6s. 8d. jurisdiction is different, and it stands on special grounds by itself.

729. It is now £12?—I did not like the extension from £8, 6s. 8d. to £12; but it having been extended, I don't say that I would make any alteration.

730. *Dr. Barclay.*—Would you allow the same privilege in Scotland which exists in the County Courts of England, of a case on questions of law to the Supreme Court?—Is it meant that there shall be no appeal from the judgment of the Sheriff-substitute, supposing him to be sitting in the Small Debt Court, to the Sheriff?

731. Yes; a case direct to the Supreme Court?—I don't see any propriety in that.

732. *Mr. Gordon.*—What is meant is a case stated, where there is a point of law of general importance or of considerable nicety, and a doubt is entertained about it?—I think that putting out of view the extension from £8, 6s. 8d. to £12, you do away with the benefit of the Small Debt Act if you give an appeal at all. If there is to be an appeal, I don't see why it should not be to the Sheriff, if the Sheriff-substitute sits in the Small Debt Court. It might be another question if the Sheriff himself sits in the Small Debt Court, whether it might not be proper to allow such a case; but it never was intended in the institution of the Small Debt Court that the judgments should go beyond the judge who sits in the court and deals with the cases.

733. *Dr. Barclay.*—Do you approve of the exclusion of all review by the Supreme Court in cases below £25?—As I said before, I am not favourable to limiting the power of review; but as that has been made the law, I am not prepared to say that I think the appeal should now be allowed. I am not prepared to say that it would be an advantage to change the law, and give an appeal in cases under £25.

734. Would you not allow an appeal in cases where the Sheriff-substitute came to one conclusion and the Sheriff came to another?—It is partly on that ground that I say I am not favourable to the limitation of the power of review.

735. *Mr. Paterson.*—Do you think there is any reason for excluding actions of reduction of deeds from the jurisdiction of the Sheriff Court?—I give the same answer to that as I have done to other questions in regard to extending the jurisdiction.

736. Do you see any reason why it should not be so extended?—I see no reason more than in the other cases.

737. Even where the reductions proceed on the ground of fraud and circumvention?—Yes.

738. *Mr. Baxter.*—Do you say the same as to extraordinary removings, and actions of proving the tenor?—Yes. I think my general answer covers all these.

739. *Dr. Barclay.*—Has not the small number of advocations to which you have referred arisen from the necessity of finding caution, which has now been done away with?—My impression is, decidedly not; and that impression is founded on my having taken an interest in the matter, and made inquiries which satisfied my own mind as to whether it resulted from anything else than this, that the parties were satisfied with the Sheriff's judgment.

740. Can you state whether there are more appeals under the new system than there were advocations?—I cannot say. I think there are very few from the Sheriff Court of Edinburgh.

741. *Mr. Baxter.*—As to the present system of review by Sheriffs, are you aware that the substitutes are chiefly taken from the bar?—Yes.

742. And that they are men of great intelligence and legal knowledge, generally speaking?—We shall assume that.

743. The record is made up before the substitutes?

Archibald Davidson.

—Yes; that is to say, supposing the Sheriff not to do it himself; but in general it must be done to a very large extent by the substitute, where the Sheriff is not resident.

744. And the substitutes take the evidence on questions of disputed fact?—Yes.

745. They have the means of judging of the credibility of the witnesses, from their manner of answering, their readiness in answering, their general intelligence and bearing, and the knowledge they evince of the questions put to them?—Yes, certainly: it is a great advantage to a judge to see the witnesses.

746. The Sheriff reviews his substitute's judgment on the facts, from the Sheriff-substitute's notes?—Yes.

747. It is thought that that makes the present appeal from the substitute to the Sheriff an appeal from a judge better informed to a judge worse informed of the facts, and that the court of appeal is weak. Can you make any suggestion for strengthening the court of appeal?—Wherever there is any peculiarity in the evidence that has been adduced before the Sheriff-substitute, in the behaviour of the witnesses, or in the mode in which they gave their evidence, that should be stated by the Sheriff-substitute in the note to his interlocutor, in which case it comes as a fact before the Sheriff upon appeal; and taking that statement of the Sheriff-substitute, which is authoritative, he can deal with the proof almost as well as if he had himself seen the witness.

748. *Dr. Barclay.*—You say that is stated in the note to the Sheriff-substitute's interlocutor. Would it not be more appropriately stated after the examination of each witness?—Either way.

749. Do you think it can be expressed completely in a note?—I think so.

750. Would not a photograph be a good thing sometimes?—I can't say it would.

751. *Mr. Baxter.*—Have you considered a suggestion which has been made as to grouping Sheriffs into a court of appeal of two instead of one?—That is, for example, that the judgment of the Sheriff-substitute of Forfar should be considered by the Sheriff of Forfar and say the Sheriff of Aberdeen?

752. Reducing the number of Sheriffs, and grouping them into appeal courts of two?—That is a matter which I have not considered; but there are some things which suggest themselves at once with regard to it. In the first place, you must of course make each Sheriff who is to sit in that district, Sheriff of all the counties in the district. Then, again, objections are taken in the course of a proof, and at the close of the proof there is an appeal upon these, and it is necessary that that appeal should be determined before judgment is given on the merits. Do you mean that the case is to be delayed till a court can be arranged for dealing with that preliminary appeal?

753. I would have the Sheriffs to hold very frequent courts?—But still I think what I have referred to would be very objectionable.

754. I think it is a question whether so many appeals as there are now should be allowed?—As to that I have a different opinion. If several Sheriffs were to sit for the disposal of appeals from the counties of a district, I think the time of these Sheriffs would be so completely occupied, that it would be impossible for them to be non-resident, with the advantage of attending to business in the Court of Session. Take the appeals from the counties of Forfar and Aberdeen. The appeals in the county of Aberdeen would be about 300 in the year, and more if you include incidental appeals; and if you add those from the county of Forfar, a very great part of the time of the Sheriffs of these counties would be occupied in hearing these appeals. Besides, as to the question now put, and in every question connected with the constitution of the Sheriff Court, you must take into consideration the whole of the Sheriff's position. He is not merely a judge in civil matters, he is the chief magistrate of his county: he is responsible for the peace of the county: he has to prevent, and detect, and investigate crime: he is the head of the police: a criminal judge with large jurisdiction; and he has to attend to county business, which I consider one of the most important parts of a Sheriff's duty. So that I think you would hardly get the men who now occupy the position of Sheriffs, at least some of them, to accept the office of Sheriff in counties in which there was so much to do, unless indeed the salaries were very different.

755. I assume that their time would be very much taken up, and that they would require larger salaries than they now have?—The answer which I make to the question, whether it is an advantage to do what is proposed, is that I don't at present recognise any objection to the present system; and I do not see how you can work out what is suggested, maintaining the present position and usefulness of the Sheriff. I think the system as it stands now is a good system, and works well, and I think it is popular. I think the people like it, and I am quite sure that practitioners like it, though it is quite possible that other schemes might be propounded which would be very acceptable too.

756. Do you think that the present mode of the Sheriff-substitute taking down the evidence by notes, in the way he does it, is satisfactory?—Very often not; at least I have seen it very often not satisfactory. One reason is, that in many counties there is more put on the Sheriff-substitute than it is possible for him to undertake, and in that way the evidence is very often taken in a manner which is not satisfactory.

757. *Dr. Barclay.*—What is your opinion as to taking the evidence by a shorthand writer, as is done in the Court of Session?—If you introduce a shorthand writer, I think you must do away with the system of reading over the evidence to the witness, and making him sign it. That is the mode in which the evidence is taken in the Sheriff Court, and I presume it is a good mode. I like the deliberateness of it. If you have a shorthand writer, you must do away with that. You cannot have it properly read over, and you certainly cannot have it signed by the witness.

758. Does the same objection not occur in the Supreme Court at present, where the cases are of more importance?—In the Court of Session the evidence is neither signed nor read over.

759. *Mr. Baxter.*—I understand that in the Court of Chancery the practice is that the shorthand writer extends his notes and sends them to the agents; the judge also takes short notes; the agents compare the shorthand writer's notes, and satisfy themselves as to their accuracy; and if the agents don't agree upon that, they go to the court?—I am not acquainted with that system.

760. Do you think that if, instead of the Sheriff-substitute silently taking down his notes and reading them over at the end, he were to dictate the evidence to a shorthand writer in the hearing of the agents, it would be more satisfactory?—Perhaps it would be more satisfactory in that way than that the shorthand writer should take down what he hears from the lips of the witness.

761. *Mr. Campbell.*—A good shorthand writer is able to read his shorthand notes as fluently as ordinary manuscript?—He may be.

762. Suppose it were enjoined that the Sheriff should dictate that which the shorthand writer is to take down, and that before the witness left the box the shorthand writer should read over to him what he had taken down, and that each deposition bore that that was the case, would that not be as satisfactory as if the witness signed the deposition?—Perhaps it would. I am proceeding on the idea that the present system is a good one, which I think it is.

763. *Mr. Harrison.*—Would not the addition to the expense in the majority of cases be rather a serious matter, if a shorthand writer were employed?—It would; and in small counties you would not get a shorthand writer.

764. *Mr. Paterson.*—In your county, is there a prevailing dissatisfaction with the present mode of reviewing the substitute's judgment by the Sheriff?—I really

cannot say that there is, but there may be without my knowing it. I am not aware of it.

765. *Mr. Webster.*—In appeals to you, is the discussion always oral, or is it sometimes in writing?—In Edinburgh it is almost always oral.

766. What was the practice in the county of Aberdeen?—In the county of Aberdeen there were more reclaiming petitions after the Act of 1853 than there were oral hearings; and, upon the whole, I preferred that. An answer was not ordered in every case where there was a reclaiming petition, because I read the reclaiming petition; and if I thought the judgment a good one, I decided the case without answers. Answers were not ordered as a matter of course. Where the question was difficult, they were ordered.

767. *Dr. Barclay.*—That is the same as not calling upon counsel on the other side?—Yes.

768. *Mr. Webster.*—Where there was no writing, at what time was the oral discussion taken?—In the Act of 1853 there is an obligation on the Sheriffs to visit their counties a certain number of times annually. In the county of Aberdeen, I think, there were four sittings in the year; but I never limited the oral hearings in that way, because I used to take them as they came; and I don't think that, except in very special circumstances, there ever was an oral hearing which was not taken up before, at the most, six weeks after the appeal was taken; so that it may be said cases were decided within a month or six weeks after the appeal was taken.

769. But where a Sheriff did not make a greater number of visits to his county than the statutory number, the delay between the date of the appeal and the date of the hearing might be a quarter of a year?—Yes, it might be so; but then the party who wanted speed, and was anxious to get a judgment, had the option of presenting a reclaiming petition.

770. Only if he was the appealing party?—Whenever the Sheriff is of opinion that the case required despatch, even if an oral hearing is asked, which it might be for the purpose of delay, he may order a reclaiming petition; and it was my constant habit to do that. In the same way, the other party, not the appellant, might put in a note saying that it was a matter requiring attention, and therefore requesting that a reclaiming petition should be ordered, instead of appointing an oral hearing.

771. *Mr. Harrison.*—Have you had much experience of the working of the Debts Recovery Act?—Yes; I have taken all the small debt recovery courts in Edinburgh since the Act came into operation, except six or eight.

772. Has the operation of that Act been on the whole satisfactory, do you think?—It is difficult to answer that question. I have not found great difficulty in it. I think there are some things in which the Act might be amended, but I cannot say that I have found any great difficulty in it. There is a duty put upon the judge which is quite exceptional, and I don't think occurs in any other court: the judge has, under that Act, to make up the record himself. The Act allows procurators to appear for the parties; but in some cases procurators do not appear, and the parties appear for themselves, in which case it is often very difficult to make what I call a record, which is stating the pleas of the parties, because it is not sometimes till you come to the proof that you have fished out what the case between the parties is, and very often a person is not able to tell you exactly what his defence is. There is very great difficulty there, and that distinguishes the operation of this Act from the operation of the Small Debt Act. In the Small Debt Act there is no record—there are no pleas of parties: it is all an oral performance; and after the evidence has been gone into, perhaps at considerable length, you come to see that there is really a perfectly different question between the parties from that which you at first thought when they stated the case to you. And the difficulty under the Debts Recovery Act is, in making the pleas in law for them, to get at what is really the truth of the case. The 'pleas in law' necessarily to a large extent contain facts, out of which the pleas arise. At all events, I am satisfied that in many cases it may turn out that the pleas of parties, by which I take it they are bound, do not contain what is really the question between them.

773. Is it not the case that the limitation of expense under the Act has induced many parties to seek a decision of the court who would otherwise have sacrificed their claims?—I don't think so. There has been one remarkable fact about these cases. There have been very few of them which might not have been decided in the ordinary court by a judge dealing with the Act of 1853 in a proper manner, by a minute of defence; and if the Act of 1853 were altered to this extent, that the pursuer could add something at the end of the minute of defence—his reply, as it were, to the minute of defence—I am quite satisfied that I could have tried in that court all those cases that have been brought before me under the Debts Recovery Act.

774. *The Lord Justice-General.*—You mean as expeditiously?—Yes. In general, these cases are decided within a week, unless the parties wish a longer time, which they sometimes do for particular reasons. No doubt the Act of 1853 gives in the ordinary court a longer space of time to the parties to take the several steps. I think if that were amended, so that all *might be* done within a shorter time, the whole of these cases might be perfectly disposed of in the ordinary court, the only difference between the two being in the matter of expense, which is statutory under the Debts Recovery Act. The fees which are allowed to procurators are by no means properly remunerative.

775. *Mr. Harrison.*—In point of fact, do you know whether the number of cases in the ordinary Sheriff Court has been diminished to anything like the same extent as the number of cases which have been brought under the Debts Recovery Act?—I should say probably to the full extent. That is necessarily so, because all these cases might have come to the ordinary court.

776. Have they necessarily diminished?—There is a great number of decrees in absence, and these could have been got in the ordinary court just as well as in the new court.

777. Except that it would have cost three or four times as much?—I have already stated that the only difference is in the matter of expense, but I don't see the principle of the limitation of this form of process to the particular cases to which it is limited in that Act. If this Act is a right measure as to the special cases embraced by it, I do not see why it should not be extended to other cases. I don't see why all the community should not be able to bring their cases in the same way, and I don't see why the limitation—if there is to be a limitation—should be in the Sheriff Court only, and not in every court in the kingdom; and why agents and counsel should not have their fees diminished, in the same way as the procurators under the Debts Recovery Act. I am not proposing anything; I only say that I don't see any principle for existing distinctions.

778. Is it not, in your opinion, the fact that the cases under that Act are generally simpler?—Yes. The great majority of the cases are decrees in absence. But very nice questions may be involved.

779. *Dr. Barclay.*—You seem to think that procurators are underpaid by the fees under that Act?—Yes.

780. In your opinion, is the principle of paying fees *ad valorem* a good one, so that an agent may get £3 for a case which lasts only five minutes, while he may get no more for one which lasts three weeks?—I think that is not a good principle.

781. Is not the old principle of being paid *pro rata* a more equitable one?—I think it is.

782. In an appeal to the Sheriff under the Debts Recovery Act, has the Sheriff power to hear parties?—I think not.

783. Then the Sheriff may, without hearing parties, reverse the judgment of the Sheriff-substitute who has taken the evidence and heard the parties?—Yes.

784. *Mr. Clark.*—Is that not also the case under the Act of 1853?—I doubt if the Sheriff can hear parties under the Debts Recovery Act; but under the Act of 1853 he can order an oral hearing at any time.

Archibald Davidson.

785. *Mr. Harrison.*—Is the having maximum fees fixed and known not a very great advantage for litigants?—All fees are fixed and known.

786. Not in the ordinary Sheriff Courts?—Yes. There is a table of fees.

787. *Mr. Clark.*—But the particular steps to be taken with a view to produce these fees are not known?—No. There is one defect in the Debts Recovery Act which I may notice, viz. that there must be a second diet before there is a judgment. Suppose the parties in a case to appear before the Sheriff, either with professional assistance or without it, and that the matter is quite clear—it may be a point of law which is perfectly obvious, and even the parties may agree that they will take a particular judgment—it is not competent for the Sheriff at the first diet to give a judgment at all. He must appoint a day for a second appearance, when alone he can give judgment. That is a defect in the statute. This has often occurred, and the only way I have contrived to get over it is to tell the parties that a particular day is appointed for disposing of the case, but that they had better not appear; and they settle the case between themselves, according to the view which I have stated to them, and as to which they are agreed. It is a defect in the Act, therefore, that there is no power to decide a case at the first diet.

788. *Dr. Barclay.*—Is not the second diet only in the case of evidence?—I don't think so.

789. *The Chairman.*—Are you often asked to take down the evidence in these cases?—I have just been once asked to do so, though I do take it in a short way for my own satisfaction.

790. *Mr. Clark.*—In the case in which you were asked to take it, was it with a view to an appeal?—I suppose so, but there was no appeal taken in that case.

791. *Dr. Barclay.*—Where the Sheriff-substitute is not asked to take down the evidence, there is no appeal to the Sheriff?—Except in point of law.

792. *The Chairman.*—Has there been any appeal taken from your court under the Debts Recovery Act?—There have just been two appeals.

793. *Mr. Webster.*—With reference to Mr. Harrison's question as to its being a satisfaction to litigants to know the expense of a litigation beforehand, would it not be a greater satisfaction to them if agents were compelled to conduct the case without any fees whatever?—There can be only one answer to that.

794. *The Chairman.*—Have you any further suggestions to offer as to alterations in the form of procedure in the Sheriff Courts?—I don't think that I have any alteration to propose, except that which I have stated, in regard to the pursuer having the power of making a reply to a minute of defence under the Act of 1853.

795. *Mr. Baxter.*—That is in the case of short records?—Yes.

796. *Mr. Campbell.*—Do you think it would be an improvement to prevent all appeals from the Sheriff-substitute to the Sheriff, prior to final judgment?—I don't think that would be an improvement, and I think—if appeals were to be allowed only on leave of the substitute—it would put the Sheriff-substitute into a disagreeable position, because he would very seldom feel inclined to refuse leave to appeal. I don't say that appeals should now be made more frequent than they are by the Act; but it very often happens that a very great deal of expense is incurred before the case arrives at a point at which an appeal can be taken, and then it turns out that the whole of that expense has been thrown away. I have known cases, for example, where there has been a dilatory defence, and where the dilatory defence, by not having been disposed of either by being repelled or sustained, has not come before the Sheriff on appeal, because the Act says it must be disposed of before it can be appealed; but it has been reserved, which the Act of Parliament gives power to do. And I have seen, in regard to that matter, a very large amount of expense incurred which has been thrown entirely away, by that dilatory defence being sustained at the end. That is an example of how it is not always advantageous to limit the power of appeal. I think the matter is very much in the hands of the judge; and if the Sheriff had the power of inflicting a penalty when an appeal was taken without good cause, I think it would be far better than limiting the stages at which an appeal might be taken. It is right I should add that, in my own experience, I have known very few frivolous appeals to the Sheriff, and very few taken merely for delay.

797. *The Lord Justice-General.*—Do you mean a penalty beyond the expenses?—Yes; because the expense may be nothing. A person can get an appeal from the Sheriff-substitute to the Sheriff for sixpence, if he does not ask an oral hearing, or put in a reclaiming petition.

798. You mean a fine?—Yes.

799. Do you propose to fine the party or the procurator?—That might depend upon circumstances. I think, in regard to all matters of delay, the great difficulty is to know whether the delay has been for the benefit of the procurator, or at the desire of the party; and if you could find out that, you might satisfactorily deal with it. I think there should be very little delay indeed for the benefit of procurators, who are very willing to accommodate each other, while their clients are desirous that their cases should be hurried forward. But in many cases the clients do not wish the case to be hurried forward, but are in the course of settlement—both desirous to settle, but neither wishing to make the first advance, and neither desirous that the case should proceed in court. I have known many cases settled by merely allowing delay. But where the delay is made by procurators, it ought to be curbed in every case by the Sheriff to the utmost extent of his power.

800. *The Chairman.*—Have you any remedy to suggest except that of a fine?—I don't see any other. It is a very difficult matter indeed. I should like to state that there has been a great deal said about the extension of the small debt jurisdiction, and making cases be tried in a summary and expeditious manner, as the small debt cases are tried. For two or three years I got some statistics made up, which I cannot lay my hands on now, as to the number of cases where the debt was above £12, but restricted to that sum, so as to bring it within the Small Debt Act, with these particulars added:—the amount which the pursuer of that restricted case actually got by the judgment; the number of times he succeeded, and the number of times he failed; and the amount in which he succeeded, and the amount in which he failed; and the proportion was marvellous of the few cases in which there had been a restriction where the party got £12. In many cases he failed altogether; and in the majority of cases the judgment given was under £12. I think that is an important fact as to the feeling of the public with reference to extending the jurisdiction. I may also state that, under the Act of 1853—the twenty-third section, I think—any case, to any amount whatever, may be tried as a small debt case; and there have been very few cases indeed in which the parties have agreed to try these larger cases in that way. In some counties, I believe, there has not been a single case. I know there were very few in the county of Aberdeen many years after the Act had been in operation—not, I think, half a dozen—and I know that in some places there have been hardly any at all. In short, that clause in the statute has not been brought into operation; and from that I infer that there is not that desire on the part of the public to extend the small debt jurisdiction that is often alleged. No doubt, under the Act both parties must agree; but I think one party as well as the other is entitled to have a say in that matter.

801. *Mr. Campbell.*—Is it not your experience, and is it not the case so far as you know in other counties, that under the Debts Recovery Act the parties have generally abstained from requiring the evidence to be taken down?—I don't know how that matter stands in other counties. I think the only judges who have tried these cases in Edinburgh have been yourself and me, and I have had only one case where the evidence was taken.

802. In the cases where the Sheriff-substitute does not take a note of the evidence at the request of parties, his judgment is final on fact?—Yes.

803. Even in cases which may amount to about £50 in value?—Yes.

804. *The Chairman.*—Has anything occurred to you with reference to the jurisdiction of the Sheriff in criminal matters,—whether it ought to be extended in regard to the classes of crime, or in regard to the measure of punishment?—My answer to that is very much the same, with reference to the classes of crime at least, as I made before with reference to the extension of the civil jurisdiction. I don't see why robbery, fire-raising, and rape should not be brought within the jurisdiction of the Sheriff as well as the cases which he now tries. The Sheriff tries all kinds of cases, with the exception of murder, fire-raising, robbery, and rape; and I don't see that it would be at all disadvantageous that the selection of the tribunal before which these cases are to be tried should be left, as all important cases are at present left, to the decision of the Lord Advocate, and that where, for example, there is a case of rape which is not very important, or in which there is not likely to be a sentence of penal servitude, it might be sent to the Sheriff for trial. A rape may be committed on a prostitute, and that may be a very inferior offence compared to a rape committed on a respectable woman. I don't see why such a case as that might not be tried by the Sheriff, if the Lord Advocate thought fit to send it to him for trial. In general, my experience goes in this direction, that the most difficult cases that occur are tried before the Sheriff,—more so than in the Court of Justiciary,—and that the only reason why a case of theft, for example, is taken to the High Court or to the Circuit Court instead of to the Sheriff, is simply this, that there may happen to be one or two additional previous convictions of theft, and it very often happens that cases which are set down for trial at the Circuit Court, or at the High Court of Justiciary, are afterwards remitted with the very same indictment—only it is put into a different shape—to be tried by the Sheriff. I have myself in Aberdeen tried cases the day before the Circuit was held, more important and more difficult than any case that was tried at that Circuit; and I have tried, after the Circuit Court was over, cases that had been indicted for the Circuit, and which were remitted for some reason to the Sheriff afterwards. Now, when the Sheriff is dealing with cases of that kind—heavy cases, where the aggravations have been very numerous—it is impossible not to feel this: why is that individual, who has been found guilty of that heavy offence, with these aggravations, not to receive the same sentence as he would have received if he had been standing at the bar of the Court of Justiciary? It was just the other day that I tried the case of a person, about thirty-five years of age, who had been six times previously convicted of theft, and on one of these convictions the punishment had been nine months' and on another fifteen months' imprisonment; and there was no doubt whatever, that if that person had been tried in the Court of Justiciary, the sentence would have been one of penal servitude. I have felt over and over again that I was going to pass a sentence on a criminal which was not at all adequate to the offence which had been committed; and of course the impression on one's mind is simply this: why should the Sheriff not have the power of inflicting an adequate punishment if the case is tried before him? why should he not have the power of inflicting such a sentence as the Court of Quarter Sessions in England has? I don't see why that should not be the case; and as there is no difference in the mode of trial or in the evidence, and as the cases are identically the same that are tried by the Sheriff and by the Court of Justiciary, I don't see why the Sheriff should not be entitled to impose an adequate punishment. I think the effect on the public mind at present is not a beneficial one. If the public see what is going on in the Sheriff Court just before Circuit and just after it, they see quite as difficult and important cases tried before the Sheriff, and it must occur to them to ask why the sentences inflicted are so different.

805. Is it your opinion that the Sheriff should have the power to inflict penal servitude, or is it your opinion that those cases which are now sent to the Sheriff ought not to be sent to him?—I give no opinion as to that. They are very well tried; that is to say, they result in conviction.

806. But which of the two do you propose?—My answer is, either the one or the other. But these heavy cases are so very numerous, that the Court of Justiciary would certainly have a great deal more to do if they tried all the cases for which penal servitude is the proper punishment, and if the business of the Sheriff Court were diminished to that extent.

807. You suggested that in certain cases of rape, where penal servitude was not likely to be the punishment, the Lord Advocate should have power to send them to the Sheriff. In the cases which you referred to, the Lord Advocate, in his discretion, sent the cases to the Sheriff; but you think they ought not to have been sent to the Sheriff, who has not the power of pronouncing a sentence of penal servitude?—That is the result. My observation in regard to the supposed case of rape was this, that supposing you don't extend the power of the Sheriff to sentence to penal servitude, there are still cases within that which might be fairly tried in the Sheriff Court.

808. What is your own opinion on the subject?—I should leave it to the discretion of the Lord Advocate as before. If there was any miscarriage of justice, I should certainly say these cases ought not to be tried in the Sheriff Court; but there has been no miscarriage, and there is no distinction between the cases, excepting that an officer says there is an additional previous conviction or two; and that being the only difference (which, however, does not always exist), it is very difficult to see why the adequate punishment should not be awarded.

809. Have you any suggestion to make as to appeal in criminal matters?—Before coming to that, I should like to say that I am inclined to do away altogether with the charge of robbery. It has often, in my experience, turned out that a case charged as theft has on the evidence proved to be a case of robbery; and the proper result there is acquittal—first, because the Sheriff cannot try for robbery; and second, because it is not the crime charged. In the Justiciary Act of last session an alteration has been made in the law as regards this matter. In the Court of Justiciary a conviction for the crime of robbery may now be charged in an indictment of theft as an aggravation; and *vice versa*, in the case of robbery, a previous conviction of theft may be libelled. I am of opinion that that provision should be extended to Sheriff Courts. But in reference to the crime of robbery, it has often turned out—I have seen it frequently—on the evidence being led, that it was not theft at all which was committed, but an act of robbery; and in consequence of that, the jury have been told that they could not convict. Therefore I think the proper provision would be to do away altogether with the distinction between robbery and theft, leaving it to the Lord Advocate to try cases in the Court of Justiciary which ought to go there; and to send cases of a less aggravated nature to the Sheriff.

810. *Mr. Clark.*—Has the number of cases tried before the Sheriff, which in your opinion demand a punishment of penal servitude, been increasing of late?—Yes, I think so, upon the whole.

811. Are more of that class in the habit of being sent to the Sheriff now than there used to be?—No: I should not say so.

812. *Dr. Barclay.*—In your practice in Aberdeen, have you not seen that the cases tried before the Sheriff depended very much upon whether the crime was committed immediately before the Circuit Court, or immediately after it—I mean the same kind of cases?—That may be a very good thing to do, instead of keeping a prisoner till next Circuit; and that is just a reason for the extension of the power of the Sheriff.

813. *The Chairman.*—Precognitions are now taken at the instance of the Sheriff's Fiscal. Do you think that a good system of investigation, or do you think that the duty ought in any degree to be left to the constabulary?—I am most decidedly of opinion, that in no respect, and to no extent, ought it to be left to

Archibald Davidson.

the constabulary, or rather put upon them, for they haven't it now. Any change of that kind would be fatal to the office of public prosecutor. The constabulary are utterly unfit for such work, except when acting under specific instructions from the public prosecutor. The success of our criminal system has depended on the whole investigation in criminal cases being in the hands of the Procurator-fiscal, under the Sheriff.

814. Do you find any difficulty in regard to harmonious working between the constabulary and the Fiscals in making investigations?—I have known cases of difficulty; that is to say, I have known cases where a Chief Constable, not being aware of his position, nor understanding his duty, has interfered in the matter of criminal investigation to the great detriment of the public service. That I take to be simply an instance of insubordination upon the part of the Chief Constable.

815. Do you consider yourself, as Sheriff of the county, to be the person primarily responsible for peace and order, along with the Lord-Lieutenant; or do you consider that the Chief Constable and the police committee are the persons principally responsible?—I don't think the Lord-Lieutenant is responsible for the peace of the county. The Lord-Lieutenant in Scotland is the head of the Militia, and he has an honorary position as a representative of Her Majesty; but he is not a magistrate as Lord-Lieutenant. He may not be a magistrate at all. If he happens to be a Justice of the Peace, he is not above other Justices. I think the police committee, again, have nothing to do with the executive department of the police. They are not magistrates; they may be, but they are not magistrates as police committee. They are a committee of the Commissioners of Supply, and that only; and their duty is to be found in the last Police Act which created them. I take it they have no place or power beyond finding the force, determining the number of the police, and finding the expense of their maintenance, clothing, etc. That is the position that the police committee occupy. They have the appointment of the Chief Constable; and, in general, the whole financial administration connected with the police, is in the hands of the Commissioners of Supply, or the Police Committee; but they have no power given them by the statute to interfere in any way with the executive part of the duty of the police.

816. The Chief Constable has the power of distributing the constabulary force, and directing their movements?—Yes; the police committee fix upon the districts in which the constabulary are to be placed; and if for any reason they ought to be sent either in greater or less numbers to particular localities, I think that lies with the Chief Constable, unless he is otherwise directed. That is a matter of his ordinary duty.

817. Do you consider that you are entitled to command the services of the constabulary for the peace of the county or the investigation of crime when you find it necessary?—Certainly. The Act of Parliament which created the police did not in the least degree interfere with the position and duty of the Sheriff as the protector of the peace, and the officer who had to take charge of the investigation of crime; and the constabulary by that Act, as I read it, were only an additional assistance given to him for the purpose of exercising his ancient duties in that respect.

818. The Sheriff's Fiscal is the proper officer for the Sheriff to employ in prosecuting the investigation of crime?—He is the hand of the Sheriff in that duty; and whatever he orders the constabulary to do, is either by the express or the implied orders of the Sheriff; and therefore it is the Sheriff's order, and not his.

819. *Dr. Barclay.*—Is there not something in the Act about the Justices giving orders; and in case of any discrepancy between their orders and those of the Sheriff, the Secretary of State is to judge?—There is a certain power given to Justices of the Peace in Quarter Sessions assembled to give an order to the constabulary; but if it differs from an order given by the Sheriff, the constabulary must obey the Sheriff till the Secretary of State tells them otherwise; but if the constabulary remain within their own province, nothing but the most harmonious feeling should prevail between the Chief Constable, or any of the constabulary, and the Procurator-fiscal.

820. *Mr. Clark.*—Has the Sheriff any jurisdiction over the burgh police within his county?—Yes.

821. In what respect?—He has the power of ordering them into the county. Are you speaking of Edinburgh?

822. Yes?—In Edinburgh the Sheriff occupies a peculiar position. He has the appointment, along with the Lord Provost, of the Superintendent of Police, and the power of dismissal; but independent of that altogether, I take it that the Sheriff within his county is entitled to order the police in the county, whether within or without the burgh, if what he requires them to do can be done without interfering with their primary duty within burgh.

823. Is the Sheriff responsible for the preservation of the peace within burgh?—Certainly.

824. And therefore he can use the police for that purpose?—More than that. I thought the question was as to using them otherwise. I think he is entitled to take them out of the burgh into the county, and use them there, if they can be dispensed with in the burgh; and probably, whether they can be dispensed with in the burgh or not, is a matter for his discretion. Allow me to add, that the observation which I made in regard to a Chief Constable not acting as I thought within his province, and being insubordinate, did not refer to the county of Midlothian, nor to the present excellent Chief Constable of Aberdeenshire.

825. *Mr. Murray.*—In the county of Midlothian the Procurator-fiscal gives his whole time to the duties of the office?—He does.

826. Is that by stipulation or understanding?—It is by arrangement on his appointment.

827. The duties are very satisfactorily performed?—They are.

828. Is it your opinion that it would be a judicious step to debar all Procurators-fiscal from private practice?—I think so. But to bring that about, you must give them sufficient remuneration, for it is the most important thing in the world to get a fit man to occupy that important office.

829. But in large counties, where the remuneration may be sufficient, is it advisable, in your opinion, to debar them from private practice?—I think so, certainly.

830. *Dr. Barclay.*—Do you approve of the Chief Constables being made Procurators-fiscal before the Justices under certain statutes?—I do not. I think the Chief Constable's business is to attend to his constables; and if he has any other work to do which interferes with that primary duty, I think that is objectionable.

831. *Mr. Baxter.*—If you were to appoint a Procurator-fiscal, and debar him from private practice, you must give him sufficient remuneration?—Undoubtedly.

832. It would not do at present in small places so to debar him?—No.

833. You would not get men of respectability to take the office?—I don't know that in small counties, such as Selkirk, Peebles, or Kincardine, you should debar the Procurator-fiscal from doing any other work. You could not get a fit man if you did so. I am talking of places where there is enough to occupy a man's attention.

834. *Mr. Clark.*—There is a burgh Fiscal as well as a county Fiscal in this county, and in other counties?—I think there are just two places where there are burgh Fiscals, Edinburgh and Aberdeen; but they don't stand in the same position. Aberdeen keeps its own Fiscal, and pays for him, whereas Edinburgh does not pay for its Fiscal. He is Procurator-fiscal of the county of the city, and is paid by Exchequer in the same way as the Procurator-fiscal of the county of Midlothian.

835. Does that division of duty impair the public service at all?—I don't think it is advantageous.

836. *Mr. Baxter.*—Does the burgh Fiscal ever prosecute before you?—No.

837. *Mr. Gordon.*—Would it be an advantage that

superannuation allowances should be provided for Procurators-fiscal?—I should say decidedly.

838. At present there are none?—I believe there are none. I think it would facilitate the getting worthy men to take the office.

839. Do you approve of the present system of appointment of Procurators-fiscal by the Sheriff?—Yes.

840. What are the advantages of it?—I think it is a great thing that he should be appointed as he is, removable at pleasure, because he is the confidential officer of the Sheriff, and he is the person through whom the Sheriff acts. If he was in an independent position of the Sheriff, I don't think that would be for the advantage of the public service. It would not be a benefit to the Procurator-fiscal himself. If he is a worthy man, nothing can be more honourable and satisfactory than his present position.

841. It is the Sheriff's interest, I presume, to get an efficient man?—Yes, and to keep him.

842. How would you reconcile the Sheriff's power of dismissal with a superannuation allowance?—You would probably make the superannuation allowance to depend upon the length of service, so that it should be given after a certain period of service; if, during the first or second period of service, the Procurator-fiscal had acted in a proper manner, and been a useful officer, I don't see why he should not have a retiring allowance, unless he had committed some gross delict, for which he was dismissed.

843. But you would not give a power to dismiss him unless for fault or *culpa*?—The Sheriff has the full power to dismiss him; and he should have that power.

844. That power is never exercised?—It is never, or very seldom, exercised.

845. There are cases in which the Procurator-fiscal has been dismissed, but it was for such conduct as justified the Sheriff's removal of him?—I have an impression of some Procurators-fiscal being removed, but I don't remember the circumstances so as to be able to speak to them.

846. *Dr. Barclay.*—Seeing that the Procurator-fiscal is in immediate connection with the Crown officers, would it not be an advantage to have the approval of the Lord Advocate to the appointment?—I think not.

847. *The Chairman.*—Might it not be an advantage to have the concurrence of the Lord Advocate to dismissal?—I think not. I think the proper position of the Sheriff to the Lord Advocate and the Fiscal is, that the Crown should look to the Sheriff, and that if anything goes wrong he should not be able to say, 'But you assisted me in the appointment.' It all works most admirably as it is.

848. Does anything occur to you about the costs of litigation?—No, I have nothing to say about that.

849. As to the privileges of agents, it has been suggested whether it might not be expedient that the agents in one Sheriff Court should be allowed to practise in in any other Sheriff Court; and that the agents in the Sheriff Court should be allowed to follow their cases into the Court of Session?—Most of these bodies of agents have privileges of a very important kind, and I don't know how far it is proper to interfere with those privileges. The present members of these bodies have paid pretty large sums, and been educated in a particular way, in order to obtain admission into these bodies, and I believe the examinations are very thorough. How far these privileges should be interfered with I don't know, or how far they would like them to be interfered with themselves, because the body interfered with would interfere with another body of agents also. I have nothing to suggest as to that.

850. *Mr. Baxter.*—Have the procurators before your Sheriff Court any exclusive privileges?—They have.

851. Do you know what these are?—The exclusive privilege of practising before the Sheriff Court of Edinburgh.

852. Can any person who is qualified to practise as a solicitor act in the Sheriff Court?—No; he must go through a trial in the ordinary way.

853. Must he serve a certain apprenticeship?—I think he must.

854. Do you know for how long?—No, I don't remember that. But I had occasion to look into this matter some time ago, and I am able to say that the examinations are very thorough.

855. But they must serve an apprenticeship for a certain period, and pay a certain amount of money to the corporation, I believe?—I believe that is the case.

856. *Mr. Webster.*—In Aberdeen there is also a chartered body?—Yes, they have a royal charter.

857. *Lord Barcaple.*—Must the apprenticeship be with a procurator of the Sheriff Court?—I rather think the solicitors-at-law in Edinburgh require that their entrants must have, at least for a certain time, been apprentices, or served under a solicitor-at-law.

858. You mean, by solicitor-at-law, a procurator entitled to practise before the Sheriff Court of Edinburgh?—Yes.

859. *Mr. Webster.*—In Aberdeen is it the same?—I think so.

860. *The Chairman.*—Are the procurators before the Sheriff in Edinburgh a numerous body?—No, they are not a numerous body.

861. *Mr. Gordon.*—Are they diminishing in number?—I am not able to speak to that.

862. *Mr. Baxter.*—Would you allow a Solicitor before the Supreme Courts to appear in your Small Debt Court?—No.

863. Nor in the Commissary Court?—No.

864. *Mr. Murray.*—Do you mean that you would not allow him, or that he does not do so?—I would not allow the privileges of my procurators to be broken in upon; and if it were mentioned to me that the agent at the bar was not entitled to practise before the court, I should suggest to him that he should leave the court.

865. *Mr. Baxter.*—I suppose there is no way of getting admission to the body of procurators except serving the apprenticeship which has been mentioned?—I fancy not.

866. *Mr. Harrison.*—Do you think such limitations are beneficial to the public?—If they can always get an agent in the court, and the fees are all regulated by proper authority, I don't know why it should not. The bar of Scotland don't allow anybody to practise before the Court of Session but themselves.

867. *Mr. Baxter.*—Do you think these regulations have had the effect of raising the character of the body of procurators?—I don't know, but they are a very respectable body of gentlemen; and there is nothing more important than that the practitioners before the Sheriff Court should be persons of respectability and station. One thing is essential—that a judge should have full power and authority over all who practise before him.

868. *Dr. Barclay.*—What is your opinion as to requiring procurators to take out a licence?—I don't know that it injures the public in any way.

869. *Mr. Webster.*—Within your county, what other courts are there besides the Sheriff Court?—There are the Justice of Peace Court and the Burgh Court.

870. And the Dean of Guild Court?—Yes.

871. What is the jurisdiction of the Burgh Court in civil matters?—I don't know that I can exactly explain that. They never come under my observation in any way.

872. I put the question with a view to getting your opinion as to the propriety of continuing the jurisdiction of such a court in civil matters?—I cannot say whether they do any business or not. In short, I have no experience of that court.

873. Have you any opinion as to whether the Dean of Guild Court should be continued as at present, at least in large towns, or whether the jurisdiction should be transferred to the Sheriff Court?—There is a doubt how far the Sheriff can interfere with the Dean of Guild's office—how far the duties may be to a certain extent co-ordinate. Otherwise, I should say the Dean of Guild is a very useful officer.

874. *Mr. Murray.*—Do you think the Dean of Guild Court gives satisfaction generally?—I think very likely not; but I am not able to say that it does not. It is highly probable it does not.

Archibald Davidson.

875. You are aware that the Dean of Guild is elected by the public?—Yes.

876. And that he does the most difficult part of his duty by deputy,—the assessor?—I don't know how he exercises his function.

877. Do you think that a good theory of a court, where the judge is elected by popular election, and where he does his duty by deputy?—I think that is not exactly the best tribunal.

878. Don't you think it would be better to transfer it at once to the Sheriff Court?—I don't know; I should say the Dean of Guild has a great many duties to discharge, which he is quite competent to discharge, and which he does well; but I have not that knowledge of the court, and the way in which it conducts its business, to give a more definite answer to the question.

879. *Mr. Gordon.*—Has the business in the Sheriff Court of Edinburgh increased or diminished of late years?—I really am not able to answer that question. I don't know the statistics.

880. *The Chairman.*—Have you any further suggestions to make to the Commissioners?—There occurs to me one thing which, as I have no personal interest in it, I should like to mention; and that is, that I have always thought that the practice at Circuit of trying the Sheriffs was a very improper one, quite unnecessary, in fact ridiculous, and not tending to increase their authority, or the respect which ought to attach to them. I have seen persons complain of a Sheriff, and I have heard the answer given from the bench to such a complainant more than once, that nothing could be done, and therefore the complainant is told to go away, after being invited to make the complaint that he does make. I don't think that is a proper thing. That practice ought either to be abandoned by the power of the Court of Justiciary itself, or, if necessary, by statute.

881. *Dr. Barclay.*—Are you of opinion that it is expedient to extend the summary criminal jurisdiction of the Sheriff, which is at present limited to a fine of £10, or sixty days' imprisonment?—I should be against that. If a man is to be punished more severely than that, he had better be punished in the way that more serious cases are dealt with.

882. Do you consider it to be right, that when a prisoner's declaration has been taken, his counsel should not have a right to call for it to be read to the jury, when he thinks it for the prisoner's advantage, while the prosecutor has the power to read it if he considers it detrimental to the prisoner?—I should say the counsel, or agent for the person accused, has always the power to call for it; and if it was refused by the public prosecutor, the case of the prisoner would be as much benefited by that refusal as if the declaration were read.

883. *Mr. Shand.*—Don't you think the prisoner, through his counsel, should have the power of calling for that declaration if it may be used against him?—As the principle of a declaration is that it is no evidence for the person who emitted it, I don't see that.

884. Then you don't think he should have that power?—Practically, whenever a declaration is called for, it is always read; at least I have never seen a case in which it was refused, so far as I recollect. I thing it bad practice to refuse it.

885. Assuming that the power of refusal is exercised, don't you think the prisoner should have the benefit of it, if he desires it, through his counsel?—It is difficult to answer that question. What prevents me from answering it decidedly in favour of his getting it, is that it is no evidence for him. I think it is open to an observation of very great weight, that he has asked for a document which would have been of importance if it had been read, and that it has been refused.

886. Then you think the power should not be given?—I found my opinion entirely on the ground I have stated.

887. *Lord Barcaple.*—You mean that it could only be introduced as part of the evidence for the prosecution, and that it might be an inconvenient and absurd thing for the prosecutor to produce evidence which he was not relying upon?—No. I have said that, according to my experience, it has been always produced when asked for; and the only ground on which I think it should not be imperative to produce it is, that it cannot be produced as evidence for the defence.

888. *Mr. Adam.*—But would you make it admissible evidence for the defence?—I don't see any harm in doing it.

889. *Dr. Barclay.*—Where a prisoner, when brought before the magistrate, makes a statement which coincides with the evidence laid before the jury, is it not fair that he should have an opportunity of showing that his statement has all along been consistent, because if it has been inconsistent his declaration is read to the jury?—That is a case in which I think it is very difficult indeed for the Crown to refuse to produce that declaration; and its refusal would open this observation of the judge to the jury, that it was a very strong fact in favour of the prisoner.

890. In regard to declarations, don't you think the English system—which is statutory, and by which the prisoner is asked if he wishes to make any statement, and told that he need not do so, no questions being put to him, but his statement being taken down if he makes any—is more fair than that adopted in Scotland, of putting the prisoner to a sort of torture by asking him leading questions, and if he does not answer them, writing down that he cannot answer them?—I don't pretend to be personally acquainted with the English system; but as a person brought before a magistrate to make his declaration is warned with reference to any statement he may make, and told that he is entitled to hold his tongue if he pleases, I don't think a jury will attach much weight—if they are properly instructed—to the fact of his having declined to answer, unless it be in a particular case, where the answer which would relieve him could be given only by himself. Supposing a person charged with theft, and found in possession of the stolen property, if he says, 'I decline to state anything about this property,' I think that is a fact which the jury would very rightly take into consideration.

891. *The Lord Justice-General.*—Is that not a fact which might be proved against the prisoner, even although he was not called upon to make any declaration?—Quite so; if a policeman apprehended the man with the stolen property in his possession, and asked him where he got it, and he declined to answer, that could be proved.

892. *Mr. Clark.*—Is the prisoner tortured in taking his declaration?—I have sometimes taken declarations as a magistrate, and I have always discouraged putting questions.

893. And practically the questions are only put for the purpose of fairly eliciting the prisoner's statement?—Yes.

894. *Mr. Campbell.*—Are you aware that in Edinburgh the Procurator-fiscal abstains from putting questions to the prisoner, and that the Sheriff-substitute alone puts them; so that if the Sheriff-substitute is fit for his office, he takes good care that he only gives the prisoner a fair opportunity of stating such facts as may be pertinent to the case?—I think that is quite a right practice.

895. *Dr. Barclay.*—Do you think it necessary in criminal cases to have a jury of fifteen, while there are only twelve in civil cases, and in England only twelve in criminal cases?—I think that is quite unimportant. No doubt it is a great tax in the way of bringing so many jurymen, but the changes of late years have made a great difference in the labours of jurymen. The first diets which have been in operation for some time in the Sheriff Court, and which are now extended to the Court of Justiciary, have relieved jurymen from attendance to a very large extent indeed. There is one observation I would make in regard to that matter. According to the recent Court of Justiciary Act, the accused does not receive a list of the jury till he has pleaded not guilty at the first diet. In the Sheriff Court he gets his indictment with a list of the jury before the first diet; the result of which is, if he pleads guilty, that those persons who have been put down as the

jurymen for that case, or these cases, if there are more than one, are relieved from attendance, and you go on to the next batch of the jury list, by which you get through the jury list quicker than you would otherwise do. I don't think that is an advantage; and I think it would be well if the system introduced into the Court of Justiciary were extended to the Sheriff Court, and if the prisoner did not get his list of jurymen till after the first diet.

896. *Mr. Baxter.*—Does it frequently happen that at the first diets all the prisoners plead guilty except one, and that forty-five jurymen are called for that one case?—Even if what I am proposing were carried into effect, that would still be the case.

897. Would it not be expedient to reduce the number of jurymen?—I daresay forty-five may be too many. But there might be this difficulty, that the one case might consist of a number of prisoners, and they would all have their challenges.

898. *The Lord Justice-General.*—Do you think the number of jurymen for the trial of each case should be reduced from fifteen?—I don't see any call for that being done, but I don't think it would be objectionable to do it.

899. *Mr. Clark.*—The Sheriff can only summon forty-five jurors for his own court?—I think he may summon as many as he likes. I think the words of the Act are, 'not less than forty-five.'

900. *Dr. Barclay.*—Do you think that the limit of age of jurymen is not drawn too low at sixty, seeing that judges remain on the bench much longer, and do their duty well?—But the judge is accustomed to sit on the bench, and a juryman is not accustomed to sit in the jury-box. Supposing you had a heavy case in the Sheriff Court or the Court of Justiciary, which was likely to last for several days, it would not be an advantageous thing to have a gentleman of 70 years of age in the jury-box.

901. *Mr. Clark.*—Do you find the jury list well taken up in your county?—I have had a great deal of trouble about that. I think we get through our jury list in a year.

902. Do you find that the list really includes all persons who are legally liable to serve?—I should think there must be a very great number omitted, particularly in the higher ranks.

903. From what cause?—I have never been able to get at that.

904. *The Lord Justice-General.*—Apart from the exemptions, don't you know in point of fact that a great many persons are not on the jury list who ought to be there?—I think so.

Archibald Davidson.

905. Can you account for that?—I cannot, except by the carelessness of the men in taking the lists up. I have tried to remedy it. I introduced a system in Aberdeen, and I have continued it in this county, by which there is a revisal of the list before the time that say a hundred persons are to be put down for service, in order to see how many are alive, or how many are above sixty; and the way we accomplished that was by sending out schedules to be filled up by the jurymen on the list. In Aberdeenshire that was admirably well done, and also afterwards in Kincardineshire and Banffshire, so that at Circuit hardly a juryman was absent, because those who returned a good excuse we struck off the list. But in Edinburgh they have found out that they are not bound to return the schedule, and they don't do so.

906. Who is the officer charged with the duty of making up the jury list?—It is the Sheriff-clerk.

907. How is he paid for that?—The Exchequer have agreed to pay the expense of the system I mentioned, and the men have been paid, so that there is no excuse in that respect.

908. How was the Sheriff-clerk paid before that system was introduced?—I think he was just allowed so much for making up the list,—a payment to officers, and no allowance to himself.

909. That was supposed to be covered by his salary?—Yes.

910. Do you think the jury list is likely to be well or carefully made up under such a system?—I don't know. There are defects somewhere, but where that is I don't know. I am afraid it is in the officers who do it, and yet they have received the fullest instructions; but now that we have got a register of voters and lists for taxes, it is very singular that anybody should be omitted who is bound to serve.

911. There is an existing evil, then?—There is something wrong.

912. But you are not able to trace the causes of it?—No.

913. Nor to suggest a remedy?—No.

914. *Dr. Barclay.*—Don't you often see persons in the list of common jurors that you think ought to be special jurors, and *vice versa*?—Very often the best men are among the common jurors. I am told they have a particular liking to be on the common list. When we send out schedules, they return themselves as common jurors, while they ought to be special jurors.

MONDAY, 14TH DECEMBER 1868.

Members Present:—

Lord Colonsay.	James Adam, Esq.
The Lord Justice-Clerk.	A. B. Shand, Esq.
Edward S. Gordon, Esq., Q.C.	T. Graham Murray, Esq.
James Campbell, Esq.	James Webster, Esq.
George Harrison, Esq.	Adam Paterson, Esq.

The Right Hon. LORD COLONSAY in the Chair.

Francis Russell, Esq. examined.

Francis Russell.

915. *The Chairman.*—You are Sheriff-substitute of Roxburghshire?—Yes.

916. How long have you been so?—Above seven years.

917. You are a member of the bar?—I am. I passed advocate in 1836.

918. The Sheriff of Roxburghshire has been a resident Sheriff?—He has,—the only one in Scotland for some years. He was appointed in the year 1807, and has always resided in the county.

919. How many courts do you hold?—Two weekly at present. It has been a question with the Procurators whether there should not be only one, for this reason, that there are four considerable towns in Roxburghshire, namely, Hawick, Kelso, Melrose, and Jedburgh, and on that account there has been considerable difficulty in conducting the business. It is difficult to get the agents to attend personally to the cases. Galashiels has been taken out of Roxburgh by a recent Act.

920. The court is held at Jedburgh?—Yes; at present twice a week, proofs being of course taken on other days, if required.

Francis Russell.

921. Do you hold Small Debt Courts?—Yes, at Hawick, Melrose, and Kelso.

922. And also at Jedburgh?—Yes; there is a weekly court at Jedburgh, and the others are held at intervals of from two to three months.

923. In the Small Debt Court the judgment pronounced by the Sheriff-substitute or the Sheriff who may happen to sit, is final?—Yes.

924. In the other court there is an appeal from the Sheriff-substitute to the Sheriff?—Yes; except in cases where the statute excludes it, and these are very numerous now.

925. Do you mean cases where statutory jurisdiction is given excluding review?—I mean so. The judgment of the Sheriff or the Sheriff-substitute, as the case may be, is there final; one of the most important of that class of cases is cases under the Bankruptcy Act. Either Sheriff may make the inquiry as to the election of trustees, or the right of voting, and there is no appeal from his judgment. Where there is an appeal at all, it is to the Court of Session. Sometimes there is no appeal at all. A number of statutes have been passed giving jurisdiction and excluding appeals. I may mention the Nuisances Removal Act, and the Police of Towns Acts, in which very important executive duties are given to the Sheriffs. There is an appeal to the Sheriff in certain cases, but in a great many there is no appeal, and in others there is no appeal to the Sheriff, but only to the Court of Session. These Acts are very numerous now.

926. *Mr. Shand.*—Would you mention the others?—Among them are—The Burial Grounds Act (1855); The Parochial and Burgh Schools Act (1861); The Boundaries of Burghs Extension Act (1857); The Public Health Scotland Act (1867); The Ecclesiastical Buildings Act (1868); The Mines Regulation Act (1860); and generally those Acts by which penalties are imposed for statutory offences.

927. *The Chairman.*—Have you any observation or suggestion to make to the Commissioners with reference to the constitution of the Sheriff Court, as consisting of Sheriffs and Sheriff-substitutes?—I have here a series of questions which were issued by a committee of Sheriff-substitutes in order to get the answers of the Sheriff-substitutes to them; as these embrace the whole points mentioned in the Note with which I have been furnished by the secretary of this Commission, I shall give my answers with reference to these, if it is equally agreeable to your Lordship.

928. *Mr. Shand.*—Have the Sheriff-substitutes formed themselves into a committee?—It is not organized; but some time ago they named a committee on the subject of their salaries, and afterwards, when this Commission was appointed, to take what measures might seem expedient in order to bring their views under the notice of the Commissioners.

929. *Mr. Webster.*—Have you got the answers of the Sheriff-substitutes?—No; I have merely got the questions.

930. *Mr. Shand.*—But the paper before you has been prepared by an association of Sheriff-substitutes?—A committee.

931. Appointed by the Sheriff-substitutes?—Appointed by them at a general meeting.

932. *The Chairman.*—What observations have you to make with reference to the constitution of the Sheriff Courts?—My first observation is that in the present state of the Sheriff Court, there is great cause of delay in the frequent appeals from the Sheriff-substitute to the Sheriff. I now hand in an abstract prepared from the Parliamentary returns, which abstract contains a good deal of information. Speaking first with reference to the delays consequent on these appeals, you will find the statistics at page 11 of the abstract. The first column states the number of appeals taken in 1863. Under the Act of 1853 it is in the power of the parties to take a judgment from the Sheriff-substitute on appeal to the Sheriff without any argument; and the second column on the page refers to the cases in which there has been neither oral nor written pleading upon the appeal. The third and fourth columns give the number of cases in which written pleadings were lodged, and the next column the number of cases in which there was oral pleading. There cannot be both oral and written pleadings in the same case; and it is in the option of the party appealing to lodge a reclaiming petition or to enter a minute craving an oral hearing. The abstract shows the average number of days occupied in disposing of the appeals; and I don't think there is overhead a very great difference between the time occupied where there is oral pleading and where there is written pleading. In some counties there is a great difference, and in others there is not a great difference. It would be absurd to strike an average over Scotland; but it may be said that three months is something like the average period, and there are not many less than sixty days. The abstract is unfortunately imperfect, because the Parliamentary returns are imperfect, some of the counties not having given in their returns. There is none for Perthshire, for example.

933. *Mr. Gordon.*—A return was got from Perthshire?—There may have been some supplementary tables printed since this abstract was made; but I think it will be found that, on an average, three months may be taken as the period from the date of the interlocutor appealed from, to the date of the interlocutor deciding in the appeal. It is of importance to keep in view the various points on which appeals may be taken in a process. In an address by Lord Ormidale, of which a copy was sent to me, he stated a case in which there might be ten appeals from the judgments of the Lord Ordinary to the Inner House. In our court there might be an exceptional case in which there might be ten appeals; but there may be five appeals in a very ordinary case, and I shall state at what points these might take place. The first may be from a judgment repelling a preliminary defence before condescendence and answers are ordered. It is the duty of the judge, under the Act of 1853, to dispose of the preliminary pleas at as early a stage as practicable. That is appeal No. 1. Then after he has considered the defences, and the record is closed, there is an interlocutor ordering proof, and there may be an appeal from that judgment. That is appeal No. 2. After the conclusion of the proof there is an appeal on the admission or rejection of evidence. That is appeal No. 3. Then at the conclusion of the proof, and after the parties have been heard upon its import, and on the whole cause, the Sheriff-substitute's judgment may be taken to appeal. That is appeal No. 4. Then in the very ordinary case where expenses are found due, subject to modification, there is a further appeal to the Sheriff on that point; and that is appeal No. 5. Now I have taken no extraordinary case at all, but a case which quite ordinarily occurs; and that being so, there being five appeals to a judge, who is required by statute to hold only four courts in a year for the hearing of appeals, and where it is in the power of the appellant to require an oral hearing in regard to all these appeals, it seems to me quite inevitable that there shall be great delays in that court. The next point I have to state is this, that there is no sufficient guarantee that the judge exercising the appellate jurisdiction shall be so manifestly superior to the judge exercising the jurisdiction in the first instance, as to satisfy the litigants and the public that his judgment, given in the same court, and with no other aids than those available to the Sheriff-substitute, except the judgment and note of the Sheriff-substitute, shall be presumably a better judgment. I may here state that there has been a very great change in the office of Sheriff-substitute since its institution in 1748, after the passing of the Jurisdiction Act. Originally the Sheriff-substitutes were appointed by the Sheriff, subject to dismissal by him at any time, and without any cause assigned. They were not generally lawyers, and they had no regular training; and no question of inferiority or superiority could possibly be raised between them and the Sheriffs. But things are changed now. With very few exceptions Sheriff-substitutes are members of the bar; many of them, in the opinion of those who are conversant with their exercise of the duties of their office, are well qualified to discharge those duties. Then the question arises, is the appellate judge clearly superior to the other, who is called the

Sheriff-substitute, or whom I may call the Resident judge, for that is the peculiar quality which seems to distinguish him? I am aware that I am touching on delicate questions, but I cannot help it. So long as I was not called on by any public authority I have not agitated this; but I have been called to speak about it, and I must refer to it. It is a question whether the bar of Scotland, after deducting from it those quite at the head of it, who would not undertake the duties of the office of Sheriff, can afford from twenty to thirty persons so manifestly superior to those who discharge the duties of Sheriff-substitute, that the result of their appellate jurisdiction will be thoroughly satisfactory to the public or to litigants. That is the form in which the question arises for me. I am assuming that the best appointments which the bar would afford are made. In many cases, I believe, appointments are made with great judgment and seriousness; but I am afraid that they are still sometimes made with precipitancy, when political changes are imminent especially, and sometimes perhaps at other times, and without a due consideration of the very serious duties which a Sheriff has to discharge. But even assuming that the appointments are well made, I say that the public is not satisfied that there is a sufficient superiority of the judge of appeal over the ordinary judge. This is a question of delicacy, and I will not go into details of any sort in reference to it. I will only state generally that it is a question which I think deserves very serious consideration. A third point is, that when judges are appointed with such important duties as the Sheriff-substitutes have to discharge, there should be nothing done to discredit their office; and I think that the present system does so to a serious extent, in this way,—they are the ordinary judges of the court, and must necessarily be so, they are bound by law to be resident in the counties; the Sheriff is bound to be in ordinary attendance in the courts of law during their sessions, which implies that he shall be resident in Edinburgh. Of course he may be a visitor in his county as to any other county, during the recesses of the court; but that is not the point. The matter is that substantially he cannot be the ordinary judge of the court, but he is entitled at any time to sit in it; he may come down any day when a court is to be held, and say to the Sheriff-substitute, 'I will take this court to-day.' So in regard to criminal trials, he may come down for this or that criminal trial. I shall have to call attention to the statistics of these cases tried by the Sheriff. They are few in number, but this only enhances the evil; for the public get no considerable advantage from it, and the ordinary judge is discredited, because it is said, 'Here is a better man come to try these cases.' If it were cases of serious and peculiar difficulty that were selected, it would be different; but the Sheriff comes just when it is convenient for him, and if there are cases he tries them. He may sit in the Jury Court trying cases there, or in the Summary Court disposing of criminal cases without a jury. All that goes to discredit the ordinary judge, and to raise the question whether he is well qualified to discharge these duties; and the fact of the Sheriff discharging them in these circumstances, when the ordinary judge is at hand and prepared to act, implies that the other judge is the better qualified. If the resident Sheriffs are not capable of discharging to the satisfaction of the public the duties with which they are entrusted, they ought not to be there, and the sooner they are out of the place the better; if they are sufficiently qualified, they ought not to be discredited by any arrangements by which the ordinary exercise of their duty shall be thus interfered with by an authority which is superior in fact,—superior in effect,—without necessarily being superior in quality. These are the principal grounds on which I think it is really desirable that the whole of this question of the constitution of the court shall be reconsidered, in order to avoid the evils which I have mentioned, namely the delays, with the unsatisfactory result as respects the judgments, and the discredit thus put upon the Sheriff-substitutes. One of the questions put for the consideration of the Sheriff-substitutes raises this question of appeal from the resident Sheriff, 'Ought the present system to be continued, modified, or abolished?' What I have said implies that there are serious evils attending it, and the question is, how are these to be met? I am not prepared to say that at present either the resident Sheriffs of the counties are so strong and well prepared to discharge all duties, or, on the other hand, that the Court of Session is so free for work, that some intermediate court between the Sheriff-substitute and the Court of Session can be safely dispensed with. I say, at present. We have had very important reforms in the Court of Session, and we shall have reforms in the Sheriff Court, and what the result may be at some future time I cannot say, but I think at present we require some intermediate court between the resident Sheriff and the Court of Session. I think it of great importance that the judges discharging these duties shall be in such a position as to give great weight to their judgments. Of some of the Sheriffs at present holding office, one would say that there cannot be better than they are; in fact they might hardly be got even for the duties of an appeal judge, but perhaps they might. I would suggest that there should be a limited number of districts in Scotland, and an appeal judge over each, whose duty it should be to hold Circuit Courts once a month, or at other short intervals, for the disposal of appeals at all the places in his district at which ordinary courts are held, and on days named either by statute or by the Home Secretary. As it is desirable to get rid of the expense of written pleadings (which is not very easily subject to regulation), I think that there should be no written pleadings allowed unless in quite exceptional circumstances, if at any time, and that the appeal should be a mere minute of appeal from the judgment of the Sheriff-substitute, and an oral hearing at the next Circuit Court held by the judge of appeal for the district.

Francis Russell.

934. *Mr. Campbell.*—A single judge of appeal?—I think so, for one or two reasons. There has been a proposal made that the court, instead of consisting of one judge, should consist of two or three. But there are great difficulties in the way of that proposal. Printing is almost a necessity if you have several judges of appeal, and that alone greatly increases the expense; and if the papers are not printed, two or three copies of the proceedings must be made, which would be nearly as expensive. I have also great faith in the increased responsibility which a single judge feels when he knows that all rests upon him, and that he cannot throw the blame upon somebody else if the judgment does not turn out quite so satisfactory as at the time it was thought to be. What geographical arrangements would be necessary to carry out any view of this kind, would require a good deal of consideration. I was confidentially asked some time ago,—I am not at liberty to say by whom,—to prepare a scheme for a reduction of the number of Sheriffs; but that was not upon the footing of so great a change as I have now proposed. I have here a copy of the scheme which I prepared. The number of Sheriffs at present in Scotland is, I think, twenty-four; but when the reduction of the number contemplated by the Act 16 & 17 Vict. cap. 92, is fully in operation, there will be twenty-two remaining. My scheme proposed to reduce these to eleven; but if they are only to act as judges of appeal, I think that a very much smaller number would be sufficient, and that from six to eight, or perhaps even less, would cover the whole of Scotland. It would be necessary to make some exceptional arrangements in regard to the northern parts of the country. It is not necessary that appeal judges shall travel to remote parts of the Highlands, where there are almost no appeals, as is seen from the returns; and in regard to these, some arrangements might be made for written pleadings, or some other exceptional arrangement to meet the exceptional case. But taking the wealthy and populous parts of Scotland, including all of it except Argyleshire on this side of the Caledonian Canal, there would be no difficulty in holding these courts at these intervals. There is direct railway communication to all the places at which the courts would have to be held;

Francis Russell.

and I think an energetic man would have no difficulty in overtaking the duties of a pretty large district, and holding courts once a month. In England the County Court judges have to hold a circuit every month; and I remember Mr. Elmslie, who is not now alive, but who was a County Court judge in Derbyshire, telling me that he got through his duties in the first fortnight of each month, and that he had the second fortnight to himself, the duties being all discharged in court. That may be taken as a very fair average, though some have very heavy duties, and may take a longer time to get through them. But I don't think that such duties as I refer to here would take anything like so long as a fortnight in most cases. In most of the districts I should think a week would overtake all the duties of holding courts at the different points where they would have to be held. In some cases it might take ten days, but that would be quite sufficient. It may be a question whether, when there are two local courts in any county, there is any necessity for the appellate judge going to each. Take for example Falkirk and Stirling. If there is an appeal court for the county held at Stirling, any agents residing at Falkirk could go to Stirling with their papers and debate their appeals. There is no question here about witnesses, which would make it important to hold courts at all the places at which ordinary courts are held. In many of these appeal courts, I think that counsel might be employed, at less expense to the litigants than at present, when frequently employed in drawing written pleadings, and at greater advantage to the courts. In proposing this arrangement, I am assuming that the duties of the Sheriffs not resident in the counties would be confined to the duties of appeal judges, and that they should be relieved of the quantity of detail which they have now in their hands as exercising administrative duties. Some of these cannot be very conveniently administered by a judge who is not in the county. I am quite aware that there are some advantages in the present system as regards that. There is a convenience in having at headquarters, as a means of communication with the Lord Advocate, and with any other local authorities, one who is familiar with the county in regard to special difficulties that may arise. But these are exceptional; and I am afraid that if we are to secure the efficient discharge of the ordinary duties of judge, we must be prepared to part with some of the advantages which the present system affords. If that were done, I think appeal judges might be got of so high a position, and with such important duties to perform, as would ensure their efficiency. They would be thoroughly acquainted with their duties, and there would be a very great advantage in this way, that there would come under their notice the proceedings in the different courts, and that would be likely to bring out any defects in the manner in which records were prepared or cases debated in a particular court; and the general tendency of that would be to raise the character of the proceedings in each court more effectually than can be done by each Sheriff making a remark in his own county without knowing by intimate acquaintance what is done in other counties. There is another question which arises here—not a question of law, but a practical question: Ought there to be a direct appeal in all cases from the resident Sheriff to the Court of Session? Such an appeal is competent at present; but when it was taken in the case *Malcolm* v. *Ballantyne*, some strong remarks were made by the Court upon the impropriety of bringing a judgment direct from the Sheriff-substitute. Now I think it should be in the option of the parties, if they think it right, to take an appeal direct to the Court of Session without going to the appeal judge. I think there would be great facility of access to the appeal judge, and it is probable that in comparatively few cases would there be a desire to go direct to the Court of Session; but I think it might be convenient to give parties the option, and it would be a kind of test as to public feeling, and as to whether there is satisfaction felt with the appeal judge. If the public were not satisfied with him, they would more frequently bring their cases direct to the Court of Session; and I dare say that with the improvements which have been introduced, or shall be introduced, in regard to the conduct of business in that court, it will be able to overtake these cases with less delay than heretofore.

935. *Mr. Webster.*—How would that work in the case of a party wishing delay?—That depends on the Court of Session. The Court of Session may be in a condition to decide the case quite as quickly as the appeal judge. The appeal would be taken at the same point of time as that at which it would be taken to the appeal judge. You are now asking a question about the Court of Session, and it may have its hands so free as to be able to decide the case with as little delay as the appeal judge, for it has not to wait till next Circuit. It takes the case the day it comes into its hands, and it rests with the court how long it shall be in its hands.

936. Would you put it in the power of a party wishing delay to enter an appeal to the Court of Session direct just before the long vacation, instead of going to the appeal court?—It might be in the power of the Court of Session to send it back.

937. But the appeal might be taken at a time when the Court of Session would not meet for several months?—These are details, and regulations might be made as to these. That was not the objection taken by the court in the case of *Malcolm* v. *Ballantyne;* the objection taken there was, that it was wrong to pass over the intermediate court. However, I don't think that a matter of much importance, because I believe that if the appeal court sits monthly, and is attended, as it will be, with very small expense to the litigants, there will be very little need to run to the Court of Session, unless in exceptional cases, for which there would probably be some good reason, other than a desire for delay. The next question put for the consideration of the Sheriffs-substitute is, 'What in your opinion is the best mode of securing a cheap and speedy review of the judgments of the resident Sheriffs?' I have already answered that, and I have stated that, in the event of there being appeal judges, their duties should be restricted to those of appeal judges. Then there is the question, Ought the right to review the judgment of any resident Sheriff, following on oral probation, to be confined to the power to review in questions of law? It has been matter of great discussion whether there should be appeals from a judge who has heard the evidence, to a judge who forms his opinion on notes of the evidence, and I feel that that is a question of great difficulty; but I am not prepared to say that it would be safe to dispense with the appeal. Whether there is any particular class of cases in which it might be dispensed with, may be a question; for it is a difficult duty and not very satisfactory to have to judge of the whole facts from mere notes of evidence, not only the witnesses not being seen, but the *ipsissima verba* of the witnesses not being before the judge; but that is a point which will deserve consideration. The next matter is directly connected with the other, and it refers also to the constitution of the court. Ought the power of appointing the resident Sheriffs to be transferred to the Crown? In regard to the Sheriffs-substitute, I think there is a universal feeling that it will be more consistent with nearly universal practice, and more consistent with the position which they occupy as resident judges discharging very important functions, that they should be appointed by the Crown. They are now appointed by the Sheriffs, but are not removable by them. There has been a great change since the report of the Law Commission in 1834 on that subject. The Commissioners in their first report, speaking of the manner in which the Sheriffs-substitute should be appointed and dismissed, state this: 'On the other hand, the great majority of the Sheriffs and other persons whom we have judged it proper to examine, are of opinion that as the Sheriff is answerable for his substitute, it is indispensably necessary that he should have the power of summarily dismissing him.' The Commissioners made a qualified recommendation; they recommended that the Sheriff-substitute should only be dismissed with the approval of the Heads of the Court, and upon that footing the office has stood ever since.

I have made this quotation to show how great has been the change of opinion since that time. I suppose no member of this Commission, and no witness examined before it, will propose that the Sheriffs shall have the power of summarily dismissing their substitutes, though that was the general opinion in 1834. If the system of giving more extensive jurisdiction is carried out, and appeal judges are appointed, the force of the argument is greater. It would be quite out of the question that these appeal judges should appoint the other judges who are to act in the different counties over which they have an appellate jurisdiction. I have a very clear opinion—I believe it is the universal opinion of the Sheriff-substitutes, and I think it is the general opinion of the public, or of all who have inquired into this matter—that it is inconsistent with the position of a judge exercising such important functions, that he shall be appointed by a private person who is irresponsible, —in this sense, that nobody can call him to account for having made any particular appointment. The only existing check on it is this, that the appointment is now subject to the approval of the Heads of the Court of Session,—of the Lord Justice-General and the Lord Justice-Clerk for the time. I am not aware whether that has had much effect as a condition of the appointment, the general understanding being that in almost no case, or in no case, has the approval been refused, which would lead one to say that the Sheriffs have in general made good appointments. If one were to say anything else, it would imply a criticism in the conduct of the Heads of the Court which I should be the last to say there was any propriety in making, or any call for being made. It is a delicate thing to ask judges to refuse their assent to the appointment of a member of the bar; but I believe the judges would exercise the duty to the best of their ability. In some cases they have personal knowledge of the person, in other cases they require evidence, and to a certain extent I assume that the check has been successful. At any rate, I believe the general opinion is that the Sheriff-substitutes as a body discharge their duties satisfactorily.

938. *Mr. Campbell.*—Don't you think, on the whole, considering the appointments that have been made during the last twenty years, that the patronage of the Sheriffs has been generally exceedingly successful, that is to say, that they have generally secured the very best men they could get to accept the office?—I think the appointments have been very good; but I don't put it on the ground of their not having been good.

939. Have you ever known any patronage in which, on the whole, the public service has been more successfully advanced than in the appointment of the Sheriff-substitutes?—I am not prepared to say that; but I make no question about it.

940. But, as contrasted with the patronage of the Crown, don't you think there has been an absence of political and other partialities which has honourably distinguished the appointments of Sheriff-substitutes? —Well, that is a leading question. I really don't like to say so, and I am not prepared to say so. I think some Sheriffs have not made successful appointments of Sheriff-substitutes, and I think a good many appointments have been made which have not been the best possible appointments. I may state further, that if there is a bad appointment of a Sheriff, it follows probably that, should a vacancy occur, there will be a bad appointment of a Sheriff-substitute, because if a weak man is appointed Sheriff, he is not going to put a strong man into the office of Sheriff-substitute. There is a very natural jealousy felt; and a Sheriff does not like to appoint a man his substitute whom he feels to be stronger than himself.

941. Assuming that the Sheriff still retained his right of nomination, do you think it would add to the respectability of the position of Sheriff-substitute, that he should receive his commission to sit as judge in the Sheriff Court, in the first instance from the Crown?—I was going to say that. The ground on which I put it is not that the selections will be better, but that the office will be in a better position. The present system puts the Sheriff-substitute to some disadvantage. He has in his court others who get their appointments from the Crown—the Sheriff-clerk, for example, and it does not seem to me becoming that the judge sitting in that court should be appointed by a private person. I don't want to go into details, or to name persons; but I will say, that there is much more disposition now than there was some years ago, to exercise the patronage with a strong, clear sense of responsibility; and I hope the public will exact that sense of responsibility, and have no mercy on appointments that may be made without due regard to the exercise of the duties of the office, to which any person shall have been appointed. If a Crown presentation is not good here, what is it good for? Our superior judges must be appointed by the Crown, and we must assume that the Crown, through its officers, is well qualified to ascertain the capabilities of persons to be selected for inferior offices; and if they don't do so, it is not from want of capacity, but from want of due care, for they have the means of getting the information. I am not raising any question as to the appointments at present in force having been good.

942. *Mr. Paterson.*—Is it your opinion that the appointments of the Sheriff-substitute should be left with the Crown?—Yes.

943. Supposing the Crown to be the patrons, would you still continue the veto of the heads of court?—They could not veto with a Crown presentation.

944. Would that, then, not be in some degree more irresponsible than it is now?—But I am afraid it would not be consistent with the Crown presentation.

945. I am speaking of the protection of the public? —The Sheriff might be entitled to make a suggestion to the Lord Advocate. I think there should be some other person than the Lord Advocate, whose recommendations are understood in matters of Sheriffships to be very nearly conclusive at the Home Office. If the Commissioners can see any other person to divide the responsibility with, it might be an improvement.

946. Can you fancy any one who has a stronger motive to appoint an efficient Sheriff-substitute than the Sheriff himself?—I think he has a very great interest to do so.

947. Supposing him to make a mistake in the original appointment, don't you think the public are sufficiently protected by the veto of the two heads of court?—So far as I know, that has been inoperative. I don't know that in any case it has been exercised. Where a right of veto has never been known to be exercised, I don't know that one is entitled to rest much on its existence. I never doubted that the Sheriffs have a very great interest in having efficient Sheriff-substitutes appointed, and, as a general rule, I think they have been so appointed. But even if the Sheriff were to nominate the substitute, I think the appointment ought to come from the Crown, and he should have all the advantage which would attach to deriving his commission from the Crown.

948. *Mr. Shand.*—Would it satisfy your view if the Sheriff-substitute were nominated by the Sheriff, but appointed by the Crown?—That would meet my view very much.

949. What you desire is that the Sheriff-substitute should have the dignity of a Crown appointment?— Yes, and hold his office on the same tenure as other judges.

950. You have said you remember the time when these appointments were filled by much inferior men?— I remember some of them.

951. To whom do the public now owe the improvement which has taken place in that respect?—There has been an improvement in the position of the Sheriff-substitutes, and an increase in their salaries. There was no salary originally paid them by the Crown. The substitutes appointed under the Jurisdiction Act had no salaries at all provided to them; then there was a salary which at first was very small, and that was afterwards improved. That was one of the means of improving them. That was not due to the Sheriffs.

952. Of late years has there not been a considerable improvement in the class of men?—Yes.

Francis Russell.

953. Is that improvement not owing to the fact that the selection by the Sheriffs has been careful?—Partly, and also that the position was so high that you got a better class of men to take it. The Sheriffs might select whom they liked; but they did not get the men to go. The office has risen in position and salary, and it is practically a different office from what it was when originally instituted.

954. But the Sheriffs have, as a rule, chosen the best men they could get for the office?—I think they have made very good appointments. Of course to say they have taken the best men they could get is putting it strongly. I think they have made good appointments.

955. I understood you to object to the Crown appointment of Sheriffs in many instances as being too precipitate?—Not in many instances.

956. But in a number of instances you think the Crown appointments were not good?—I said they were not good in all cases.

957. Would not your proposal rather open the evil in regard to the Sheriff-substitutes which you have deprecated in regard to the Sheriffs?—I think it is better that it should be the Sheriff-substitute than the Sheriff, even though he has a great part of the local duties to do. I assume that the present arrangements in the Crown office are continued, as to which Lord Advocates naturally feel great anxiety when any changes are proposed in respect to the office of Sheriff; and if the Sheriff-substitute were appointed by the Crown, it would then be open to the Lord Advocate to recommend for appointment any well-qualified Advocates-depute to the office of Sheriff-substitute, instead of, as matter of usage, appointing them to the superior office of Sheriff after they have had experience in the Crown office as Advocates-depute for some years, although they have had a very limited experience in the matter of civil practice, the civil practice being what they require when they become Sheriffs. As regards the criminal work, they do very little in most counties, though if some of them are at leisure, they may go and do a little of it; but as regards civil cases, they have a great deal to do, and it is far more essential that they shall be well qualified to dispose of civil cases on appeal than that they shall be familiar with the conduct of criminal business. On the other hand, if they are well qualified for the disposal of criminal business, it will give them very great advantage as Sheriff-substitutes, who have criminal business to discharge. The great bulk of the criminal business is discharged by them. I may state that of the whole criminal cases tried, only two per cent. were tried by the Sheriffs; and in a detailed return given in 1861 of the whole criminal causes tried in the Sheriff Courts in all Scotland, there was not so much as ten per cent. of the jury cases tried by the Sheriffs, the other ninety per cent. being tried by the Sheriff-substitutes. Now if persons familiar with the conduct of business in the Court of Justiciary were appointed to the office of Sheriff-substitute, they would have very great advantage in regard to the criminal business; and if they were familiar to some considerable extent with civil business, they would be the better qualified for the discharge of the whole duties of their office.

958. *Mr. Campbell.*—The theory of a double judgment is inherent in the constitution of the Sheriff Court as now understood?—As now understood.

959. In order to secure that, it is essential that the Sheriff-substitute should, in the first instance, try and determine all ordinary cases and most summary causes?—All appealable causes.

960. Then in sitting in his court the Sheriff-substitute is not properly the substitute or deputy of anybody, but a judge in the first instance?—Practically; but there is no doubt that the Sheriff is entitled to dispose of cases in the first instance sitting in his own court.

961. But is that ever done in practice?—It is done for the convenience of the Sheriff-substitute when he happens to be absent. I have had that advantage, the Sheriff residing in the county.

962. It would take away the power of appeal if that was done?—Yes; and the Sheriff would give judgment without the advantage of the comments of the Sheriff-substitute.

963. Has it been found a grievance that the name 'Sheriff- substitute' is employed?—I don't call that a grievance. It reminds me of an expression of John Foster, the essayist, that often 'words, instead of being the signs of things, become their monument.' I think the name is a monument of a state of things which existed when the whole essential work was done by the Sheriff, and the substitute was merely his hand to carry out what he did. But now it is not so. Only one Sheriff is resident in the county, holding the ordinary court; and I think resident judge is a more appropriate term than substitute. There may not be much in names; but I think it is more appropriate and distinctive of the particular office that he holds now.

964. You said something about Sheriff-substitutes being removable with consent of the heads of the court: has anything of that kind ever taken place within your memory?—No, I don't think so. I have stated that nine-tenths of the whole criminal jury trials were tried by the Sheriff; and it appeared from the same return for the year 1861, that there were twenty-one jurisdictions in which there were criminal jury trials during that year, and they were all disposed of by the Sheriff-substitute. I think it is very important that the Commissioners should have in view practically the duties that are discharged by the Sheriff-substitute, and not go on the hypothesis that the serious and difficult cases are usually taken by the Sheriff. It is not so in the counties generally, but a very large proportion of the duties are discharged by the Sheriff-substitute.

965. *Mr. Webster.*—By the appointment flowing from the Crown, although the selection was perhaps made by the Sheriff, the duration of the office would be more in accordance with correct theory than at present, where you are appointed by a Sheriff who dies or resigns; but you still continue to act as Sheriff-substitute?—Yes; I am glad you have mentioned that. One of the grounds on which it was thought very desirable that the Sheriff-substitute should be appointed by the Sheriff, was that he might be entirely in accord with him—a person with whom he could act comfortably. When the law was so far changed that the Sheriff-substitute continued in office after the Sheriff had ceased to hold his office, that advantage ceased to be one on which much could be rested, and in point of fact at the date of these returns the majority of persons who were Sheriff-substitutes in Scotland had not been appointed to their office by the existing Sheriffs, but by their predecessors. This shows that that purpose is very far from being accomplished by the arrangement on the footing on which it now stands.

966. *The Chairman.*—What was the date of the Act that made the change?—The 1st and 2d Vict. c. 119.

967. *Mr. Campbell.*—The Sheriff-substitute, in the absence of the Sheriff, is expected to take an active part in the general business of the county, to attend as a Commissioner of Supply, to sit as a member of the Prison Board, and to act as one of the Commissioners in disposing of appeals under the Valuation Act?—Yes.

968. Has it been found sometimes that his authority is a little diminished, and his character affected by the fact that he is at any moment, in the course of deliberations by these different bodies, liable to be superseded by the arrival of the Sheriff?—There are some of these cases in which he is independent of the Sheriff. As a Commissioner of Supply he sits as Sheriff-substitute. But as a member of the Prison Board and of the Police Committee he only acts in the absence of the Sheriff, and it is rather inconvenient if the Sheriff comes when he is there, and the Sheriff-substitute who may be ordinarily in attendance is not entitled to attend as a member, and so can only be aware of the proceedings from the minutes. There is that obvious inconvenience.

969. *Mr. Shand.*—He can always be present?—He has no right to be present.

970. He always is?—I don't attend.

971. You would always be invited?—I don't know that. Some members of the police committee are not fond of the Sheriffs, and they don't like Sheriffs interfering very much with them. I have not attended meetings of the police committee, unless I had a right to be there.

972. *Mr. Paterson.*—I understood you to say, that the public were not satisfied that the principal Sheriff was superior in all cases to his substitute? Have you ascertained that to be the public impression?—I did not say that there was a general impression to that effect; but I said there was not sufficient superiority to justify the appellate jurisdiction. It is difficult to ascertain public impressions, as they come from so many quarters; but I have found that impression in a great many quarters. I may mention one influential public quarter which I think is much entitled to consideration on any occasion,—I refer to members of the House of Commons. On two occasions I have had to go to London to see them about the Sheriff-substitutes' application for increase of salaries, and I found but one opinion, that our salaries should be increased. On the first occasion that I had the honour to appear before Sir George Grey, twenty members of the House of Commons attended.

973. *Mr. Murray.*—Twenty Scotch members?—Yes. In 1866, there were twenty members of Parliament who went to Sir George Grey. It was practically arranged that the salaries should be increased; but the Government, of which Mr. Moncreiff was Lord Advocate, went out of office before the matter could be finally settled, and we had to begin again. The following year I had again the honour to go to the Home Office as a member of the deputation of Sheriff-substitutes, and on that occasion thirty-six members of Parliament attended. On both these occasions I had an opportunity of seeing a great many of the Scotch members, and I found a very large number of them who strongly objected to the office of Sheriff, upon the ground that there was no sufficient superiority of the Sheriff over the Sheriff-substitute. On that ground a number of them who thought the office of Sheriff should be altered, declined to go with us to the Home Office, though quite agreeing that the salaries were inadequate, and ought to be increased. But they said, 'We will not settle your question till the other question is settled,' because they thought the present position of the office unsatisfactory. That is one indication of public opinion in the highest quarters. It is secondary public opinion; it is the opinion of men who have been influenced by public opinion, and who to a large extent form their own opinions from what they hear from many quarters.

974. *Mr. Paterson.*—Did they form their conclusion on views in the direction of utility or of economy?—I think utility, decidedly, although some of them also on the other view; but I think the Scotch members don't care much about economy as a general rule in reference to any requisites for Scotland.

975. I suppose they were aware of the statutory requisite that the Sheriff-principal must be a practising advocate in Edinburgh?—They know the conditions of the office substantially.

976. You mentioned as one of the advantages of the Sheriff being resident in Edinburgh, that he had more immediate access to the Lord Advocate and other officials. Is there not another advantage that he has—the power of immediate communication with all the other practising advocates who are non-resident Sheriffs?—Clearly. I feel the isolation of the Sheriff-substitute more than anything else. There is no person in the county to whom he can speak about difficult questions of law. He cannot speak to the procurators of his court, who are the only other lawyers in the county. I myself take every opportunity to communicate with my brethren at the bar when I happen to be in Edinburgh, and I spend more of my time in the Parliament House than anywhere else.

977. Do you think a Circuit Appeal Court of the character you have mentioned would be greatly superior to the present system, by which the Sheriffs have the benefit of the advice of their brother Sheriffs in the Parliament House?—I mean the appeal Sheriffs to be resident in Edinburgh, so that when not on their circuits they will be in the Parliament House. Their duties may in some cases be consistent with practice if matters are well arranged, or a person of large experience may sacrifice his practice in order to take the appointment of a district judge, for I assume they will be so well paid as to make it worth the while of men of high position to accept the office. It is a question whether they should be prevented from practising. One proposal is that they shall be so prevented, because there is great risk of their private practice competing with their public duty. There is no doubt as to that; and any one who has seen work in the Sheriff Courts will see that. And it is a question for the consideration of the Commissioners whether they should take private practice or not.

978. *Mr. Campbell.*—Would not such an appeal judge as you propose have reasonable hope of promotion to the bench?—He would be the most natural person to promote if he continues in the Parliament House when not in Circuit. I assume that he is a man so high in his profession, that if he had remained at the bar he would have had a fair chance of being promoted. I don't think his holding district courts, while he continues to reside in Edinburgh, and haunt the Parliament House, is a reason why he should not be promoted to the bench.

979. *Mr. Webster.*—Is it conceivable that a counsel in large practice could be holding Circuit Courts and carrying on business at the bar during the long period that the court sits?—I think not. I think it would not be consistent with his being in large practice. He may have to sacrifice his practice, and it is a question whether it would not be better to prevent him from taking any practice. A Sheriff-substitute is absolutely prohibited from exercising any office or employment except that attached by statute to his office; and when their salaries are considered, that must be taken into account, for while their salaries have been materially increased since 1853, in all cases the emoluments have not been increased. Some of the Sheriff-substitutes used to hold offices of great emolument as factors and bankers, and other such appointments, and the revenues derived from their whole sources of income were greater than those derived now by the Sheriff-substitutes from their sole source of income, which is their official salary. I may add that there are fees for examinations in bankruptcy, which are insignificant in most counties; and the sooner the better that is abolished, because it is unseemly that the judge should be paid fees where there is not money to pay creditors. The fee of one guinea for each examination is the whole emolument they have besides their official salaries.

980. *Mr. Murray.*—Would not the salaries of eight appeal judges, such as you propose, amount to more than the salaries of the twenty-two Sheriffs?—I don't know. I am not putting it as a question of economy, and I don't say that there are to be eight of these appeal judges. It may be no saving, but the work would be much better done. The question of economy is another thing. Perhaps it may be as expensive a system, and no doubt you will find difficulties with the Treasury if there is to be an increase of the salaries. People were all agreed that the salaries of Sheriff-substitutes were inadequate; but whenever it came to the Treasury giving the money, then there were difficulties.

981. *Mr. Shand.*—Then you don't think that the scheme you propose would be a saving of money?—I have not calculated it in that view.

982. *Mr. Murray.*—What are the total salaries of the Sheriffs?—In 1866 there were twenty-five Sheriffs with salaries amounting to £18,350.

983. What would the salaries of six or eight appeal Sheriffs amount to?—I think if you take six at salaries of £1500 or £2000, that would be about the number required.

984. *Mr. Harrison.*—Then you don't suppose that your scheme would cost more than the present system?—No, you would save five or six thousand pounds.

985. *Mr. Murray.*—Would you not have to add travelling expenses?—£50 or £100 would go a long

Francis Russell.

way for travelling expenses. I think that for £1500 or £2000 a year you would get men at our bar glad to do these duties.

986. *The Chairman.*—Do you except Glasgow and Edinburgh from your scheme?—Yes; but I mean four districts besides Glasgow and Edinburgh.

987. Are Glasgow and Edinburgh included in the £18,000?—Yes; but there is room to deduct these and still have a large saving. I should say that £1500 to £2000 is such a salary in Scotland that many well-qualified persons would not refuse to perform for it duties which are not very arduous. The salaries of the County Court judges in England, some of whom are in very good position indeed, vary from £1500 to £1800.

988. *Mr. Shand.*—You made an observation in regard to the office of Sheriff at present, that it was such that men at the head of the bar would not accept of it?—In some cases.

989. Is there any one at the Scotch bar, that you are aware of, of high position, who has not accepted the office of Sheriff when offered, except the law officers of the Crown?—I think there are some. I think I have known some who have refused to do it.

990. Are you aware that one of the existing Sheriffs has declined promotion to the bench?—Yes, I understand so.

991. Am I not right in saying that, with the exception of the four law officers of the Crown, who cannot hold the office of Sheriff, the office is taken by any other member of the Scotch bar?—Yes.

992. And that it commands the highest members of the bar?—Yes, very high members.

993. Do you think that an appeal judge, such as you refer to, could be obtained from the same class of men?—No; two or three would be excluded. You would have to pass over perhaps four or six at the head of the bar; but if you take off those who have a large practice, and who look forward with confidence to the bench, you would still find persons well inclined to accept this office; and while they might not be so good in some respects as the best of the Sheriffs, they would be far better than the average of them. Besides, they would be specially destined to this duty, and it would not be an incidental thing which they were to do with more or less diligence, according as they might find it convenient.

994. Do you propose to make the appointment a life appointment?—Certainly, and with a retiring allowance.

995. Is it not obvious that if you propose to appoint a member of the bar to an office which would take him from a week to ten days once a month away from practice, a practising member of the bar could not hold it?—Yes, and I doubt if he should.

996. Therefore he must give up the hopes of future practice?—Like a great many of the Sheriffs who have no considerable private practice, and who occupy themselves with the duties of Sheriff.

997. *Mr. Campbell.*—But they may carry on an extensive chamber practice, and act as arbiters in many cases?—Yes.

998. *Mr. Murray.*—Are you aware whether any County Court judge in England was ever appointed to the bench?—I cannot tell; but I think a person in the position proposed is very much higher relatively to Scotland, than a County Court judge relatively to England. There are about sixty County Court judges in England, and I think we could secure for the district appeal judges in Scotland men of far higher position relatively to their own bar, than are obtained in England for their County Court judgeships. They are more like Sheriff-substitutes; and Sheriff-substitutes in Scotland have a great deal higher work than County Court judges. Their work, when examined, comes to be to a large extent what we dispose of in our Small Debt Courts; and there are far more difficult cases disposed of by the Sheriff in his ordinary court, than are disposed of by the County Court judges in England. Their jurisdiction is limited to cases of £50, whereas in the Sheriff Courts it is unlimited.

999. *Mr. Shand.*—You have said that you think it an advantage to have a single judge, in respect of the responsibility which he feels to attach to him. Does it occur to you as objectionable that the appeal should be to one judge only?—If you secure the superiority of the judge to whom the appeal is taken, that may be justified, but not in the same court.

1000. You say the present system does not guarantee that the Sheriff shall be superior to his substitute. Do you think that a system which would exclude men of the highest practice at the bar from the office of superior judge would be better than one which includes that class of men?—It would be better for the country generally, but perhaps not for the small part of Scotland in which these men exercise their jurisdiction. The average of Scotland, as to professional level and ability, would be much higher under that system than it is at present.

1001. Why do you think so?—Because persons are now eligible for the office of Sheriff, and are appointed, who are very far from being at the head of the bar, and who never had almost any practice.

1002. Would you expect men in large practice to accept the office you suggest with £1500 or £2000 a year?—I think very many would take office for life with a salary of £1500 or £2000, and a retiring allowance.

1003. Renouncing their practice?—Yes, except a little that they may pick up, and they might take proofs. But I think that for £2000 a year you would get very good men indeed. Unless the bar is a great deal wealthier than it used to be, I think there are not a few men of good position who would not reject £2000 a year, with a retiring allowance, without serious deliberation.

1004. You have mentioned the delay which exists at present in the Sheriff Court; suppose the Commissioners came to be of opinion that the constitution of the court should remain as at present, have you any suggestions to make for lessening that delay?—I am coming to that.

1005. One of your reasons for requiring a change, is the delay that occurs between judgments; would that not be obviated by requiring the Sheriff to go more frequently to his county?—Of course, and that would interfere with his private practice also.

1006. Except that you would not contemplate the same length of visit?—No. All these are considerations. Besides what I have proposed, there is an intermediate proposal providing for eleven Sheriffs; and I think if you take away their administrative work, and make them do mere appellate work, that would do.

1007. Do you think the number of Sheriff-substitutes might with propriety be reduced?—I think they may.

1008. *Mr. Paterson.*—Do I understand you to say that the duties of the Sheriff as a practising advocate in Edinburgh sometimes conflict with his duties as Sheriff?—I am afraid so. Unless he is extremely zealous in the discharge of his public duty, if he has his own private cases, he will not hurry to go down to his county, even though his own presence may be desirable. It is a sacrifice to give up cases in the court, though he knows that there are appeals waiting for his decision in his county which can only be disposed of after an oral hearing.

1009. Do you know any special cases?—I understand so, but they don't come under my observation. The Sheriff of the county in which I am has always lived in the county.

1010. Of course you are aware that he cannot practise in cases from his own county?—Yes.

1011. Another of your observations was, that some of the Sheriff-substitutes felt themselves discredited by the principal Sheriff occasionally presiding in their courts?—I put it as a general theory that it is a discredit to the office. If you have a person holding an office of that kind, and somebody else is to come down, not to relieve him, but to supersede him, that has a tendency to discredit the court. Happily most of the Sheriffs are gentlemen of such delicacy and propriety, that they will take care not to make it disagreeable.

But there it is, and the fact of their doing so discredits the office.

1012. Your opinion is that it tends to throw discredit on the Sheriff-substitutes?—Yes.

1013. You said the principal Sheriff of your county takes your duty occasionally?—Yes; but it is always by arrangement with me, and the cases in which he has done so have always been for my accommodation.

1014. Can you say that there is any feeling of discredit from the Sheriff-principal presiding, on the part of the practitioners at your bar?—I don't suppose it.

1015. Or the community of your county?—It never happened in my county.

1016. The Sheriff-substitutes don't feel it?—Oh yes; I believe they do. What I stated was, that it tends to discredit the office, and I have heard some of the Sheriff-substitutes express that feeling more than once. Unless the Sheriff discharges his duty with a great deal of delicacy, it is very likely that it will occur.

1017. May there not be cases in which Sheriff-substitutes would find themselves rather encouraged by the Sheriff-principal taking the bench occasionally?—I think there may be.

1018. And where the practitioners would feel themselves satisfied?—I have never spoken to them about that matter. It is a very delicate thing to talk to them about their feelings with reference to Sheriff and Sheriff-substitute.

1019. Do you not believe that in some cases public confidence in the Sheriff Court may be strengthened by the Sheriff-principal occasionally doing the duties?—It could only do so in the particular cases which he disposed of.

1020. You don't think it would have any beneficial effect on the community in general?—I don't think so; but I am particularly ill qualified to give evidence about that. I have spoken to other Sheriff-substitutes about it; but it has not happened in my own experience, because my Sheriff has thought that I discharged the duties quite efficiently, and he has not found it for the public advantage that he should discharge them except when I was not present.

1021. In regard to the inconvenience of the Sheriff-principal not having an opportunity of seeing the witnesses, and noting their demeanour, have you found in your own experience any real practical difficulty to arise from that?—Yes. I have thought that the cases would have been differently decided on appeal had the witnesses been seen. There is a very large number of cases in which the question is as to credibility, especially in cases of affiliation and aliment, where the pursuer and defender are both examined, and make conflicting statements, the question being, which is speaking the truth? In regard to the matter of credibility, I think that seeing the witnesses is of very great importance, and that the notes of evidence, even if very well taken, don't afford sufficient means of judging of the matter of credibility.

1022. The Sheriff-substitute's notes give the import of the evidence?—Oh yes; my own notes have been taken very carefully. It is very hard work taking them; and I have a suggestion on that subject to make to the Commissioners.

1023. Is it your practice where you find a witness who hesitates, or pauses for an unusual time, or gets confused, to make a record of it for the use of the Sheriff?—No; I have never done that. I have sometimes observed that this witness gave his evidence with great candour, or with every appearance of veracity, where I thought the witness a good one; but beyond that I did not see that it was the function of the judge to make comments.

1024. Supposing the witness had not given his evidence with candour, might that not be done with advantage?—I have done that, not in the evidence, but in my note upon the case. I have stated that the manner in which the witness gave his evidence did not inspire confidence.

1025. Would that assist the Sheriff-principal in advising a proof?—I think so.

1026. In that way you would give a picture of the evidence, if not a photograph?—I would rather have a photographer, and let the picture of each witness be taken. It is the expression of the face that is the thing, and it is not possible to describe it. One always looks you straight in the face, like an honest man, and another looks away from you; but I don't think it would be safe for judges to write down their impressions.

1027. *Mr. Webster.*—Would you apply to the judges of appeal the same limitation that is applied to the Sheriff, namely, not to take business from their own district?—I suppose that would be necessary; but I think their local ties would be so inconsiderable that it would not be of much consequence.

1028. *The Chairman.*—Your view seems to be that they should have no practice at all?—I think most likely that would be the result. If their districts were large so as to occupy a good deal of their time, that would prevent them from practising. If the Commissioners are of opinion that while the present system should be changed in the way of enlarging the area of the jurisdictions, the area shall not be so large as to prevent practising lawyers holding them, something like the present system would be continued. These matters deserve the serious consideration of the Commissioners.

1029. *Mr. Murray.*—The judges you propose would have none of the administrative work which the present Sheriffs do?—By the proposal to reduce the Sheriffs to eleven, they would be relieved of the duty of holding courts when they happened to be in their county, and of holding Small Debt Circuits, which I think is a waste of time, and of no advantage to the public. I believe the Sheriffs are nearly all of that opinion. But whether they should be relieved of their administrative duties is a large and important question. If the districts are made large, they cannot exercise their administrative functions; if what I propose be adopted in its fulness, their duties would have to be confined to those of appeal judges. If an intermediate scheme is adopted, such as reducing their number to one half, it is for the Commissioners to consider whether they should be relieved of their administrative duties, or to what extent they should be relieved of them.

1030. *Mr. Webster.*—If the administrative duties are not left with the Sheriff-principal, or the appeal judge, in whom would you place them?—There is no choice. In the resident Sheriff.

1031. How would you do in counties where there are several substitutes?—I think it is very easily disposed of. The whole administrative duties would rest upon the resident Sheriffs. I would give each of them jurisdiction over the whole county. I have not yet stated whether I would propose that the number of the Sheriff-substitutes should be reduced; but supposing the present system to continue, each Sheriff might have power over the whole county, because there would be great practical difficulty in dividing the counties; but each would act in his own district by mutual arrangement. In such places as Edinburgh and Glasgow there is no difficulty, because though there are three or four Sheriffs, one of them would be *primus*,—*primus inter pares* if you like,—and it would be his duty to take charge of the keeping of the peace, and of the arrangements for the distribution of the business among the whole body of Sheriffs. In Glasgow there are three or four Sheriffs; but that is such an exceptional case, and the number of appeals is so great, that it is more than ordinary work for an appeal judge. You could not include it in any appeal district; and you would have to make a special arrangement, Lanarkshire being quite large enough for an appeal judge, even if the appeals were greatly reduced. I was asked whether I proposed an alteration of the districts of the Sheriff-substitutes. I was requested by a person in authority to make such a proposal, and I did so. That proposal has no peculiar value, and it is entirely my own. It was just an attempt, with a little study of the geographical conditions of the country, to make out a rough scheme by which eight or nine of the jurisdictions might be dispensed with by enlarging them.

1032. *Mr. Shand.*—What is the number now, and to what do you think they might be reduced?—The num-

Francis Russell.

ber of districts at present is fifty, and deducting ten would reduce it to about forty. There are difficult questions in regard to the Highlands and Islands, owing to their geographical position; but I have not gone into detail in regard to these.

1033. You hand in your scheme as part of your evidence?—Yes, I can do so.

1034. *The Chairman.*—Did you prepare it with reference to your examination now?—No. I prepared it with reference to the duties of the Sheriff-substitutes, at the time when I was in communication with Government. I state this because it was not an ultroneous proceeding on my part; but I did so at the request of a person entitled to ask me to do it.

1035. *Mr. Gordon.*—I think you prepared them at my request?—I did. I prepared one of them at your request.

1036. And I think the other also. You thought there might be a fund set free by the consolidation of Sheriffs' districts?—Yes. When you were Lord Advocate you suggested that there might be a difficulty with the Treasury, and one of the tables was made up with reference to that.

1037. In point of fact, do you know that the public avail themselves largely of the power of appeal to the Sheriffs?—Yes; much too largely. The Sheriff in my county has again and again told me that he thought nine-tenths of the appeals were taken for the purpose of delay, and a large proportion without the slightest prospect of the judgment being altered.

1038. How many of your judgments have been altered in the course of a year?—I have not a return; but very few.

1039. You said there were many cases in which there were alterations in consequence of the Sheriff not having had the benefit of seeing the witnesses?—If I said many I was wrong; all I meant to say was that there were cases.

1040. How many cases have been advocated from your Sheriff?—I have not got the return. The advocations don't come back to the Sheriff; but they are not very many. The expense has been the impediment; but under the recent Act considerable facilities have been given for bringing appeals to the Court of Session, no caution being now necessary; but it will depend very much upon the Court of Session how far advantage can be taken of it, for the expenses are too heavy to make it easy for litigants to go there. What they principally complain of is the expense of printing, and the expense of two counsel in the Inner House. So long as that is considered necessary, I don't think that there will be a very large number of appeals, but there is every facility for bringing them.

1041. You have said that a certain degree of discredit attaches to the resident Sheriff from its being in the power of the Sheriff-principal to supersede him at any time. Do you think that operates in any way to prevent efficient men from accepting the office?—It is difficult to tell. They probably don't know it till they have accepted the office, and it is difficult to say how far it may have presented itself to their minds.

1042. *Mr. Shand.*—Are there not a great many applicants from very good men for every office of Sheriff-substitute that falls vacant?—Those who are in the Parliament House have better information as to that than I have.

1043. *Mr. Gordon.*—Is there not a convenience in the Sheriff being able to take the business, and in that way to liberate the Sheriff-substitute for a short time?—A very great convenience, and that is one of the things to be looked to. There must be arrangements made for their absence. The judges of the County Courts in England have two months during which they don't hold courts. At present the absence of the Sheriffs-substitute is not generally by arrangement with the Sheriffs; in the majority of cases they have to make their own arrangements. Sometimes the Sheriffs are exceedingly accommodating, and take the duties; but I think, as a rule, the absence of the Sheriff-substitute must be without special arrangement with the Sheriff, except getting his consent to the appointment of any particular substitute.

1044. Do you know whether it is the fact that local Sheriffs, who are discharging their duties in a limited district, are sometimes apt to get mixed up with local disputes?—Occasionally, and the only way of preventing that is to raise the character of the office; and I don't think there is much of that now.

1045. *Mr. Murray.*—Have you ever considered whether that objection might be obviated by applying to the Sheriff-substitutes the principle applicable to military and other appointments—namely, removing them every five or six years?—That never occurred to me; but I don't see any reason why they should always live at the same place, except their domestic arrangements. When you have given them official residences, which they want very much, I don't see why they should not be transferred to other jurisdictions if they are getting into entanglements of any kind in the immediate locality, just as Methodist preachers are transferred periodically from one place to another. But one of the great difficulties in regard to the Sheriff-substitutes is the difficulty in getting houses, because very often houses of the kind they require are not to be had at the places where they are stationed.

1046. *Mr. Shand.*—You have stated as one reason why you thought there should be an alteration of the constitution of the courts, the great cause of delay by frequent appeals. Don't you think that admits of considerable improvement?—I think so. I shall refer to that afterwards. Another question is, Ought any resident Sheriff to be capable of acting for any other resident Sheriff as his deputy, and if so, under what conditions? In the English County Courts Act (1867) there is a clause by which any County Court judge may act for any other judge of County Courts as his deputy. There is great convenience in that. The duties to be discharged in two counties are much the same duties, and no one is so well qualified to discharge them as a judge from another county; and if what I propose were adopted, the work would probably be better done than it is at present by a deputy, who has no special experience in regard to the duties. My answer to that question would therefore be, Yes, with the approval of the Lord President. In the case of the sudden illness of a Sheriff-substitute, where the Sheriff cannot be got, it would be extremely convenient to have the Sheriff-substitute of another county, who would come and hold courts for him, either in civil or criminal cases, or in both, such arrangements being made as would prevent abuse.

1047. *Mr. Campbell.*—Are you aware that that end has been attained under the existing system?—I doubt if it is lawful, though if he acts without getting any additional emolument, perhaps it may be; but I doubt whether it is lawful for the Sheriff to appoint the Sheriff-substitute of an adjoining county to act in his county.

1048. *The Chairman.*—What is the disqualification?—He is not entitled to hold any office of profit.

1049. But it is not an office of profit if he gets nothing for it?—No; but the terms of the Act are 'any office.'

1050. *Mr. Shand.*—You spoke of arrangements to prevent abuses; what abuses do you refer to?—The Sheriff-substitute is not entitled to be absent from his county more than six weeks in any one year, or more than two weeks at any one time.

1051. What abuses do you contemplate?—He might go away more than was convenient. I think there should be a general provision, such as there is in the English County Courts Act, that it should be competent for any judge of a County Court to act as substitute for any other County Court judge. The next question is, Ought there to be any alteration in the rules as to occasional absence of the resident Sheriffs? There might be some alteration, I think, if a substitute is provided. At present the Sheriff-substitute is not entitled to be more than two weeks absent, which is a very short time: it entirely precludes an excursion to the continent or to any distant place, and I think it is an unnecessary limitation. If proper men are appointed, and they have the responsibility of seeing the duties discharged, I don't think there should be so labsolute a rule as to their periods of absence.

1052. *Mr. Campbell.*—On special cause shown, the Sheriff has the power to extend his substitute's leave of absence?—The condition is the providing of a substitute. He must either do the work himself or provide a substitute. The next point is, Ought there to be a readjustment of the periods of session and vacation? I think that such an alteration might be made with advantage. At present the first session is from 1st October to 15th December, and there is then a recess for a month till 15th January, and the court then sits till 15th March; there is then a recess till 3d April, and from that there is no break until the 31st of July—four months. That is rather a long time for a session, and I think an improvement might be made by regulating the periods without making the time occupied by the sessions any shorter. I would propose that the sessions should be—from 1st October to 20th December, from 10th January to 15th April, and from 15th May to 31st July.

1053. What is the inconvenience of one of the sessions lasting four months, as at present?—In large counties, the labour without any break is very heavy to the agents; and there is no advantage of its being without a break.

1054. *Mr. Gordon.*—How many court days have you in each week?—Two.

1055. How long may the duties of the court occupy?—It may be only an hour or two, if there are merely formal motions; but if there are proofs, it occupies longer. If the proofs are long, I take them on separate days, and, if it be necessary, I generally sit for eight hours. There are very few cases in which I cannot conclude the proof in eight hours.

1056. *The Chairman.*—Do you take proofs in vacation?—Yes, occasionally; but not as a rule, unless they are pressing. The procurators think it hardly fair, and there is an unwillingness on their part to do it. If the court was so crowded with business that one could not get through the proofs without taking them in vacation, I should have no hesitation in doing so; but it is easy to take the proofs in session without making special arrangements. I think it would be a good deal objected to if I would make it a practice to take them in vacation. There is next a question of considerable importance. Ought there to be some restriction imposed on the existing option of bringing before the Court of Session, in the first instance, actions in which the pecuniary interests involved do not exceed £50, and are such as may be competently disposed of in the Sheriff Court? I would refer on that subject to the County Courts Act of 1857, which provides that the superior courts can send down for trial in the County Courts actions of smaller amount; and in sections 7 and 10 there are provisions with a view to keeping the business which is thought proper for a County Court within the County Court, for there are a good many provisions in that Act to prevent the superior courts from being occupied with cases which are proper for the local courts. I think there will now be many more appeals coming to the Court of Session from the Sheriff Court, and it is desirable that the time of the superior courts should not be occupied with cases which can be properly disposed of in an inferior court.

1057. Would you regulate that in any degree by the amount at stake?—Yes, what I propose is £50. It might be made £40, but I suggest £50, which is the sum fixed in the English County Courts.

1058. Then you would hold actions for debt not to be competent in the Court of Session below £50?—You might either do that, or you might give a power to send cases of the kind, that you thought should not be tried in these courts, to the Sheriff Court. That power is given to the judges of the superior courts in England. There was a provision in Mr. Moncreiff's Court of Session Bill of 1863, sec. 189, that actions up to £25 should not be competently raised in the Court of Session.

1059. Actions for debt?—Yes, where the pecuniary interest involved did not exceed £50. The Court of Session might have power to remit to the Sheriff Court questions which were not pecuniary claims, if they thought they were actions which could competently have been brought in the inferior court, and ought to have been brought there, and where they thought the expenses to be incurred in the higher court were disproportioned to the importance of the inquiry.

1060. *Mr. Paterson.*—Could the Court of Session make such a remit without previous inquiry into the nature of the case?—The Court of Queen's Bench does it, and many of these things appear on the face of the case. An action of affiliation and aliment is competent in the Court of Session. Now I don't see that the time of the Court of Session should be taken up with questions of aliment of £1 a quarter. I think it has enough to do in reviewing such judgments of inferior courts.

1061. *The Chairman.*—Do you not think there is a sufficient check to the improper bringing of small cases into the Court of Session, in the power which that court has to deal with the matter of costs?—I doubt if it is sufficient. In point of fact, those now in the administration of the court will have their attention called to this, whether there are not now cases brought into the Court of Session which would more properly be brought in the inferior court in the first instance, with a right of appeal.

1062. *Mr. Paterson.*—In some important questions of marine insurance, it is not uncommon to take the premiums paid by one underwriter, which may not amount to £50; would you shut the door of the Court of Session to that case?—No; because there the pecuniary interest is more than £50.

1063. But the money claim is not more?—Well, that might require some regulation.

1064. *The Chairman.*—You put it at £50?—I put that as a suggestion.

1065. £25 has a sort of principle derived from the rule of advocation?—Yes.

1066. *Mr Gordon.*—Is there not an incompetency in any action below £25 at present?—No; not an incompetency. If it had been incompetent, I don't think there would have been such a clause in the bill of 1863; but my suggestion is that it should be £50. Then, in regard to taking proofs, I think it would be an advantage if it were in the power of the presiding judge to take the assistance of a shorthand writer,—not that the shorthand writer should take the evidence from the witness' mouth, but that the judge should dictate it, so that you would have it more full than most judges would write it, and you would have it coming with the authority of the judge. I think it would not be safe to adopt in the Sheriff Court the practice in the Court of Session, because that demands such high qualifications in the shorthand writer that it would be very difficult to get shorthand writers who could be trusted to take the evidence directly. But any shorthand writer can take down evidence to dictation. It would be the duty of the judge to read over the evidence after it was written, to satisfy himself that there was no mistake as to words, which would be the only probable mistake. I believe in some courts, where the work is heavy, that could be done with great advantage. It is a very laborious thing to take notes for eight hours; and if the judge could be relieved from the manual labour of it, I think there might be some advantage to the public.

1067. *Mr. Campbell.*—You mean such discretionary power as is given in the Debts Recovery Act?—Yes.

1068. *The Lord Justice-Clerk.*—Has that ever been acted upon?—I understand so.

1069. *The Chairman.*—You think it would save time?—Those who have experience of it in the Court of Session tell me so. The shorthand writer would be writing while the judge is dictating. He will write it faster than the judge, and probably a little more fully than most judges would think it necessary to take it.

1070. Do you think that would diminish or add to the cost?—It would certainly add to the cost, assuming that the proofs can be concluded in one day, which is generally the case in my court. I have discharged my duties for seven years, and I think there is hardly any case in which I continued a proof a second day,

Francis Russell.

except where witnesses could not attend. With despatch, I find that a great many witnesses can be examined in eight hours, and perhaps forty folios of notes written. If the proof were to be concluded in one day, the employment of a shorthand writer would not lessen the cost, excepting that it would save an hour or two, and the charges of the agents would be somewhat less. There might also be a saving in not detaining witnesses so long, as in some cases witnesses have to stay over a night in consequence of its being late before the proof is concluded; and if by greater despatch it could be concluded earlier, there might be a saving of expense. I suppose the shorthand writer's fee would be a guinea or two.

1071. And the writing out of the evidence?—I think it should only be done with the consent of parties, and that would remove any difficulty on the ground of expense. These are all the points I have to refer to in regard to the constitution of the court. With reference to the extension of the jurisdiction, the first question is, Ought the criminal jurisdiction to be enlarged so as to confer the power of sentencing to penal servitude for any term; and if so, for what term of years? These powers are exercised in England by the Quarter Sessions; and it is a question whether it would be for the public advantage that the Sheriff should have that power, leaving it to those in the administration of the Crown Office to send the case to the Sheriff, or to reserve it for trial before the Court of Justiciary, as they might find it expedient. I have not a strong opinion on this matter one way or other. A very large proportion of the cases which are tried before the High Court or the Circuit Court are cases tried there, not because the particular offence is of an aggravated kind, but because the criminal has a very bad character, and has been several times convicted of theft. It is therefore necessary that a sentence of penal servitude should be passed; and the Sheriff not having the power to pass such a sentence, these cases are reserved for the Circuit Court or the High Court. It would be a considerable relief to these courts if it was thought safe to give the Sheriff the power of dealing with these cases; and while we have the efficient establishment that we have always had in regard to the general management of the Crown office, I don't think there is much risk of evil being incurred by it. But I only put that as a suggestion deserving of consideration. The next point is, Ought the jurisdiction of the Sheriff to be so extended as to embrace any of the pleas of the Crown? Now there are occasionally charges of robbery in which a question arises on the evidence whether it is theft or robbery. As the Sheriff has no jurisdiction to try for robbery, it must be libelled as theft in order to be tried before him; and so slight cases of robbery, such as snatching with some slight violence, must be tried before the Circuit Court. I think it would be for the ends of justice that the Sheriff should have jurisdiction to try these cases.

1072. *Mr. Campbell.*—Might not the Sheriff also have jurisdiction in such cases of rape as Crown counsel might think proper to send to him?—We don't want these cases. We would rather give them to the judges of the Court of Justiciary to try. There are many slight cases of fire-raising, which I think it would be quite proper to give the Sheriff jurisdiction to try.

1073. *Mr. Adam.*—Would you put stouthreif and similar charges under robbery?—That is just another name for robbery. So long as we have in Scotland an efficient system of regulating the distribution of business, with a view to the character of the particular case, I think there would be no danger in giving the Sheriff jurisdiction to try cases which it may be thought for the public advantage to try in his court. The next question is, Ought this jurisdiction to be so extended as to render competent, in cases tried without a jury, but with notes of the evidence preserved, sentences of imprisonment of longer duration than are now competent? At present, without a jury, a sentence of two months is the extreme limit which the Sheriff can award. In England, the Recorders pronounce sentences of imprisonment for a much longer period without a jury; and it is deserving the consideration of the Commissioners whether the power of the Sheriff in these cases might not be extended. I have not a strong opinion on the subject, but I think that if such extended power were given, it should only be with notes of the evidence preserved.

1074. *The Chairman.*—Notes of evidence preserved, for what purpose?—For the purpose of appeal to the Circuit Court. I would not propose to interfere with the power of appeal at present existing in criminal cases. I would preserve the notes of evidence, also, for the sake of affording security that the trial is carefully and seriously undertaken; and also, if necessary, for the consideration of the Secretary of State, in the event of any question being raised about the propriety of the sentence, so that he might have the materials for forming a judgment. The next question is, Ought the Procurator-fiscal to be prohibited from private practice? At present the Procurators-fiscal in some counties occupy themselves very much with their private business as agents and factors, and also as bankers. I think it is a question deserving of consideration, whether it is for the public advantage that they should continue to conduct private business. It may depend partly on the extent to which the districts may be enlarged. If they continue small, it may not be easy to get a person of sufficient position to accept the office of Procurator-fiscal upon the condition that he shall have nothing but his salary; but if the districts were sufficiently large to afford a sufficient salary without drawing unduly on the public revenue, I think it would be for the public advantage that the Procurators-fiscal should not be embarrassed with their private practice.

1075. You think it of importance that the Procurator-fiscal should be a gentleman of position in his profession?—No doubt of it.

1076. And that he should be in the confidence of the Sheriff?—Clearly; and the question is very much a question of expense, whether you can afford such emoluments as will secure the services of a sufficiently good man, if he is precluded from private practice. I think it would be a great advantage to the public, because it is impossible but that he must sometimes be embarrassed in conducting the business of the criminal court with questions in which the interests of his own clients are concerned. Besides, he is often absent on his private affairs when it is very desirable that he should be on the spot to take charge of any criminal matters that may arise.

1077. *Mr. Murray.*—Do you consider that he should be appointed by the Sheriff?—No; I think an appointment by the Crown would probably be better. I believe it is the practice of Sheriffs, when one succeeds another, to continue the appointment of Procurator-fiscal, unless there is some serious objection to the man. But at present he ceases to hold office when the Sheriff who appointed him ceases to hold office.

1078. He holds office at the pleasure of the Sheriff?—Yes; and when the Sheriff who appointed him ceases to hold office, he must be reappointed by the succeeding Sheriff, and there is no obligation to reappoint him.

1079. *The Chairman.*—Do you not think it important that he should be appointed by the Sheriff, whose confidential officer he is, and who is responsible for the performance of his duties?—That is very important, and I think it is a question of considerable practical difficulty. He ought to be on the most confidential footing with the Sheriff; at the same time, he is a public officer, and he ought to be secured from any undue pressure from any quarter in the discharge of his duties.

1080. Are these not duties which the Sheriff has to see discharged?—Very much so, but not altogether. He corresponds directly with the Crown Office.

1081. That is a matter of convenience?—I suspect he is under the orders of the Lord Advocate, though of course the Lord Advocate may send his directions to the Sheriff. However, this is a matter on which, as I said before, I have not a very strong opinion; but I think he ought not to be subject to arbitrary removal.

1082. Are you aware that for a considerable time,

not very long ago, the person who communicated with the Lord Advocate was in some counties the Sheriff-substitute, and in other counties the Procurator-fiscal?—I don't know to what extent that was so. The next subject is the extension of the Sheriff's jurisdiction in civil matters; and the first question is, Is it expedient that the Sheriff's jurisdiction should be extended over all parties in any action where the defenders, or one of them, resides or carries on business within the county, or where the cause of action, whether contract or damage, has wholly or in part arisen within the county? That is taken from the first section of the English County Courts Act. It has happened, I suppose, to all Sheriffs, that cases which were proper to their courts could not be competently brought there, because only one of the defenders resided within the jurisdiction. Now that is not convenient for the public service, and it has been provided for in the County Courts Act by the provision which I have just mentioned.

1083. *Mr. Paterson.*—Are you speaking of the case where a copartnership happens to be the defenders?—No; a copartnership is one person.

1084. These three or four parties may be in different counties, but all individually liable?—Yes; and if the action is competent in any of the Sheriff Courts, I don't see any disadvantage in its being brought in the court which happens to be most convenient.

1085. *The Chairman.*—It would probably be brought in the court of the *forum* of the pursuer in that case?—Probably; a defender must be in the county.

1086. But if there were several defenders, the pursuer would select the county to suit himself?—Perhaps he would.

1087. Is that altogether consistent with our principle?—He cannot call the defenders in all their courts, and his only course at present is to go to the Court of Session. Now I don't know that that is an advantage. The principle *actor sequitur forum rei* holds in England as well as in Scotland; but the difficulty I have referred to was provided for in the County Courts Act.

1088. Are you aware that some years ago an attempt was made to alter the course of procedure from that maxim, and to make all persons resident in Scotland amenable to creditors in Westminster Hall?—Yes; but cases occur every day in which it would be convenient to have such a provision as I have stated. The town of Galashiels has been removed out of my jurisdiction, but formerly one half of it was in the county of Selkirk, and the other half in Roxburghshire; and I remember having a question brought before me in which a firm was in one place, and the partners in another, and there was very great doubt whether I had jurisdiction to try it.

1089. *Mr. Paterson.*—Suppose a case where there were three debtors, and only one of them was convened in Roxburghshire?—But there would be authority to convene them all. The provision is, that in a question with more than one defender residing in different counties, if one of the defenders resides in a particular county, the Sheriff of that county shall have jurisdiction for the purposes of the action over all the defenders. That may require some limitation, but I think it would be attended with advantage. The next question is, whether the Sheriff's jurisdiction should be extended in all cases of aliment or maintenance, as between husband and wife, or parent or child, and as to the custody of children, legitimate or illegitimate. I am not prepared to say whether it would be convenient to extend the Sheriff's jurisdiction in these respects. There are very few cases that occur as between husband and wife, and I don't know that it would be desirable to extend the jurisdiction as to these.

1090. *The Chairman.*—Would you propose to extend the jurisdiction to cases of divorce?—No; only aliment and maintenance. I do not think it is desirable to extend it to cases of divorce; and there are very few of these cases.

1091. *Mr. Paterson.*—Would you extend it to declarators of marriage?—I certainly would not propose to have declarators of marriage in the Sheriff Court, because they seem to me to be about the most difficult cases that can occur. The next suggestion is as to extending the jurisdiction in applications for the appointment of a judicial factor or a *curator bonis*, where the value of the estate does not exceed £500 in personal property, and £50 per annum in heritage. This is to provide for a cheaper means of managing properties of small value, and I do not see any great risk which would arise from entrusting the Sheriff with the appointment of a judicial factor or a *curator bonis* in regard to small estates. The expenses incurred in the Court of Session, where the estate is of small value, are very considerable. The next question is, Ought the Sheriff's jurisdiction to be extended to questions involving right to heritable property, where the rent or annual value of the subject in dispute does not exceed £50? There is a provision in the County Courts Act by which the judges have jurisdiction of that kind in regard to heritable property of limited amount. A great many questions occur in the Sheriff Court where the Sheriff can only pronounce possessory judgment, and where the possessory judgment is of no use. The most ordinary case is that of building a house, where a question arises about the marches, and the adjoining proprietor says, You are encroaching on my ground. There a possessory judgment will not answer the purpose. The party will not build his house on the chance of finding that he has been building it on ground which does not belong to him. Now I think there might safely be a power in the Sheriff Court to decide questions of right to heritable property where the amount is of small value. The next point is, whether the jurisdiction should be extended in all questions depending on use or enjoyment for forty years, or for time immemorial. I don't think it is desirable to extend the Sheriff's jurisdiction to that. Then it is suggested to extend it in all actions of removing, whether arising at common law *ex pacto*, or under the provisions of any statute or Act of Sederunt. I don't know that there would be any objection to that. The next question is, whether it should be extended, 'where in any pending action the validity of any writing is impugned, to determine, for the purposes of such action, the validity of such writing.' It has happened now and then to myself, that in a case where a very small amount was at stake, a question was raised as to the validity of a writing, and the case had to be sisted till declarator was brought in the Court of Session at an expense quite inconsistent with the importance of the matter at issue. I think it would be an advantage to give the Sheriff power to determine the validity of such a writing.

1092. *The Chairman.*—Might it not be attended with some awkwardness if the validity of the writing was established in one action and disproved in another?—That might happen occasionally, but I think the present inconvenience is practically much greater, for the serious expense implied in a declarator often defeats the ends of justice. Besides, it may be raised on the most frivolous grounds, and it is enough that it is raised. The Sheriff cannot say, There is no doubt of the validity of the writing—you are raising the question on frivolous grounds; he must sist the process.

1093. Suppose the challenge of the validity was on the ground of forgery or fraud, would you have the Sheriff try that question himself without a jury or with a jury?—There was a time when there were no juries in the Court of Session to try these cases, but now they are tried by a jury.

1094. Do you propose to give the Sheriff this jurisdiction?—That raises the question whether there should be trial by jury in the Sheriff Court. My own opinion is, that there should not; and that if such a case is to be tried, it should be tried by the Sheriff without a jury. It has been proposed that the Sheriff should try cases with five or seven jurors; but with the experience we have had of jury trial in Scotland, I am not at present prepared to say that it would be for the advantage of the public to have such a thing in the Sheriff Court. The time may come when we shall have that, but we can afford to wait for it. The next questions are with regard to Forms of Process. The first proposal is to adopt the form of writ and indorsement, as in the Court

Francis Russell.

of Session Bill of 1863, where the conclusion is wholly for the payment of money, and to adopt the form of bill or petition where the conclusion is wholly or in part *ad factum præstandum.*

1095. What do you mean by bill or petition?—It is an English form.

1096. Can you not put it in Scotch law language?—I cannot. It is a new term for a new kind of writ, and it was proposed in the Scotch Bill of 1863. However, I am not myself prepared to recommend it. The next suggestion is to alter the present form of process in the Sheriff Court, by making summons and minute of defence imperative, abolishing condescendence and defences, and substituting a replication where the defence opens new matter. At present, under the Act of 1853, the provision is, that if the Sheriff is satisfied that the record can be closed without condescendence and defences, it is closed upon a minute of defence prepared under his eye by the parties or by himself, and in that case there is no opportunity for the pursuer to make any statement as to any matter which may be raised upon the defence. That seems a difficulty in dealing with cases where the record is closed on a minute of defence; and this proposal is, that the pursuer shall have power to make a replication where the defence opens new matter, so that if compensation be stated, the party shall state the nature of that compensation, the result of which may be that the question is resolved into one of law, and a proof is dispensed with; but where there is nothing of that kind, a proof cannot be dispensed with. The other alternative is this: By closing the record on a short summons with a note of the pleas of parties, made up at the sight and with the aid of the Sheriff, condescendence and answers being ordered only in cases in which a full detail of the facts is thought requisite. I think it deserves the consideration of the Commissioners which of these two would be best,—whether the minute with or without any answer, or the note of pleas of the parties stating the pursuer's plea, either in fact or law, as well as the defender's. The summons now states nothing but that he is due this account for goods furnished, and contains no detail of facts. If either of these were adopted, the summons for ordinary debts might be made like the summons in small debt cases, and some expense saved. The pleas of parties at the first diet might be made up as under the Debts Recovery Act.

1097. I understand your general view to be, that the pursuer should have an opportunity of shortly meeting what is in the defence?—I think so. In many cases in my experience a proof would be saved by that, because the pursuer will make such admissions as to make the question one of law. But I beg to say that I have made no special study of the very difficult matter of pleading, which unfortunately in Scotland is very little attended to. I don't say our modes of pleading are bad; but it is a matter which is not so much studied in Scotland as in England; and we have no book on the subject.

1098. *Mr. Paterson.*—In your court, is the record in the majority of cases closed on a summons and short defence?—No; I think in the majority of cases there are condescendence and answers.

1099. *Mr. Gordon.*—Are you aware that the old system of pleading in the inferior court was by replies and duplies?—Yes.

1100. The record was made up upon the reply?—Yes.

1101. That was abolished by the Act of 1853?—Yes.

1102. Replies were also the form in the Court of Session, until that form was abolished by the Act of 1825, after a Commission had been issued on which a number of English lawyers served?—Yes. Of all these, the one I should prefer is a note of pleas made up at the sight and with the aid of the Sheriff.

1103.—Would you allow no amendment of the defences or of the replies by way of revisal?—I would allow them to be amended at any time before final judgment; and that is the next matter to which I was coming. By the Court of Session Act of 1868, sec. 72, the Court of Session have that power in cases coming from the Sheriff Court. I think it would be for the ends of justice that there should be a power at any time to make additions. At present an appeal is not unfrequently taken to the Sheriff, for the mere purpose of allowing the record to be opened and new matter added. The Sheriff-substitute has not power to open the record.

1104. *Mr. Paterson.*—Have you found that the short form of record led to any inconvenience in disclosing the whole facts upon proof?—Not upon proof; but I think proof may be sometimes avoided. The statements in the condescendence and defences frequently afford materials for disposing of the case without a proof. The next suggestion, I think, deserves the consideration of the Commissioners. It is: In causes under £25 in value, whether arising in the ordinary or in the Small Debt Court, ought it to be in the power of either party to require the Sheriff, after judgment, to state a case for the decision of one of the Divisions of the Court of Session, on any point of law (but not of fact), the party asking the case consigning £5, 5s. in security for the costs? The statement of cases is comparatively new to us in Scotland, and in questions arising with reference to registration it was not very successful at first; but I understand that this year they have been in all cases successful, and that no case has been stated which did not sufficiently bring out all the points, so as to enable the judges to decide them satisfactorily. This would give an appeal at very small cost, and I don't think it likely that it would be abused, if the person taking the case had to deposit £5, 5s. in security of costs. There are examples of cases stated in reference to trustees in sec. 63 of the Court of Session Act. It might be a little laborious for the Sheriffs to prepare these cases, if many of them were taken, but it might be a check on the judgments of the Sheriff that he might be called on to state a case.

1105.—Would you combine with that a power to the parties, or either of them, to remove the case to the Court of Session?—I have already suggested that there should be power to take the case direct from the Sheriff-substitute to the Court of Session.

1106. That would obviate the inconvenience of the case remaining in the Sheriff Court, but the point of law going to the Court of Session for decision?—The judges would have nothing to do but state their opinion in the case laid before them, just as in the Registration Court.

1107. *The Chairman.*—Where would the decree go out?—From the Sheriff Court, I presume.

1108. *Mr. Paterson.*—What I understand you to mean is, that a joint case, stating the facts which would bring out the point of law, should go up to the Court of Session pending the process?—No, I mean after judgment. The expenses would not be disposed of in the meantime. One of the parties thinks the Sheriff's judgment bad in law, and asks him to state a case for the Court of Session. That might be done at very small expense. The next point is a very important one. 'In the event of any intermediate appellate jurisdiction being retained, ought there to be any appeal before a judgment disposing of the whole cause, unless with the leave of the resident Sheriff?' There is a provision in the Court of Session Act of last year, secs. 53 and 54, by which reclaiming notes against interlocutory judgments of the Lord Ordinary are not competent without the leave of the Lord Ordinary. I think it might be an advantage that a similar power should be given to Sheriff-substitutes. It is open to abuse, but I don't think it likely to be abused; for it is not to be assumed that they will withhold leave when any serious question arises. But in point of fact, many of these appeals are taken for the mere purpose of delay; and I think this suggestion would be a decided improvement. The next matter is with reference to the Debts Recovery Act; and here there are three questions, viz., Ought it to be repealed, or ought it to be amended? and if so, in what respects? and ought it to be extended to all pecuniary claims under £50? I have never been able to see why persons bringing these actions under those

particular heads, which are covered by the triennial prescription, should be preferred to all the other lieges by getting speedier justice. The cases are not more easy. An action on a bill, for instance, cannot be brought under the Debts Recovery Act, because it is founded on a written document. I think a good many of the details of this Act might be reconsidered; and I very much doubt whether it should be restricted to a limited class of cases. It is not a very convenient mode of framing an Act, to include in it a number of clauses of another Act, in this case of the Small Debt Act; and I think that an independent Act might be drawn up, which would be shorter and more efficacious than the present Act, as it has been constructed.

1109. *Mr. Harrison.*—Do you think that the average fees payable under that Act are fairly remunerative?—They bear no proportion to the work done. No other professional employment is paid on that principle. The same fee is allowed for two cases, although in one of them there may have been ten times more labour involved than in the other. I have had a few cases in my own court under the Debts Recovery Act; but I cannot say that the fees are remunerative.

1110. Are you aware that the system of *ad valorem* fees has been found to work well in the English County Courts?—I am not aware.

1111. *The Chairman.*—In your taxation of accounts, what is it that fixes the scale that applies to the particular case?—The amount of the claim.

1112. Then the principle is similar to this?—No; the principle of the Debts Recovery Act is not that there shall be a small charge for each piece of work done, but a slump sum for the whole.

1113. But it involves so much of the principle, that the remuneration is made to depend on the amount of the claim, on your mode of taxing accounts?—Yes, there are three scales of taxation in the Sheriff Court—£25, £100, and above £100. There is a scale applicable to each of these, the agent being paid according to the amount of the labour, though not on so high a scale in cases of small amount. But under the Debts Recovery Act they are not paid according to the labour. That system has certainly this advantage, that the agent has no interest to prolong the case.

1114. There is this difference of principle, that on your mode of taxing accounts, the amount of the account will depend upon the work done, but the rate charged is different?—Yes. The next question is, whether the small debt jurisdiction ought to be extended; and if so, how far? At present it is limited to £12; and unless there is to be an appeal, I don't know that it is desirable to extend it. Whether, with an appeal upon a case stated, it would be safe to extend it, is a matter for others rather than for the Sheriffs to consider. I am not prepared to recommend its extension. It is not a very satisfactory court, for no opportunity is given for considering the cases, because it is very inconvenient to continue them from one court to another, the courts being generally held at considerable intervals. Judgment must therefore be rapidly given, and it cannot be so satisfactory as if there was time for consideration. That is a matter on which others will probably give evidence; but I would recommend that the appeal which I have suggested should apply in small debt cases on a case being stated; and I think it would not be abused.

1115. At whose option?—At the option of the party.

1116. Either party?—Yes.

1117. Whether pursuer or defender?—Yes; of course it will be the loser.

1118. Would you put it in the power of the judge to limit it?—If he thought it frivolous, I think it should be in his option to decline stating a case; but I think he should be required to give his reason for doing so, because we are all tempted to be a little lazy, and sometimes we might desire to be saved the trouble of making out a case.

1119. The number of small debt cases is very great?—Yes.

1120. In some counties enormous?—Yes.

1121. A small percentage of these appealed would add greatly to the business of the Supreme Court. Would you make such cases summary causes in the Court of Session?—I think they should be dealt with precisely as registration appeals are dealt with.

1122. Do you mean in a Division of the court, and as a summary case?—Yes.

1123. Would that not greatly augment the summary roll of the court?—I don't think many appeals would be taken under the stringent condition of depositing £5, 5s. in security of costs. But there are many cases in which the power to require a case to be stated might prevent careless decisions.

1124. Are not expedition and finality the great principle of the Small Debt Court?—Certainly. But what I am suggesting does not apply exclusively to the Small Debt Court.

1125. *Mr. Shand.*—At present fifteen days must elapse before the Sheriff sees the judgment. Do you think that is too long a period?—I don't think it is too long if there are written pleadings; but I think there should be no written pleadings, and then the cause might be heard at the next sitting of the court five or six days afterwards.

1126. Is it not a common thing that the process lies in the Sheriff Court for fifteen days, and that the case then comes to the Sheriff without an application for an oral hearing or written pleadings?—I believe so.

1127. And these fifteen days are among the days estimated in the delay which occurs?—Yes; and I think it is perfectly possible to shorten the time.

1128. *The Chairman.*—Would that delay be obviated by requiring the appellant almost instantly to state whether he desires an oral hearing, or to give in a petition if he wishes to do so, within a few days?—I think he should state whether he wishes an oral hearing, and then the Sheriff would dispose of the case on the earliest opportunity; but if written pleadings are still to be competent, there must be some time allowed, and fifteen days are not a great deal too much if two papers have to be written.

1129. I am not speaking of the time that must elapse before it is transmitted, but of the necessity of compelling the agents to put in the papers?—It is transmitted the moment the second paper comes in. There is first the reclaiming petition, and it goes to the Sheriff to see if it requires to be answered. I don't know that it would not be better that the other party should make his answer before it goes to the Sheriff.

1130. Should he have fifteen days to put in his petition?—No, clearly not. I think the appeal might be entered very safely within three or four days of the judgment, and the party should at the same time state whether he wishes an oral hearing; and if not, he might have three or four days more to lodge the reclaiming petition; and I think it is worthy of consideration whether that petition should go to the Sheriff to see if it should be answered. Some Sheriffs seem to think that they may order written pleadings wherever they think it advisable; others take the stricter view, that it is only in peculiar cases that they are authorized to order written pleadings. If the Sheriffs are to be frequently in their counties, I believe it would save expense and prevent delay if written pleadings were not allowed, but the discussion confined to an oral hearing. With reference to the amount of work done in the criminal courts, I wish to state for the information of the Commissioners, that in the year 1865 there were tried in the High Court of Justiciary 39 cases, and in the Circuit Courts 316, being in all 355; while in the Sheriff Courts there were tried, with a jury 1064, and without a jury 1111, making a total in the Sheriff Courts of 2175, showing that more than four-fifths of the whole trials after commitment take place in the Sheriff Courts. I have already stated that at least nine-tenths of these are disposed of by the Sheriff-substitutes, and that they are thus doing very important work in criminal matters. I have said nothing of the question of salaries of the Sheriff-substitutes, but I am sure the Commissioners will be disposed to take a fair view of that. I could enter into details, but I don't know that that is desirable. I

Francis Russell.

think the salaries at present are very inadequate. The expense of living in the country is great,—in many respects greater than in towns. That is so in respect of education, the necessity for providing some means of conveyance, and in a good many other respects. I myself have found that living in the country is more expensive than living in Edinburgh on the same sort of scale; and there is no allowance made for travelling expenses. Moreover, their emoluments are not equal to the total emoluments of the offices of those who work along with them. The Procurators-fiscal and the Sheriff-clerks no doubt have to pay certain expenses of their offices; but deducting these, their total emoluments are often greater than those of the Sheriff-substitute, who is, unlike them, precluded from other means of income. The salaries were fixed after the Act of 1853 was passed, and not on a very liberal scale. The Act fixed them at from £500 to £1000, and the average is about £600; but that average includes the higher salaries. They have been materially increased in Edinburgh and Glasgow, but they have not been increased systematically in Scotland since 1853. In 1863 a memorial was presented to the Government, but it was not very favourably received. Mr. Jameson, then Sheriff-substitute at Edinburgh, interested himself very much in it, and also Mr. Glassford Bell, who was then Sheriff-substitute at Glasgow. The answer to the memorial was, that certain cases would be considered, but that no general revisal would be conceded. In 1865 I was appointed convener of a committee of Sheriff-substitutes to communicate with the Government on this subject, and our first communication was with the Lord Advocate, Mr Moncreiff. We went as a deputation to him, and privately asked his support; but we were not much encouraged by our reception, the question as to the offices of Sheriff and Sheriff-substitute being plainly the embarrassing one. We did not lose heart, however, and I continued to communicate with him and others; and before he went out of office he intimated that the Government were favourably disposed to consider our claims, and that he hoped to get the matter arranged before the end of the session. That Government, however, went out of office. I have placed in the hands of the Commissioners copies of the memorial then presented to Government, which shows, in some detail, the nature and amount of the work done by the Sheriffs-substitute. We again applied to the next Government, and we were largely supported by members of Parliament. Mr. Hardy was then Home Secretary. He looked at the returns, and said he thought that, considering the amount and variety of our duties, the salaries were inadequate. A good deal of negotiation took place with Lord Advocate Gordon, and he gave us his cordial support; but the Reform question came on, and nothing has been done in the question of our salaries. We have, however, the admission of two successive Governments that the salaries are inadequate, and deserve to be reconsidered; and upon that footing the matter now rests. There is one subject which, speaking of Sheriff Jameson and Sheriff Bell, I wish to state to the Commissioners, and that is the claim of the Sheriff-substitutes, where well qualified, to be appointed to the office of Sheriff when a vacancy occurs, assuming that the office, even if modified, is to be continued. Since 1853 there have only been three such appointments. The first was Mr. Bell, who was Sheriff-substitute at Kilmarnock, and who was removed to the Sheriffship of Banff and Elgin; the second was Mr. Jameson, senior Sheriff-substitute at Edinburgh, who was promoted to be Sheriff of Aberdeen; and the third was Mr. Glassford Bell, who the other day was promoted to the Sheriffship of Lanarkshire. I think there are many cases in which it would be right that Sheriff-substitutes should be so promoted, and it would be a great encouragement to them to discharge their duties with energy, if they knew that they had a chance of promotion. At present there is no prospect of promotion held out to them. This was much pressed in the memorial of 1863; and it would be very desirable, I think, that the Commissioners should make a recommendation, if they think it right to do so, that where Sheriff-substitutes have shown themselves well qualified to discharge their duties, their claims should be considered in making appointments to the office of Sheriff. They are eligible for the office by statute, but practically there has been only one promotion in five years since 1853, and the instances have been more or less exceptional.

1131. I suppose you would limit it to such of them as are members of the bar?—Certainly, and those of them who have shown themselves efficient judges.

1132. But you would limit it to members of the bar?—Yes; those who are not members of the bar are not eligible.

1133. Jedburgh is the only royal burgh in your district?—Yes.

1134. Do the magistrates exercise a civil jurisdiction in debt there?—No, I don't think so.

1135. Is there a Dean of Guild Court in Jedburgh?—Yes.

1136. Does the Dean of Guild hold a court and exercise jurisdiction?—I understand so, but rarely; questions being generally settled extra-judicially. In regard to the Commissary Court, I think there is a pretty general opinion that it might be combined with the Sheriff Court. The Sheriff is both Sheriff and Commissary, but there are two offices and two sets of clerks, and I don't see any advantage in that. I think all the duties could be more beneficially discharged in the office of the Sheriff-clerk, and there would be a saving of expense to the public. In the county in which I reside, the offices of Sheriff-clerk and Commissary-clerk are separate, but in some counties the same person holds both offices, and I think it would be an advantage to combine them.

1137. Is the Commissary-clerk paid by fees or by salary?—By fees. As to Justice of the Peace Courts, there seems a great variety of usage in different counties. In some counties the Justices of the Peace exercise a considerable civil jurisdiction. It is not so in the county in which I reside. They exercise only statutory jurisdiction. There are district Justice of Peace Courts held in the four towns of the county—Jedburgh, Melrose, Hawick, and Kelso; and at each of these there used to be a Procurator-fiscal for the Justice of Peace Courts, so that in the case of any crime being committed in any of these districts, the criminal could be immediately apprehended on a warrant got by the Procurator-fiscal of the district from a Justice of the district; but two years ago it occurred to the Justices of the Peace to make a change, and they arranged to have one Procurator-fiscal residing in Jedburgh for the prosecution of all cases in the Justice of Peace Court, and that his duty should be restricted to the prosecution of statutory offences; so that at present, in the large county of Roxburgh, there is no authority to deal with a criminal case except the Sheriff; and persons from the remotest parts of the county, such as Liddesdale, twenty or thirty miles from Jedburgh, are continually brought up before me on the most trifling criminal charges, such as cases of assault which are punishable by a fine of 5s. or 10s., in consequence of this practical restriction by the Justices of the Peace of their power to deal with cases. The cases mostly dealt with before them are offences against the Road Acts, the Tweed Acts, Public-houses Acts, and poaching cases. To show the large number of offences against the Tweed Acts, I may state that during the last year the Justices have tried them all, and I have had nothing to do with them; but in the year before last I tried ninety persons for offences against the Tweed Acts, and there were besides about twenty-four more who were tried by the Justices of the Peace for the Kelso district, making in all about 114 persons. At present these are all disposed of by the Justices of the Peace, the Procurator-fiscal going down from Jedburgh to whatever district the cases may be tried in. I may mention that the fees payable to the Justice of Peace Clerk in these cases are considerably higher than those payable to the Sheriff Clerk (to be accounted for to the Crown), amounting sometimes, when several cases are tried at one sitting of the Court, to not less than £6 or £8; and I will furnish, for the information of the Com-

missioners, a copy of the table of fees now in force, as fixed by the Commissioners of Supply. These cases are prosecuted under the Summary Procedure Act, with no record of the evidence.

1138. Do you think the mode of paying Fiscals has anything to do with that?—In Roxburghshire we have tried several different systems. They were at one time upon fees, and then they were put upon small salaries. Does your Lordship mean the expense that the county is put to?

1139. Yes?—I think so. That is an element. They get it done at less expense by having one than having four.

1140. But you think that system is not conducive to the preservation of peace, and the suppression of crime?—It is no advantage that a person brought up from a remote part of the country shall be tried before the Justices of the Peace, but there was an advantage in having him tried on the spot. It is a great expense to bring a man twenty or thirty miles by rail to try him for a common assault, or breach of the peace, where all that goes to the Crown may be 5s. or 10s.; but all that is necessary in consequence of there being no local authority at the different parts of the county to dispose of these cases.

1141. *Mr. Gordon.*—Are you favourable to the jurisdiction of the Justices being retained?—That is a very difficult question. The public voice is going very much against it. I don't think the poaching cases are those that they should try.

1142. But for petty offences?—The difficulty is to get hold of them in these cases. I spoke to the Duke of Buccleuch once as to Liddesdale, and he said there are plenty appointed, but that it is difficult to get them to act.

1143. *The Chairman.*—They act in licensing matters?—Yes, both in Petty and Quarter Sessions.

1144. Are you satisfied with the manner in which that is done?—No, I am not. I think individual Justices, whose views are known, are pressed to attend the court. Some persons think there should be no licensing at all.

1145. How would you remedy that?—You must alter the court I am afraid.

1146. What is your suggestion?—I am not prepared to make any suggestion consistent with the retention of their jurisdiction in the matter.

1147. Do the magistrates of the burgh of Jedburgh exercise that jurisdiction?—Yes.

1148. Do they do it in a satisfactory way?—It is more uniform, and the same persons are sitting there. I have not studied the matter, but I think the jurisdiction is unsatisfactory. There is another thing which I wish to point out with reference to the trials before the Justices in poaching cases. The usual practice is to get one or two Justices to try the case; there is no summoning, the judges are selected. I do not mean to say that they are selected because they will be under the influence of those who conduct the prosecution, not being persons of position, or legal experience; but that is the mode adopted, and I don't think it is a satisfactory way of holding a court. If it is a court of Petty Sessions, the Justices of the district should get notice, and have an opportunity of attending if they like, so as to let the judgment of the court have the weight of a considerable number of persons. At present the selection of them is left very much to the prosecutor and the clerk, and I don't think that is satisfactory.

1149. *Mr. Shand.*—Is there a general feeling in your county that it would be better that game cases generally should rather be disposed of by the Sheriff than by the Justices?—There is a very strong feeling among the public.

1150. *Mr. Gordon.*—In the event of the Sheriff being abolished, what would be the proper salary for the persons discharging the duties of resident Sheriffs as you call them?—The Act gives power at present to raise the salaries to £1000, and I think if the jurisdiction were extended, that would in most cases not be more than the proper salary. I think some might be a little less, and perhaps some a little more; but £500 is not a salary for a person exercising the duties of a resident judge. I think there might be exceptional arrangements in the extreme north.

1151. Supposing there was an immediate change, would you continue the resident Sheriff, or give an option to the principal Sheriffs to do the duty?—Give them an option to retire on their salaries? You might do that if you like.

1152. *The Chairman.*—The question was whether you would give an option to the principal Sheriff to take the local duties?—Probably he would have his option. That is a matter for consideration. Some of the good men would not take it. The Sheriff holds his office *ad vitam aut culpam;* and we are practically on the same footing in that respect. I think it should be the person who has carried on the ordinary duties on the spot who should have the preferable claim. The Sheriff has not had an opportunity of attaching himself to the place, and he has not discharged the duties of ordinary judge. If there is to be a person appointed to continue to do the ordinary duties, I think the person who has the preferable claim is the person who has hitherto discharged them.

1153. *Mr. Gordon.*—Do you think there might be a saving of time by the Sheriff being required to go more frequently to his county than he is by the Act of 1853?—No doubt of it.

1154. There are facilities of railway communication which did not exist at that time?—Except in the remote parts of Scotland, every other jurisdiction can be reached in the course of a day. As to these, some exceptional arrangements would require to be made.

1155. *Mr. Adam.*—In the case of there being only one resident Sheriff, would you select that Sheriff from the bar only?—It is desirable to do so, I think, so long as they can be got. I would not make it a statutory requisition; but I think if members of the higher branches of the profession are available for such appointments, it is not for the public interest that the person selected should be taken from the lower branches of the profession, unless on special grounds. I think a barrister is better qualified to discharge these duties, from his education and experience, than members of the other branches of the profession; but I don't say that that should be a statutory requisite. In point of fact it is very rare now that appointments are not made from the bar; and if the office were put on a better footing, there would be greater inducements to members of the bar, of unquestionable position, to accept it.

SATURDAY, 19TH DECEMBER 1868.

Members Present:—

LORD COLONSAY.
THE LORD JUSTICE-GENERAL.
THE LORD JUSTICE-CLERK.
LORD BARCAPLE.
THE LORD ADVOCATE.
EDWARD S. GORDON, Esq., Q.C.
A. R. CLARK, Esq.
DR. BARCLAY.
JAS. CAMPBELL, Esq.
A. ORR EWING, Esq.
GEO. HARRISON, Esq.
JAS. ADAM, Esq.
A. B. SHAND, Esq.
T. GRAHAM MURRAY, Esq.
CHARLES MORTON, Esq.
JAS. WEBSTER, Esq.
J. B. BAXTER, Esq.
ADAM PATERSON, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

A. Beatson Bell.

A. BEATSON BELL, Esq. examined.

1156. *The Chairman.*—You are one of the Sheriff-substitutes of Fifeshire?—I am.

1157. How long have you been so?—Nearly four years.

1158. You have been a member of the bar for a number of years?—I was called to the bar in 1854.

1159. Have you any suggestions to make as to the constitution of the Sheriff Court as consisting of Sheriff and Sheriff-substitutes?—Yes; I have turned that over in my mind, and I shall be glad to state my opinion if the Commission wish it. It is perhaps rather a delicate matter for one holding the office of Sheriff-substitute to urge changes in the matter of the constitution of the court; but, at the same time, having formed an opinion, and the Commission having been good enough to ask what that opinion is, I think it right to state that I consider the present constitution of the court anomalous, and in some respects unconstitutional. There is no doubt, I think, on the other hand, that there are certain advantages attending the present constitution of the court, and it is for the Commission, and ultimately for the Legislature, to say which of these counterbalances the other. My own opinion is, that the anomalous and unconstitutional character of the constitution of the court counterbalances any advantages which are derived from its form. I say it is unconstitutional, in the first place, that one judge should have the appointment of another judge. Still more, I think, it is unconstitutional that a judge should have the power of doing his duty by deputy, which, I believe, is the true theory of the present constitution of the Sheriff Court. I shall speak afterwards as to the matter of appeal, which enters largely into the subject of the constitution of the court, and therefore I say nothing about that at present. But I would observe, in the next place, that it appears to me very desirable that the chief magistrate of a county should be resident within that county. That was the principle on which I understand the office of Sheriff was constituted at the time the heritable jurisdictions were abolished; but that principle was departed from subsequently, and I think ought now to be returned to. You will observe that I do not say that the Sheriff-depute should be abolished. On the contrary, I say that the Sheriff of the county ought to be resident within the county, and doing the work of Sheriff. Of course it is quite another matter, and a personal matter, in which I give no opinion, whether the fillers of the one office or the other should be selected for the purpose of filling the single office of Sheriff. With reference to the present state of matters, while stating that I do not mean anything personal to the gentleman with whom I have the honour to serve, and with whom I am on terms of the most perfect cordiality in the management of the office, I would say that it is very undesirable that the Sheriff should be entitled at any time to come down to the county, and to take his seat on the bench, and thereby supersede the ordinary resident judge. It may be said that is not a thing very likely to happen; but I should wish to call the attention of the Commissioners to the words of the Act of 1853, sec. 46, where it is enacted, after the enactments about the visits of the Sheriff to his county, that he shall hold a Small Debt Circuit once a year, 'and shall on such occasions, in addition to holding a Small Debt Court, despatch as much of the ordinary business that may be ready for adjudication as the time may permit of.' Therefore it is contemplated by the Legislature that the Sheriff shall come down to his county, and while he is there shall supersede the Sheriff-substitute in his ordinary court. That, I think, is an undesirable thing, because it must necessarily, if done, affect the position of the resident Sheriff in the eyes of the public and of the functionaries in the court. I am further of opinion that it seriously affects the position of the resident Sheriff, who at present is the Sheriff-substitute, that he does not hold the direct commission of the Crown. I think his duties are so important, and his position in the county is of such weight, that he ought to hold a direct commission from the Crown. He ought to be the officer of the Crown in the county. This, I think, should be the case whether the double office is retained or not. If the double office is retained, I think the resident judge ought to be appointed by the Crown, and hold his commission from the Crown equally with the Sheriff of appeal. If it is determined to retain the double office, I should further suggest that the number of the Sheriffs-depute should be materially diminished. The reason for this will be more apparent afterwards, when I come to speak of appeal, as I am of opinion that appeal may be very much limited; but I bring it in at present as it affects the constitution of the court, that the Sheriffs-depute, if retained, should be reduced in number. The result of that would, I think, also be, that if they have many counties to superintend, their functions should be limited to the office of appeal judge, and that they should not be entitled to discharge the ordinary duties of the Sheriff Court. There are other duties of the Sheriff which are at present usually discharged by the Sheriff-depute. In the first place, there is the registration business of the county, which I think might very well be left to the resident Sheriff. There is the duty of returning officer, which, if the number of Sheriff-deputes were diminished, would necessarily fall to the Sheriff-substitute, because, in the hurry of a general election, it would be impossible for the Sheriff-depute to act as returning officer in several counties; but that is a duty also which I think the present holders of the office of Sheriff-substitute might safely be trusted with, and in point of fact they do frequently exercise these duties at the time of a general election. Another function which in my own county the Sheriff-depute discharges to a considerable extent, is that of criminal jury trials. It is the general rule in my county that the Sheriff-depute fixes jury trials, and comes down to the county and takes them. If he finds it inconvenient to do so,

after waiting some time, and occasionally I think longer than is desirable, he intimates to the Procurator-fiscal that he cannot take the jury trials, and requests the Procurator-fiscal to apply to me to take them, which I am always very happy to do. I don't think it desirable that there should be such a system in what I suppose is considered by the public a more important part of his duty than the ordinary work,—that it should be the practice of the Sheriff-depute to come and to supersede the Sheriff-substitute in the exercise of it, unless in special circumstances. I should wish here to say that I mean nothing personal to Mr. Mackenzie, with whom, as already mentioned, I am on terms of the greatest cordiality. I would also say, that whether the double office is abolished or retained, I consider the number of resident Sheriffs might be very materially diminished, and that probably a dozen might be struck off. The districts were assigned before railway communication was known in the country, and places are now very much nearer each other, measured by time and not by distance. I think also, that if you take a man and pay for his whole time, which is the thing that the public does in this case, the Sheriff-substitute being prohibited from taking any other business, it is right that he should have full occupation if possible. In my own case that is not so; and there are several other small jurisdictions in my immediate neighbourhood which are even in a worse position. I might refer particularly to the county of Kinross, which is within a very few miles of my residence, where the population is under 8000, and where the full staff of Sheriff-substitute, Sheriff-clerk, and Procurator-fiscal is kept up. I think that jurisdiction might be amalgamated with my own. A few years ago I considered the matter with reference to other jurisdictions; and the districts that I think might well be abolished are Bute, Clackmannan, Kinross, Nairn, Peebles, Tain, Selkirk, Falkirk, and probably some of the Highland districts, although upon that I speak with diffidence, not having sufficient knowledge in the matter, and being of opinion that probably the Highlands and Islands must be dealt with as exceptional in some degree, owing to the facilities of communication not being so great as in the Lowlands.

1160. *Mr. Baxter.*—Do you mean to reduce the Sheriff-principals only?—No; I mean the Sheriff-substitutes, if the double office is retained, and the single resident Sheriffs if it is abolished.

1161. *The Chairman.*—You mean that these places should cease to be the seats of Sheriff-substitutes?—Yes; but I think it might probably be well to continue them as seats of court, and that the Sheriff or Sheriff-substitute shall hold courts there once a week, or oftener if necessary.

1162. *Dr. Barclay.*—What counties do you propose to amalgamate?—I may refer to a scheme which will be found in the *Journal of Jurisprudence*, vol. x., p. 129. With reference to my own district in the county of Fife, I should wish to bring under the notice of the Commission the very unequal division of that county, for which I am quite unable to account. The Cupar district comprehends a population of 119,000 odds, and the Dunfermline district a population of only 35,400. Of course the business from the two is divided in somewhat the same proportion. The difference in the salary of the two Sheriff-substitutes is only £100 a year, and the work is about three times as much in the one as in the other. These are all the observations that I have to make in regard to the constitution of the Sheriff Court.

1163. *The Lord Advocate.*—Why do you think it desirable that the chief magistrate should reside in the county?—Because he is the person responsible for the peace of the county.

1164. Are you aware of the ground upon which he was prohibited from residing in the county?—I understand it was in order that he might be in closer communication with the Lord Advocate and other officials in Edinburgh.

1165. Was it not also that he should be removed from local influences?—It may be so.

1166. Do you not think that a material and important element in the matter?—I do not think so.

1167. Supposing it had been found before the Act of Parliament passed that that did take place, what would you say?—Society was in a very different state then.

1168. You would not apprehend that that would take place now?—I think not; and in Edinburgh and Lanarkshire, where the Sheriff-depute is resident within his county, I am not aware of any inconvenience having been felt.

1169. *Mr. Shand.*—Do you think that the system of one judge appointing another has not worked well in the way of producing good Sheriff-substitutes?—That is rather a delicate question to put to a Sheriff-substitute. I think it is more for the public to say.

1170. Don't you think that, as a rule, the Sheriff-substitutes throughout Scotland are very good men?—Of course I would say yes to that; but it is a delicate question, I think, to urge on a Sheriff-substitute.

1171. *The Chairman.*—The question is substantially this, whether the Sheriffs have, as a rule, well exercised their power?—I think so. I put the objection to the system upon the constitutional ground.

1172. *Dr. Barclay.*—Is it not important that the sanction of the heads of court must be got to the appointment of a Sheriff-substitute?—I am aware of that, which is no doubt in some respects a safeguard.

1173. *Mr. Shand.*—Has not the Sheriff a material interest in appointing a very efficient man?—I should think so.

1174. What do you refer to when you say you should think so?—I think it is desirable to have an able coadjutor in the work of the court. I cannot conceive a man appointing an inferior person for the sake of the public thinking that that person is inferior.

1175. Therefore the Sheriff has the strongest possible motive to appoint a good man, and in point of fact that is the rule?—I think so.

1176. *Mr. Paterson.*—Have you found any practical difficulty to arise from the principal Sheriff occasionally taking part of the ordinary business of your court?—No; he does not as a general rule in my district do so, unless in jury trials as I have explained.

1177. Have you any complaints from your bar on the subject of his taking the duties which you think might be done by the Sheriff-substitute?—No; I am not aware of it. I am not likely to hear of such complaints.

1178. *Mr. Adam.*—With reference to extending the jurisdiction of the resident Sheriff, would you take a prisoner to make a declaration from the end of one county to the middle of another?—Yes, by railway, and that would probably be done much quicker than in the old days when he was taken to the county town by gig.

1179. *Mr. Baxter.*—These cases will not be numerous?—No.

1180. *Mr. Adam.*—Don't you think it is an objection with reference to a man who is only apprehended on suspicion, to send him by the public railway in the custody of police officers?—That is a question of degree. It is always unpleasant to be taken by officers through the public streets; but that must be done.

1181. *Mr. Baxter.*—It is done in every case in the county when a man is apprehended and taken before the Sheriff?—Yes.

1182. *Mr. Adam.*—You say it is a question of degree?—Yes; and in the districts which I propose to amalgamate with my own, Kinross is not above fifteen miles from Dunfermline by railway, and Alloa is about twelve miles on the other side. I cannot see that it is a greater hardship to take a man by railway from Alloa or Kinross to Dunfermline, than to drive him in a gig from the borders of Clackmannan or Kinross-shire to the county towns of these jurisdictions.

1183. *The Lord Justice-General.*—What do you mean exactly by saying that it is unconstitutional for one judge to appoint another?—Because I am not aware of any other instance in which that is done.

1184. You mean that it is unknown?—It is unknown to the British constitution in any other case, so far as I am aware.

A. Beatson Bell.

1185. *Mr. Campbell.*—You think it is not conformable with the theory of judicial appointments that such a thing should be done?—Quite so. I think the appointment should flow from the Crown.

1186. *The Chairman.*—Is that also what you have in view when you say it is anomalous?—Yes.

1187. *The Lord Justice-General.*—Then your chief objection to the existing system is, that it is an arrangement that is unknown in other cases or in other countries?—Yes.

1188. Do you think that a great evil in itself?—I think so.

1189. *Mr. Shand.*—You stated that you have a scheme by which about a dozen resident Sheriffs might be dispensed with; does your scheme also embrace the number of the Sheriffs-depute that you think might be dispensed with?—No; I have not considered that fully.

1190. Have you considered it at all?—Yes, I think that might be done; but I have not considered the details.

1191. Have you formed any idea as to the number?—No; not the precise number.

The next head of the notes which have been furnished to me is, the Sheriff's jurisdiction with reference to limits, and, *first*, in civil matters. I am of opinion, under this head, that it is expedient that the small debt jurisdiction of the Sheriff should be extended. I have come to be of that opinion from its expeditious and its cheap character, and from finding that it is the most popular jurisdiction which the Sheriff exercises. In the returns of 1863, I find that there were 396 cases raised at Dunfermline under the Small Debt Act in 1863, and in 1867 I find, from statistics which the Sheriff-clerk-depute at Dunfermline has been kind enough to prepare for me, that the number was 627; the amount sued for in 1863 was £1450, while last year it had risen to £2430. On the other hand, I find that the ordinary court business has fallen off to a considerable extent; for while in 1863 there were 19 cases raised under £25, concluding for a total sum of £279, last year there were only 8 cases raised, concluding for £161, 19s.; and of actions above £25 in 1863 there were 23 raised, concluding for £2300, while last year there were only 13 raised, concluding for £563. The result of that upon the whole is, that the small debt cases are very much more numerous than the cases in the ordinary court, and are for three times the pecuniary amount. It may be a somewhat limited experience in a small district; but from that I would be disposed to say that the small debt is a favourite jurisdiction with the public, and I think therefore it is capable of being extended.

1192. *The Lord Justice-General.*—Do you think it is as popular with defenders as with pursuers?—The number of cases brought into a court can only be judged by the number of pursuers. I suppose no action is popular with the defender.

1193. Not the action, but the court—the jurisdiction?—In small matters, I think the defender, when not fighting merely for delay, would rather have the case disposed of at once, than have the delay inseparable from the ordinary court.

1194. Then you think it is equally popular with defenders as with pursuers?—I should think so, as far as I can judge; but my opinion is not much worth upon that, as that is a point which statistics cannot touch, and I do not come into contact with litigants so as to hear from defenders themselves whether they consider the court popular. I was also going to give another reason why I think the small debt jurisdiction might be extended, and that is from the experience we have already had of the Debts Recovery Act. That Act seems to be giving satisfaction. In the first few cases notes of evidence were asked with a view to an appeal; but that has become entirely obsolete, and it is quite exceptional now that notes of evidence should be asked. Both parties prefer that the decision of the judge who tries the case should then and there be given, and should be final in point of fact. From that I am disposed to think that it has been a popular measure, and that it may be extended to other actions. I call it a small debt jurisdiction, but I ought to explain that it is with certain limits. I would not extend the small debt jurisdiction further than it is at present, without appeal in matter of law. I think that £12 is sufficiently high to be final both in fact and law; but I would be disposed to take the limit of the Debts Recovery Act, namely £50, and to apply the small debt procedure to all cases under £50, and to give an appeal in point of law in such cases between £12 and £50.

1195. *The Lord Advocate.*—Do you prefer the small debt form of process to the Debts Recovery Act?—They are, to a large extent, at present the same.

1196. But the Debts Recovery Act goes up to £50?—It does.

1197. What object have you to gain by extending the small debt jurisdiction to £50, if you think the Debts Recovery Act has been working well?—Because it has been working well as a Small Debt Act,—not as an Act under which appeal has been practically taken.

1198. Then, substantially, it meets the object you have in view?—With reference to the class of cases to which it applies, but I would extend it to all cases. That is my proposal.

1199. *Mr. Campbell.*—When a note of evidence is not asked to be taken, the proceedings, with the exception of noting the pleas, are the same in a small debt action, and in an action under the Debts Recovery Act?—Precisely; and the finality is precisely the same, because, though an appeal in point of law is provided for in the Debts Recovery Act, the machinery for working that appeal has not been provided.

1200. *The Chairman.*—You would have an appeal in point of law under the Small Debt Act?—Not under £12.

1201. Would you abolish the Debts Recovery Act?—I would abolish it to this extent, that I would consolidate the whole into one. There should not be a particular form of process for debts to which the triennial prescription applies, and another for debts to which it does not apply.

1202. *Mr. Shand.*—Which form of process would you adopt under your consolidated statute?—A modification of the small debt, giving power of appeal in point of law, and providing machinery for carrying that out by means of a stated case, as it is sometimes called, or by means of what is very much the same thing, an interlocutor containing findings in fact and law, such as Sheriffs pronounce at present in proofs.

1203. *The Chairman.*—Would the extending of the Debts Recovery Act to sums under £12, but without an appeal in law, accomplish your object?—I think that is very much what we have at present.

1204. Under the Debts Recovery Act you cannot take a case under £12?—But you have the small debt process.

1205. *Mr. Shand.*—Which of the two forms of process do you find in practice works best,—the proper small debt, or the debts recovery?—The proper small debt; so much so, that the debts recovery is worked in that way without appeal.

1206. *Mr. Baxter.*—If you appeal under the Debts Recovery Act, what does the Sheriff judge of? What goes to him?—The notes of evidence taken by the Sheriff, or dictated to a shorthand writer, and extended.

1207. Does he hear the parties?—No. He has the power of reversing on the proof, or of ordering a new trial, but not the power of ordering an oral hearing. He reviews, without the advantage of a debate, or of seeing the witnesses, the judgment of a judge pronounced after personally taking the proof and hearing parties.

1208. Have you ever heard of a reversal in such an appeal?—No, I have not; not in my own experience.

1209. *Mr. Shand.*—Do you attribute the falling off of your ordinary cases to any dissatisfaction with the ordinary process?—I think so. I think there is dissatisfaction with the ordinary form of process in the Sheriff Court.

1210. And you attribute the falling off to dissatisfaction with the form of process?—Partly.

1211. What leads you to think so?—Because in

many cases the summons is restricted to such a sum as to bring it within the small debt jurisdiction. Under this head of extension of jurisdiction there have also been various proposals made for the extension of the Sheriff's jurisdiction with reference to the matters falling under his jurisdiction, as well as to the mode. It has been proposed that the Sheriff's jurisdiction should be extended so as to give him jurisdiction over all parties in any action where the defenders, or one of them, resides or carries on business within the county, or where the cause of action, whether contract or damage, has wholly or in part arisen within the county. I believe that much inconvenience has been found from the jurisdiction of the Sheriff not being extended to that, necessitating, where defenders live in different jurisdictions, very small matters to come to the Court of Session. It has also been proposed to give the Sheriff jurisdiction in the appointment of judicial factors on small estates, and I think that that might be of advantage in some cases. With regard to giving a jurisdiction in matters of heritable right, I must say I am more doubtful. That is more for the public to say. I think the Sheriffs would be quite willing to accept such jurisdiction, if the public think it ought to be extended to them. The privative jurisdiction of the Court of Session at present no doubt sometimes acts injuriously; at the same time, it is a difficult thing to draw a line—to give a jurisdiction up to a given point in value in heritage, as a piece of land only worth a few pounds a year may have a *pretium affectionis* to the owner, which makes it desirable that a question of that sort should not be disposed of by the Sheriff.

1212. *Mr. Baxter.*—Though that were given, do you think that many cases of great importance would be appealed?—I don't think so.

1213. *Mr. Shand.*—Do you know of cases of hardship occurring in your own district about small heritable subjects, where parties have failed to get a remedy in the Sheriff Court?—I have had to sist process in very small matters, to allow parties to bring a declarator in the Court of Session; and very probably I have heard no more of the case, the expense being so serious.

1214. *The Chairman.*—Would you be disposed to give jurisdiction in cases of *status?*—I think not.

1215. *Mr. Baxter.*—Would you give the Sheriff jurisdiction in questions under the Conjugal Rights Act—in petitions for protection of a wife's earnings?—I believe that might be done. I believe in England that is competent to a police magistrate; and if it is found to work well there, I see no objection to it.

1216. Extraordinary removings?—I believe there is some kind of a removing that is not competent to a Sheriff Court, but I have never seen one. I don't think that is a clamant case of hardship; but if there are really many of such removings, I think undoubtedly the Sheriff's jurisdiction ought to be extended to them. I thought that such a slight matter that I did not mention it.

1217. Would you extend the jurisdiction to suspensions on bills?—To an unlimited amount, do you mean?

1218. Yes; or a higher limit?—I have not considered that point fully, and I should not wish to give an opinion upon it.

1219. *Mr. Paterson.*—You have said you would extend the jurisdiction to the appointment of judicial factors on small estates. Have you considered what the limit should be?—The limit that has been suggested, and that has met with pretty general approval, is where the estate does not exceed £500 in personal property, and £50 per annum in heritage. That is a hard and fast line, and it must be drawn somewhere.

1220. *Mr. Murray.*—You would not give the Sheriff jurisdiction in questions of divorce?—No.

1221. *Dr. Barclay.*—Though you would not give the Sheriff jurisdiction in cases of divorce, would you give it *a mensa et thoro?*—I think not.

1222. Are you aware that the inferior commissaries had that up to 1826?—I am aware of that.

1223. Have you not found in your jurisdiction clamant cases of maltreatment of a woman by her husband, where there was no remedy to be got?—I do not see how I could have been officially aware of such cases.

1224. By their coming before you and making complaints, or the agents for the poor taking them up and saying they had no remedy?—No, I have not heard of any such cases in that way. Of course I have tried criminally husbands for assaults on their wives. I have also had married women, who have been deserted by their husbands, coming to me to ascertain if they could be compelled to come back, but not apparently wishing to have a separation.

1225. *Mr. Baxter.*—Are you not aware that the lower orders are debarred from the remedy of divorce by having to go to the Court of Session?—I am not aware of that. On the contrary, when at the bar I was counsel for the poor, and I saw many poor people get the remedy of divorce in the Court of Session at little or no cost.

1226. *Mr. Clark.*—Were these cases frequent?—They were very common indeed. About one half the business of the poor's counsel was in that class of cases.

1227. *Mr. Shand.*—How many poor cases of divorce have you seen in a year in the Court of Session?—I should say about half a dozen, which, I think, gives a large enough proportion for Scotland.

1228. *Dr. Barclay.*—Were both husband and wife on the Poor Roll?—I have frequently seen that; but most divorce cases are undefended.

1229. *Mr. Campbell.*—Have you had repeated cases of interim aliment?—Some, but not very many.

1230. Is there any reason why the Sheriff should not have power to dispose of cases of permanent aliment?—That comes to giving him jurisdiction in cases of separation and aliment, which I have already stated I think he should not have.

1231. *Mr. Shand.*—Do you mean to say that there are only six cases in which divorce should be given among the poorer classes in this country in the course of a year?—I think so.

1232. Do you think that is about the number of poor people who have a right to divorce in Scotland in course of a year?—Not who have a right, but who are in such a position that it is right for them to exercise it.

1233. *Mr. Paterson.*—You have a large mining population in your neighbourhood?—Yes; a large mining and manufacturing population.

1234.—Do you think that a cheap and easy means of getting divorce might increase the number of cases of divorce?—I have no doubt of it. I have no doubt that if the Sheriff got jurisdiction in divorce cases, there would be plenty for him to do.

1235. *The Chairman.*—Do you think it would add to the laxity of morals if divorce were more easily got?—I think so.

1236. *Dr. Barclay.*—In what way?—I think there should not be very much facility for divorce. It is a very serious matter, and a man should not be entitled just to go to the court and get divorced on the spot.

With reference to the Sheriff's jurisdiction in criminal matters, I think it works very well upon the whole. It might be perhaps advisable to extend his jurisdiction to cases of robbery, but I think to none of the other pleas of the Crown. The Crown authorities would still have the option of sending such cases to be tried before the Sheriff or not as they pleased; but there are many cases of what is legally robbery which are adequately punished by the sentence which the Sheriff has power to inflict. It has been proposed to give the Sheriff power to pronounce a sentence of penal servitude. I think that is more a question for the public than for the Sheriffs; but as long as the Circuit Courts are kept up, I think it is probably more desirable that sentences of penal servitude should be confined to them. I am very clearly of opinion that there should be no extension of the summary power of the Sheriff to award imprisonment beyond two months. In some quarters there has been a proposal to extend it to six months; but I am of opinion that the powers of the Sheriff are

A. Beatson Bell.

sufficiently high in the matter of summary jurisdiction already. With reference to the matter of criminal jurisdiction, I may here remark that I think the Procurators-fiscal should not be allowed to have private practice.

1237. *Mr. Baxter.*—Do you mean in all localities?—Yes, with this explanation, that, as I have already stated, the districts of the Sheriffs should be so enlarged that it would be possible to give an adequate salary to Procurators-fiscal, and to get their whole time. At present it is out of the question. The idea of keeping a Procurator-fiscal for Kinross alone, and paying for his whole time, could not be entertained; but the districts should be enlarged; and if so, the Procurators-fiscal should be debarred from private practice.

1238. At present, in small districts, could you get men to do it?—Certainly not. But it is obvious that the Procurator-fiscal is often placed in a false and delicate position, having clients, and practising as a lawyer.

1239. Did you ever know any evil to result from that?—I cannot speak from my own knowledge, but I have heard traditions to that effect.

1240. *Mr. Clark.*—Do you mean all forms of private practice,—conveyancing, bank-agency, and everything else?—Yes, and bank agencies in particular. I have heard of a case in which a Procurator-fiscal was a bank agent, where he had to investigate a charge against a prisoner who was a clerk in a rival bank, and where he had to examine the books of that bank. I should add that that case did not occur in my district.

1241. *Mr. Baxter.*—Do you think that the matter of bail is upon a right footing at present, the test now being whether the crime was capital or not?—Yes, that is the test.

1242. Supposing a man to commit three petty acts of theft on three different days, you could not admit him to bail?—Not without the consent of Crown counsel.

1243. Supposing a man to be guilty of fraudulent bankruptcy to the extent of thousands of pounds, you would admit him to bail?—I must.

1244. Do you think that a good system?—I think that should be considered.

1245. Would it not be better to leave the matter of bail to the bailing magistrate?—I have not considered that; but speaking on the spur of the moment, I should say that there is no objection to that, and that the Sheriff-substitute should be entrusted with that power as well as Crown counsel.

1246. Reset of theft you would admit to bail to any extent?—I must.

1247. Don't you think it would be better to give the magistrate a discretion?—Do you mean an unlimited discretion?

1248. With an appeal to the Court of Justiciary?—I have not considered the point, but I see no objection to give the discretion to the magistrate, and not to the Crown counsel, to accept bail in cases technically capital. The limitation or abolition of the right of every prisoner to demand bail in cases not capital is a very serious matter; and I hesitate, without more consideration, to give an opinion on it.

1249. *Mr. Paterson.*—What is your experience as to the number of bail-bonds forfeited, and those that are not?—I have never seen a bail-bond forfeited in my jurisdiction. I have seen it in Circuit Courts often, but I have never seen it in my jurisdiction.

As to the writs, pleadings, and procedure, including the investigation of facts,—first in civil matters. First of all, I would say a word as to the record, which I presume is the first writ. The summons, I think, should be as short as possible. The printed form of small debt summons does well in practice. Something analogous to that might be adopted in all cases. With reference to making up the record, after the case comes into court, I have found in practice that making up the record by condescendence and answers is in general not advisable. I find that the short form of record provided by the Sheriff Court Act of 1853 works well, upon the whole. It is cheaper to the clients, and it saves great delay. If condescendence and answers are ordered, I find that nothing more is heard of the case, it may be for months from the prorogations given of consent by the agents to each other, in the way with which we are all familiar in the Court of Session. When the Sheriff has the case before him at the first or second calling, he gets the record closed then and there, and pronounces orders for proof in many cases, and the case is tried and disposed of very soon.

1250. *Dr. Barclay.*—That would do where the defender denies the libel; but where there is a reply, how would you do?—That is a defect, and I think the form under the Debts Recovery Act is decidedly preferable. Under that Act I have always put down the pursuer's reply where there is a separate statement by the defender. I think the rule as to making up the record should be amended to that extent. I would still retain the power of ordering condescendence and answers.

1251. *Mr. Clark.*—Have you found in practice that not making up condescendence and answers leads to continuations of proof on the ground of surprise?—That has led to a few motions, but I have very seldom granted them, because in point of fact I thought there was no surprise.

1252. In most of the cases which have been made up with that form of record, has the proof been as continuous as if the record had been made up by condescendence and answers?—Quite as continuous. I am very strict in adhering to the Act of Parliament about continuity of proof in all cases where that is possible.

1253. *Mr. Baxter.*—You do not suggest any alteration in making up the record?—I suggest the adoption of the form under the Debts Recovery Act.

1254. But you don't abolish the present form?—Not the power of the Sheriff to order it where he thinks proper. With reference to proofs, notes of proofs are taken in all cases at present; but if the proposal which I made a little ago, to extend the small debt jurisdiction and the debts recovery jurisdiction to £50, were adopted, with finality in regard to findings in fact, it would not be necessary to take notes of proof in cases under £50. The findings in fact, or the stated case, would be made on the spot immediately upon the conclusion of the trial. In cases above £50 I am not prepared to abolish notes of proof or review upon the facts as well as the law. Therefore some mode of reducing the proof to writing will still be necessary in these cases; and I am of opinion that there ought to be a power given to the judge or the parties to appoint shorthand writers where these can be obtained, the judge dictating the proof to the shorthand writer. I would still retain the power of the Sheriff to take the proof with his own hand if he thinks fit, because in small cases it might be hard on the parties to make them pay for a shorthand writer.

1255. *Mr. Clark.*—You would give the Sheriff power to order proof to be taken by a shorthand writer if he thought proper?—Yes; and I have no doubt the discretion would be used fairly.

1256. *Dr. Barclay.*—Would you not give the parties a right to demand it?—Yes; but the tendency would be the other way—viz. to avoid the expense of a shorthand writer, by desiring the Sheriff to take notes with his own hand.

1257. The Sheriff dictating?—Yes. In country towns you could not get shorthand writers of such accomplishments as to be able to take down the evidence without dictation; but even then it would abridge the labour very much.

1258. *Mr. Baxter.*—And the Sheriff dictating would also be a check on the shorthand writer?—Yes.

1259. *Mr. Shand.*—Don't you think that would lead to prolixity, even supposing that the Sheriff dictated the evidence?—I have not found it so in the few cases under the Debts Recovery Act in which I have used a shorthand writer.

1260. *Dr. Barclay.*—Do you find any difficulty in getting a shorthand writer?—No; there is a newspaper in Dunfermline, on the staff of which there is a shorthand writer.

1261. *Mr. Shand.*—Do you not think it would lead to prolixity throughout the country?—I don't see how it should. The power of the judge to check that would be as great in dictating to the shorthand writer as if he was himself writing the evidence.

1262. *Mr. Campbell.*—Have you been in the practice of requiring the shorthand writer to read over the notes of the evidence of each witness before the witness left the court?—No; the Debts Recovery Act does not contemplate that.

1263. But don't you think it would be an expedient thing, in the event of a shorthand writer being employed in the ordinary court, where the cases are of importance, that to prevent all after dispute he should, before the witness leaves the box, read over his evidence to him, and that the notes should then bear that the evidence had been so read over, and that the witness expressed himself satisfied with it?—I am not aware what delay that would cause, and I don't know whether a shorthand writer can read off his notes as quickly as ordinary manuscript. If he can, I think that would be a desirable provision.

As to the writs, pleadings, and procedure in criminal matters, I have no observations to make. I think they work very well at present.

1264. *The Lord Advocate.*—Do you attend the taking of precognitions yourself?—In serious cases; as a general rule, in all the pleas of the Crown.

1265. *Mr. Adam.*—Would you give a judge the power to allow an indictment to be amended at any time during the trial, provided that it did not prejudice the prisoner?—He has that power at present, under the Summary Procedure Act; but with regard to an indictment before a jury, that is a more solemn matter, and I think either the Procurator-fiscal or Crown counsel should take care that it is in proper form.

1266. *Mr. Baxter.*—But suppose there was a slight clerical error which would be fatal to the indictment, and that the alteration would do no harm to the prisoner?—But who is to be the judge of that?

1267. The judge, of course?—I think that is putting a delicate duty upon him.

1268. Supposing articles were libelled as the property of John Alexander, and that they turned out to be the property of John Alexander & Co., don't you think that an amendment of the libel to that extent might be fairly made during the trial?—I am adverse to amendments in jury cases. I think the power has gone far enough in summary trials.

1269. *Mr. Clark.*—You mean that you are adverse to amendments after the panel has been passed to the knowledge of an assize?—Yes.

1270. *Dr. Barclay.*—Are you aware of a case in which the only mistake in the indictment was putting the parish as Collessie instead of some other parish, and where the prisoner would have suffered nothing by a correction of that mistake?—That mistake should not have occurred, and I think it would be letting in the thin end of the wedge to allow its correction after the trial was in progress.

1271. Would any injustice have been done to the prisoner by substituting the right name of the parish?—I think the principle of the law of Scotland, that after the prosecutor has moved that the panel be remitted to the knowledge of an assize, the libel should not be touched, is so sacred that no alteration should be allowed upon it.

1272. *Mr. Shand.*—Would you not allow an amendment even if it were proved that no injustice would be done to the prisoner?—No, I would not.

1273. *Mr. Baxter.*—Supposing a mistake was made in naming the parish in which the prisoner himself resided, would you not allow that to be corrected?—No; not after the stage of the trial to which I have alluded.

1274. *Mr. Clark.*—Have you found any difficulty in your county, as to the relation of the Chief Constable and the Procurator-fiscal?—Not the slightest.

1275. Do they always work harmoniously?—They work most harmoniously together.

1276. The Chief Constable admitting the authority of the Procurator-fiscal as the hand of the Sheriff in making his investigations?—I understand so.

1277. Of course you don't doubt that the Procurator-fiscal, as representing the Sheriff, can give the Chief Constable orders with a view to the investigation of crime?—I don't doubt that to be the law.

1278. *Dr. Barclay.*—Does your Chief Constable hold an appointment as Procurator-fiscal before the justices?—He does; but I shall speak as to that in the sequel, when considering Justice of Peace Courts.

1279. *The Lord Advocate.*—Do you think that coal-pit accidents are satisfactorily investigated under the present system?—I think so. The present system is, that the owner of the mine is bound to give notice to the Lord Advocate and to the Government inspector; and very often, before the notice through these channels comes to the county officials, we have already received notice of the accident from the police; and that gives a double chance, so that no coal-pit accident can escape being investigated.

1280. Are they thoroughly investigated?—Thoroughly. A precognition is taken in all serious cases.

1281. Do you think that there is as much care as might be reasonably expected shown by the proprietors of the mines?—I think so, upon the whole.

1282. Does the Fiscal investigate cases of sudden death satisfactorily?—I think so.

1283. Have you nothing to suggest as to that?—Nothing. A warrant for precognition is granted. If there is no suspicion of foul play, I am not present at the precognition; but it is usually laid before me previous to its being sent to Crown counsel.

1284. *Mr. Clark.*—In precognitions in ordinary cases, of course, the prisoner is not there?—No.

1285. And the precognition is taken in private?—Yes.

1286. Do you think that a good system, or would you desire that the prisoner or the public should be present while the precognition is being taken?—I think not. I think the Scotch system works pretty well.

1287. There are cases where there has been suspicion of very grave crime, such as murder, where the public mind is a good deal excited, and it is sometimes said that a prisoner is put on his trial to satisfy the public mind. Would that be avoided by taking the precognition in public?—It would, but the precognition is not upon oath.

1288. It may be?—It may be, but in practice it never is. That would come to be a coroner's inquest not upon oath, and without a verdict.

1289. It might be on oath in these cases?—Not if the party who is suspected of the murder is one of the witnesses examined; at least I should not think it safe to put him on oath.

1290. But he may be put on his trial to satisfy the public mind, though the precognition is not sufficient to convict?—I am not sure that that is the legitimate object of a trial for murder.

1291. But is it not sometimes done?—I never was a Crown counsel, and I don't know their motives for sending cases to trial.

1292. *Mr. Adam.*—Have you seen it done in cases of railway accidents, where death has resulted from carelessness?—I have seen parties put to the bar, and the Advocate-depute give up the case after he has led his proof.

1293. Why?—I did not know the motive of the Advocate-depute for putting the man on trial, or for giving up the case. I think it is not desirable that an Advocate-depute should put any man on trial, if he does not think that he ought to be convicted; but I speak with great hesitation on that point, never having held the office.

1294. *The Lord Advocate.*—Do you think that the present system of taking precognitions in secret is a protection to the innocent? Does it not prevent rumours from getting abroad as to innocent people?—No doubt of it.

1295. Do you think that a material element?—I think so.

1296. Do you think that secrecy or publicity would be most available for securing the ends of justice?

A. Beatson Bell.

—I think secrecy in most cases. Of course there are certain cases where publicity might be the means of bringing forward witnesses who could speak to the case.

1297. *Mr. Shand.*—How are the declarations of prisoners taken in your county? Are the questions put by you or by the Procurator-fiscal?—Generally by the Procurator-fiscal, and the answers are always dictated by me. I often interpose with questions, and I often disallow questions which the Procurator-fiscal wishes to put.

1298. But the prisoner is put under examination by the Procurator-fiscal in your presence?—He is.

1299. Do you approve of that system?—It goes very deeply into the whole criminal system in Scotland, and, with the safeguard of a magistrate closely superintending, I am not prepared to say that it is in most cases objectionable.

1300. *The Lord Advocate.*—Don't you think it would be better to reduce it simply to asking the prisoner whether he has anything to say?—I think so; or, at most, a few simple questions.

1301. *Mr. Clark.*—Can he make any statement, if you merely ask what he has got to say?—He may make a rambling statement.

1302. Must you not put some questions to bring out his mind on the matter of the charge?—I think so.

1303. And if these questions are few, is there any harm done?—It ought to be done within careful limits, I think.

1304. *Mr. Shand.*—Don't you think any questions of that kind should rather be put by the judge than by the Procurator-fiscal?—The judge is not so familiar with the case as the Procurator-fiscal. If the questions were to be put by him, he would require to study the police information beforehand.

1305. Is there any reason why he should not do so?—The information is not to him; it is to the Procurator-fiscal. He may lay it before the Sheriff, no doubt, but that is a third thing that the Sheriff would have to consider. He would have to consider first the police information; second, the precognition; and thirdly, he might have to try the man. I don't think it is desirable to have more passing through the mind of the judge who is to try the prisoner than is absolutely necessary.

1306. *Dr. Barclay.*—Do you see any objection to the prisoner having a right to ask that his declaration shall be read to the jury, if it is libelled?—I am aware that it is not competent for the prisoner to put his declaration in evidence in his own favour when it is not used by the prosecutor, but I have seen it refused in very few cases where it was asked by the prisoner; and these were cases where I thought it was quite right to refuse it, the prisoner having made charges against innocent parties in his declaration, which it was not desirable should be read in open court. Therefore I don't think that, as a matter of right, he ought to get it.

I had reached the matter of review, and first within the court itself. Upon that matter I am of opinion, as I said before, that the double Sheriffships should be abolished, and that there should be no review within the court itself. I am of opinion that an appeal from one judge to another is an absurdity, especially upon matters of fact, where the one judge has heard the witnesses and the other has not. Therefore I am of opinion that there should be no appeal within the court itself.

1307. *The Lord Advocate.*—You don't mean to state it as an absolute proposition, that an appeal from one judge to another is an absurdity?—There may be exceptional cases, when, from the nature of the court or of the questions dealt with by it, it may not be so.

1308. *Mr. Clark.*—Are you aware that there is an appeal from the Vice-Chancellor to the Lord Chancellor?—Yes, but I don't know if the Vice-Chancellor sees the witnesses.

1309. *Mr. Shand.*—Are you aware that the Lord Chancellor sits in very numerous cases of appeal both from Vice-Chancellors and from the Master of the Rolls?—Do you mean both on fact and law?

1310. Yes?—I am not sufficiently familiar with the English courts to speak on that subject.

1311. If that is so, would it be liable to the same condemnation as you have expressed?—I don't think it a good thing in principle, that one judge should review the judgment of another.

1312. Therefore that falls under the same observation that you have made with reference to the Sheriff Court?—I think so; and if there is to be no appeal from one judge to another, I think it is conclusive that there should be no appeal within the court itself, because the system of reclaiming petitions to the same judge is radically vicious. It still lingers in matters of *cessio*, where it is competent to reclaim to the Sheriff-substitute; and if he is disposed to refuse the reclaiming petition, he sends it to the Sheriff. I think that should be abolished.

1313. *The Chairman.*—Do you think that the judge should have no opportunity or power of correcting any error which he may commit in pronouncing a judgment?—There is a power in the Act of 1853 of correcting clerical errors, and that power has been largely interpreted; but I would not allow him to change his judgment after he has announced it to the parties.

1314. He must then come to the Supreme Court?—Yes; but, as I have already explained, there would be very few appeals, because the great mass of appeals at present are on matters of fact. I shall now briefly sketch the scheme of appeal which I would suggest. It is that there should be an appeal to the Court of Session upon stated cases, or upon interlocutors containing findings in fact and in law, between £12 and £50, as already explained. If the case is not capable of being measured by pecuniary value, I would give it on leave from the inferior judge. Above £50, I think, it would be unreasonable to demand finality in point of fact, and I think an appeal should be allowed there both in fact and in law to the Court of Session. It will be for the Court of Session or for the Legislature to determine how that appeal shall be heard there—I mean before how many judges; probably either two or four would be the proper number for an appeal court. Three is rather an unsatisfactory number for an appeal court, because in the event of difference of opinion, the whole judges who have heard the case are then divided two and two. That disadvantage does not apply to two judges or four judges. But I would further say, that such appeal should only be *in fine causæ*, and that there should be no appeals from interlocutory judgments except with leave. Limiting the appeal in matters under £50 to points of law, and limiting the appeal in all other cases to final judgments, I think the Court of Session would be quite able to overtake the whole appeal work of the country, the appeals would be so much diminished in number. With reference to the matter of expense—the smallness of which is, as I understand, urged particularly as the advantage of the present system—I think when you have findings in fact and in law, you will be saved the necessity in cases under £50 of almost any printing at all when the case comes to the Court of Session. All that will be brought up will be the stated case containing the facts and the law, and it will not be necessary to have the mass of printing of evidence which was one of the great causes of expense in the old system of advocations to the Court of Session.

1315. *Mr. Paterson.*—Then you would have no appeal within the Sheriff Court itself?—No.

1316. *The Lord Advocate.*—Have you made any calculation as to the probable expense of an appeal to the Court of Session?—That depends on whether the court is to enforce the rule of having two counsel on each side in every case.

1317. What do you think is the least that it could be had for?—I should think five guineas on each side, if it is a simple point of law.

1318. *Mr. Clark.*—Do you mean nothing but a point of law, or an easy point of law?—I mean a point of law not extending over more than one day's debate.

1319. *The Lord Advocate.*—Do you know any case

where an appeal has been decided for that sum in the Court of Session?—I don't think so in ordinary cases; but in registration appeals on stated cases, which much resemble the system I propose, I do not think the expense much if at all exceeds that.

1320. Have you made no inquiry as to what the expense is in point of fact?—I am aware of the general expenses of the Court of Session,—the amount of fees to counsel, and the amount payable to agents. That would be all that would be required in such an appeal. For one day's hearing, I think the fees would be three guineas to counsel, and two guineas for other expenses.

1321. Have you not inquired into the average expense of a case in the Court of Session?—I am aware that generally it is very much larger than that.

1322. So that your opinion is formed without any information as to the probable expense?—On the contrary, I think the expense of the Court of Session is very large at present; but it is capable of being very much reduced.

1323. What suggestion would you make as to that?—I think a great amount of the present expense is caused by the printing; and I have pointed out how, in cases under £50, that might be reduced to the minimum.

1324. A point of law may arise on the evidence?—I would not print the evidence, because it has not been recorded in these cases.

1325. In cases above £50 that would not apply?—I don't say that five guineas would pay the expenses if the cases were above £50, but such cases could well bear a larger expense.

1326. But is not £5 about the average expense of an appeal at this moment to the Sheriff-principal?—I don't think it is so much, unless counsel are employed.

1327. Then, unless the appeal is to be much better in quality, the litigant had better take the present appeal to the Sheriff?—But I should think it would be much better in quality; and even if it were more expensive, it would be worth the difference.

1328. Are litigants of that opinion? Do they, as a general rule, take the judgment of the Court of Session?—No; because they are deterred by the expense and the delay.

1329. Would they not be deterred under your system?—I think not. They have already had the expense of an appeal under the present system, and that is all they are willing to risk.

1330. But you think the delay and the expense ought at present to prevent cases from coming to the Court of Session?—Yes.

1331. That would not operate, you think, in the other case?—By the time a case is decided in the Sheriff Court by both the Sheriffs, after preliminary appeals before proof, and on appeals on the merits, the losing party is utterly worn out, his means are exhausted, and he would rather submit to a loss than go further.

1332. On the whole, you think the appeal to the Court of Session would be as cheap and rapid as an appeal to the Sheriff?—It might be made so, I think.

1333. What do you suggest might be saved, in addition to the printing?—Do you mean me to go into the details of the way in which an action is heard in the Court of Session?

1334. That is almost essential in order to confirm your opinion?—I shall be glad to do so. I think that the way in which a case is frequently heard in the Court of Session leads to great expense. I may explain that I sat for four years in the First Division as a reporter, and I saw a good deal of what went on in the way of hearing advocations in the Inner House; and undoubtedly, from the mode in which the cases were heard, there was expense which I thought might have been avoided. The system of refreshing fees to counsel has taken such deep root in the bar, that I suppose it cannot very well be got rid of; but I have seen an advocation called at a quarter before four o'clock when the court rose at four; and I have heard agents say that the hearing then cost about a guinea a minute or thereby. I think that might have been avoided, either by abolishing the system of refreshers, and sending a fee to counsel for the case, however long it took or whenever it was taken up, or by some other arrangement as to calling the cases. These are two points on which a good deal of expense might be saved.

1335. Are you of opinion, on the whole, that the appeal might be made as cheap as it is to the Sheriff just now?—Not quite.

1336. Does it not cost at least double?—Double for one appeal; but there would be in general only one appeal in the case, so that I don't know that the expense of appealing would be greater, considering the number of appeals now competent in each case.

1337. But suppose you restrict the appeals to the Sheriff in the same way, what object have you in taking a litigant to the Court of Session, when he is to pay double for the remedy he gets there?—It is always worth more to get the decision of the Supreme Court.

1338. *Mr. Clark.*—Do you think that if there was only one judge in the Sheriff Court, there would not be a great many more appeals to the Court of Session than there are now?—Undoubtedly. There are very few at present.

1339. *Dr. Barclay.*—Do you mean that the appeal should be without caution?—Yes, as is now competent under the Act of this year.

1340. That would increase the number of appeals?—Yes.

1341. *Mr. Shand.*—You spoke of the expense of a Sheriff Court litigation as being ruinous and wearing out to the litigant. What is the average expense, in your experience, of a litigation concluded before you?—Do you mean with a judgment of the Sheriff-substitute and the Sheriff?

1342. Yes?—The statistics will show that.

1343. *Mr. Clark.*—What is the average sum in your decree for expenses?—It varies very much. In the ordinary court it is about £18.

1344. £9 a side?—No. That is the expense of the defender successfully resisting the pursuer's demand. In the other case of pursuer succeeding in a defended cause, the average expense last year was £19, 11s.

1345. *Mr. Shand.*—Can you give the highest and the lowest?—I cannot give that.

1346. How many cases were there?—About twenty actions for debt, besides a few *ad facta præstanda*.

1347. What is the average expense of an appeal to the Sheriff, without an oral hearing?—A few shillings.

1348. And with an oral hearing?—It depends on the scale of the case.

1349. But from what to what?—From £2 to £4.

1350. You mentioned five guineas as what might be the expense of an advocation in the Court of Session. Is that the whole expense?—That is the expense per side.

1351. How do you reach your estimate of five guineas?—I think the counsel should get three guineas; and probably the other two guineas would be sufficient to pay the agent.

1352. And printing, and clerks' fees?—There would be no printing. The stated case or interlocutor might be read by counsel at the beginning of the hearing, or a written copy handed to the judge.

1353. Are not copies as expensive as printing?—Printing a stated case, or an interlocutor with findings in fact and law, would not cost above 10s.—even a very long one.

1354. You would allow 10s. for printing, and for clerks' fees?—Yes.

1355. *Mr. Webster.*—And that is only on one side?—Yes.

1356. *The Chairman.*—And £3, 3s. for counsel on each side?—Yes.

1357. For a case that is heard on one day?—Yes; not to occupy the whole day, but to be called and disposed of on the same day. The counsel may have many such cases in a day.

1358. *Mr. Baxter.*—Then judgment must be pronounced on the same day?—Yes.

1359. *Mr. Webster.*—You allow nothing for coun-

A. Beatson Bell.

sel's clerk?—The magnitude of these fees is an abuse too, I think.

1360. *Mr. Shand.*—Do you contemplate keeping up the power of appeal for the purpose of progress under the Judicature Act, as distinguished from review?—I have not considered that fully. I think it depends a good deal upon whether it is expedient to introduce jury trial into the Sheriff Court. If the public are anxious to have that, I think it would be unnecessary to remove cases to the Court of Session for jury trial.

1361. How many of your twenty cases are advocated or appealed to the Court of Session?—There has been only one advocation since I went to Dunfermline four years ago, and there have been two appeals since the new Act came into force, by which the necessity for finding caution was abolished.

1362. Do you attribute the bringing of these appeals to the facility afforded by that Act?—One of them. One would have come at any rate; it was a heavy case. In the other the Sheriffs differed.

1363. Do you approve of the abolition of caution?—Undoubtedly.

With regard to review in criminal matters, I have no observation to offer. I think the review by suspension in the Court of Justiciary is very satisfactory.

As to costs: of course costs will be much diminished if my plan were adopted in the Sheriff Court. The system of costs introduced by the Debts Recovery Act is an experiment, and I am not prepared to give an opinion upon it one way or other. I don't find that there is any difficulty in getting agents to take cases under that Act; but it may be matter for consideration whether the uniform system is a right one, and whether a person who has a difficult case is to get part of his agent's fees paid by another litigant who has an easy case—the one being overpaid, and the other underpaid. That system is still on its trial, and I think it is more a matter for agents to give an opinion upon than for me.

1364. *Mr. Murray.*—Does not the agent get his payment, taking the chance of the rough and the smooth?—Undoubtedly.

1365. *Mr. Webster.*—Is it right that a man with a very plain and simple case should pay the costs of another who has a difficult case?—That is what I was putting; but I think it is a matter for agents.

1366. *Mr. Harrison.*—Have you heard any complaints from litigants, that they have had to pay more than their fair share of the expense?—I don't come in contact with litigants.

The next matter is the privileges of agents; and I would suggest that the time has now come when there should be a general body of agents for all Scotland, admitted by the Supreme Court, with power to practise in all courts, both supreme and inferior.

1367. *Mr. Shand.*—What would be the advantages of such a system?—If you adopt the system of appeal which I have suggested, it will simplify and cheapen matters, because the same agent will either himself conduct the case in Edinburgh, or he will have a partner in Edinburgh who will do it. He will be saved the trouble and expense of instructing another agent. At present it is considered *pactum illicitum* for a country agent to have a partnership with an agent in Edinburgh, and to share the profits of a litigation in the Court of Session. In England I understand it is not so; and I see no reason for its being considered *pactum illicitum*. On the contrary, I think that, from the raising of the status of the Sheriff Court procurators, the time has come when there should be one body of agents throughout Scotland.

1368. *The Chairman.*—But suppose your more general view not to be adopted, do you see any objection to removing the obstruction of *pactum illicitum*?—No, I never could see why an arrangement of the kind I have indicated should be *pactum illicitum*.

1369. *Mr. Murray.*—If your view of having one body of agents was adopted, I suppose the qualifications would be the same for all. In that case, would you level up or level down?—Country practitioners have been very much levelled up already by the Procurators Act.

1370. According to the present system, a Writer to the Signet must have passed an apprenticeship of five years, and attended a university for five or six sessions; would you require that qualification from all country practitioners?—Not so much as five or six sessions.

1371. Then would you bring down the qualifications of the Edinburgh practitioners?—I think the Writers to the Signet are quite entitled to keep up the qualifications of their body to any extent they think proper. I don't propose to make the others Writers to the Signet.

1372. But you propose to make all one body?—All practitioners. I do not propose to interfere with the corporations of Writers to the Signet, or the Solicitors before the Supreme Courts.

1373. *Mr. Harrison.*—Would you propose that they should still retain certain exclusive privileges as to practice?—Not as to practice. Until very recently, the Writers to the Signet had exclusive privileges in preparing certain writs, but that has been very much broken in upon by recent legislation. Under the Act of this year, a Writer to the Signet is bound, on payment of a small fee, to sign any summons presented to him.

1374. *Mr. Murray.*—What advantage would any one have in being a Writer to the Signet, if a man of lower qualifications were admitted to do everything that a Writer to the Signet can do?—If signet letters are still to be kept up, he would not be a Writer to the Signet, and he would not have the social status that Writers to the Signet have.

1375. Then you don't contemplate that the general body of practitioners should be able to practise in everything?—They would be able to practise before the court.

1376. *Dr. Barclay.*—I thought your remark was only applicable to provincial Solicitors following their cases into the Court of Session?—No, I go further than that.

1377. *Mr. Murray.*—You would make one body of practitioners for the whole country, to practise in all courts?—Yes.

1378. *Mr. Paterson.*—Supposing your plan for a general body of practitioners for Scotland was carried out, what test would you impose as to their qualifications? Would you require them to have attended college?—I think so. They are all obliged to do that at present.

1379. For how many sessions would you require that they should attend?—I have not considered that fully, but long enough to give them a liberal education.

1380. Without such a test of their qualifications, I suppose you would not place them on a parity with any of the legal bodies in Edinburgh or elsewhere, having exclusive privileges?—No, I think not, only as practitioners before the court.

1381. *Mr. Murray.*—Would you think it just to require from a practitioner in Mull all the qualifications that you would require from a Writer to the Signet in Edinburgh?—I think the further that you are away from Edinburgh, there is the more necessity for having a well-educated lawyer to assist the court.

1382. *The Chairman.*—Did your observations apply to Writers to the Signet?—No; not to Writers to the Signet as such.

1383. Writers to the Signet require a certain education, and apprenticeship with members of their own body, that is, *qua* Writers to the Signet?—Yes.

1384. But as practitioners before the court, they have no higher powers than a solicitor, and what you are alluding to is the agency of causes before the court?—That is precisely my meaning.

1385. *Mr. Shand.*—Do you think that the present system of double agency has kept business from the Supreme Court which would otherwise have come to it?—I am disposed to think so. If it had not been for the rule of *pactum illicitum*, I think that more cases might have come from the Sheriff Court to the Court of Session.

1386. *The Chairman.*—How does that arise? Do you think that there is an indisposition to bring them

to the Court of Session because the adviser in the country has no benefit from that; or is it because the adviser in the country has an interest to keep the case there till the client is exhausted?—I understand Mr. Shand's question to refer to the end of a cause in the Sheriff Court. The adviser in the country has then no pecuniary interest that the case should go further.

1387. But the client has the same interest, and he can take advice from somebody else?—Yes; but the country agent has then ceased to have any pecuniary interest in further proceedings, and without his advice the client is not likely to go further.

1388. And you think that without a stimulant from him, the client would not come to the Court of Session?—I think not very often.

1389. And you think this would be a stimulant to the client?—I think so.

1390. Have you any other suggestions to make?—I would suggest that, in revising the salaries of the Sheriff-substitutes, or resident Sheriffs, if that is to be done—and I assume that it will necessarily be done—it would be desirable that the system of fees in bankruptcy cases should be abolished. That is an unpleasant part of the emoluments of Sheriff-substitutes at present: they take no fees from rich people coming before them; but when a poor man who has lost his all comes before them, the Sheriff gets a fee of £1, 1s. I think that is degrading to the Sheriff, and I would suggest that it should be abolished.

1391. *Mr. Paterson.*—Is it the poor man or his creditors who pay the £1, 1s.?—It is equally unpleasant, whichever it is.

1392. *Dr. Barclay.*—The fee is paid by one of the practitioners?—It is handed to me by the Sheriff-clerk, and I feel it rather a degrading proceeding.

Another matter which I would refer to, is the regulations as to leave of absence to the resident Sheriffs. At present these are very stringent. No Sheriff-substitute can go out of his district for more than a fortnight without leave from the Sheriff. If he grants leave, he is bound either to go to the county and do the work himself, or to appoint some one to do so. In practice, that substitute must be paid by the resident Sheriff, and that is practically an obstacle to any resident Sheriff getting a vacation of any length, except once in six or eight years or so. I think that might be relaxed. At present it is a grievance to some extent.

1393. *The Chairman.*—But you have proposed that there should be no principal Sheriff to do the duty?—I am speaking on the assumption that the present system is to be continued; and I think it might be provided that the principal Sheriff should come to the county during part of the vacation, and that the resident Sheriff should get a holiday. If the double office is to be abolished, it will be necessary that some provision for occasional leave of absence be made; and what I point at is, that the present limit of a fortnight at a time be somewhat extended. I do not complain of the annual allowance of six weeks in all.

1394. *Mr. Clark.*—Are not three fortnights in a year a tolerable holiday?—If one were allowed to take these fortnights together, or even to take two periods of three weeks each, I would not complain.

1395. *Mr. Baxter.*—Have you considered the propriety of strengthening the court of review within the court itself, by grouping the Sheriffs?—I have considered that; but it was found to work so ill in the Court of Registration Sheriffs, that I think it would not be expedient to revive it.

1396. *The Chairman.*—In what respect did it work ill?—Different decisions were given by different groups of Sheriffs in different parts of the country.

1397. Is there no risk of there being different decisions by Sheriff-substitutes in different parts of the country?—But that would be corrected by an appeal to the Supreme Court.

1398. *Mr. Baxter.*—But I meant with the appeal?—Then that is an intermediate appeal. You would have the expense there, without any countervailing advantage.

1399. *Mr. Campbell.*—It has been suggested that it might be convenient to vary the periods of vacation in the Sheriff Courts; have you anything to suggest as to that?—I think that might be done with advantage. The winter vacation is a month, which is rather long; the spring vacation is too short, and too early. This arose from a misapprehension, from thinking it necessary that the court should meet on 3d April, so as to call cases of removing from farms forty days before Whitsunday, which is not now necessary. It may be right to explain that the word vacation is not to be understood absolutely in the Sheriff Courts, as during vacation all criminal business goes on as usual, and much summary civil business is also done.

As to other local courts, I think the Commissary Court might well be amalgamated with the Sheriff Court, at all events so far as the clerks are concerned.

1400. *The Chairman.*—You think the same machinery might do for both?—Yes. As to the Justice of Peace Court, I may explain that I frequently sit as a Justice of the Peace; but, so far as I know, no civil cases are ever brought before the Justices of the Peace in Fifeshire, at least in the western district. Their jurisdiction, in practice, is confined to trying public-house cases, road cases, and poaching cases; and, on the whole, that works very well. The Justice of Peace Fiscal is also Chief Constable, and that raises a question which has been considered in some counties. With us it works, on the whole, well; but we have a particularly energetic and able Chief Constable. As a general rule, however, I think the Procurator-fiscal of Court should be a trained lawyer. I believe the change was made from motives of economy. The fees of the Justices' Fiscal pressed on the county; and when a Chief Constable was being appointed, the opportunity was taken of getting him to do the Fiscal's work without any additional salary. The Government Inspector of Police has reported against it several times, but the system still continues; and though it works well with us in practice, I think it is wrong in theory, and it only works well in practice from the excellence of the individual.

1401. *Mr. Baxter.*—Has he not involved himself in a number of actions of damages?—He got into an action of damages as Chief Constable in connection with a case in the eastern division of the county, but not in his character of Justice of Peace Fiscal. There has not been a single suspension since he was appointed Justice of Peace Fiscal.

1402. *Dr. Barclay.*—What is your opinion as to admitting the defender's oath in cases of paternity?—That is a very painful class of cases. There is perjury in almost every case on one side or the other; but I am not prepared to say that the remedy is to make the defender incompetent as a witness.

1403. Don't you think that the ends of justice were better served by the old law of *semiplena*, where the defender was judicially examined, but never could be a witness?—The law of *semiplena* was abolished before I came to the bar, so that I cannot speak as to that.

1404. *The Chairman.*—You think there is a risk of perjury?—That is so under the present system.

1405. Is that not an objection to the law which allows parties to be witnesses in their own cause?—It is.

1406. It is an objection to the new Evidence Law?—Yes; but the new Evidence Law is a great improvement on the whole, and I would not wish it altered in any respect.

MONDAY, 21st DECEMBER 1868.

Members present:—

Lord Colonsay.
E. S. Gordon, Esq., Q.C.
James Campbell, Esq.
A. Orr Ewing, Esq.
George Harrison, Esq.
James Adam, Esq.
A. B. Shand, Esq.
T. Graham Murray, Esq.
Charles Morton, Esq.
James Webster, Esq.
J. B. Baxter, Esq.

The Right Hon. LORD COLONSAY in the Chair.

Henry Cowan Gray.

Henry Cowan Gray, Esq., examined.

1407. *The Chairman.*—You hold an official situation in Ayr?—Yes; I am auditor of the Sheriff Court of Ayr, and have been so since 1845. I have also been senior magistrate of Ayr for two years. I was Dean of Guild for five years, and I am at present agent for the Commercial Bank of Scotland.

1408. Have you been in practice in the Sheriff Court?—No.

1409. As auditor of the court, have you had occasion to observe the course of litigation, and the costs of litigation?—I have. I may state that, taking the printed note with which I have been furnished, I have jotted down a few remarks; and first, with reference to the constitution of the courts as consisting of Sheriff and Sheriff-substitute, I have long been of opinion that the double Sheriffship should be abolished, and that it would be an improvement to have only one resident Sheriff. The present state of matters is far from satisfactory. The substitute does the principal work, and he is assisted by other substitutes who have an honorary appointment. These gentlemen have not been bred to the law, and are often employed in taking the declarations of prisoners, trying accused parties, and exercising other important functions for which they are not qualified. This is certainly objectionable; but the great objection to the double Sheriffship is, that an appeal from one judge to another does not inspire confidence and fosters litigation. An appeal, in my view, should always be to a plurality.

1410. Would you explain what you mean by the honorary Sheriffs?—They are gentlemen engaged in business, to whom a commission has been granted to act in the absence of the Sheriff-substitute without pay.

1411. Do you think that objectionable?—I do; they are easily accessible, and are called on when the Sheriff-substitute ought himself to be present.

1412. Are you of opinion that the duty of the Sheriff-substitute is not effectively performed?—I do not undertake to offer any opinion as to its not being effectively performed. I merely state what are facts. If the acting Sheriff-substitute is not in the way, what the clerk or the Fiscal immediately does is to send for one of these honorary substitutes to do his work.

1413. Do you allude to criminal matters?—Sometimes civil matters too, such as petitions requiring an instant warrant, which cannot be delayed.

1414. How would you remedy that?—I think it would be remedied very much if the Sheriff-substitute was obliged to give attendance in his chambers so many hours every day, when he is not engaged in court. In that case he would be found. But it is not so with us, and that is especially the case in Kilmarnock, the resident Sheriff-substitute there residing several miles from Kilmarnock.

1415. Are there any periods of the year when the Sheriff-substitute has a vacation?—During the recess he generally takes a short period of vacation.

1416. What do you call the recess?—The time the court is not sitting—two or three times in the year.

1417. How do you propose to deal with that?—There ought to be some party who would be able to take the Sheriff-substitute's place when he is necessarily absent.

1418. Who would that party be?—There might be a supernumerary, as there is, I believe, in connection with the Advocates-depute.

1419. Do you mean a paid officer?—Yes; one conversant with the administration of the law, and paid to supply the place of any of the Sheriff-substitutes who go away for recreation or otherwise when they get leave of absence. We have gentlemen, some of whom have been in business as merchants, and others as bankers, but not trained to the law, who act as these temporary substitutes.

1420. You think it would be better to have some person trained to the law, and paid for it?—I think so.

1421. Does the Sheriff take any part of the duty in the absence of the Sheriff-substitute on leave?—I am not aware of the Sheriff-principal coming to the county except at stated periods of the year, when he is required by Act of Parliament to hold courts. He also attends when the Circuit Courts are sitting, and at Registration Courts.

1422. You would still have a Sheriff-substitute residing in Ayr, I presume?—Yes.

1423. Where would the supernumerary reside?—I presume there would be no difficulty in having a supernumerary in Edinburgh, who would be sent to supply the place of the Sheriff-substitutes throughout Scotland when they were absent. I don't think there is sufficient work for two substitutes in one division of the county of Ayr.

1424. You think an appeal from a single judge to a single judge is not a good thing?—I don't think it a good thing; it does not give satisfaction or confidence.

1425. What would you substitute for it?—If the double Sheriffship were to be continued, I think it would be a very good thing to have three or four sitting in circuit, hearing appeals from different counties; but I should myself prefer a direct appeal to the Court of Session.

1426. As auditor of the court, can you give us an idea of the expense attendant upon an appeal to the Sheriff from the Sheriff-substitute?—It cannot be very great. There are simply the appeal and the debate, for which a certain fee is allowed. It costs not above £2 in some instances, or perhaps £2, 10s. at the outside.

1427. *Mr. Baxter.*—On both sides?—I speak of one side. It would be double that for both sides. The fee allowed for an appeal varies according to the amount in dispute.

1428. *The Chairman.*—If your suggestion were adopted, that two or three Sheriffs should hold a circuit, how would you distribute the business? What Sheriffs would hold the circuit from which the appeal would lie from the Sheriff-substitute at Ayr?—The counties of Wigtown, Dumfries, and Ayr lie contiguous to each other, and the Sheriffs of these three counties might be appointed the appeal court for these counties.

1429. Sitting in the different towns in which there are Sheriff Courts held?—Quite so.

1430. Would you have them to sit at stated periods?—I think so; and more frequently if the business called for it.

1431. Would that add to the expense of the appeal?—I don't see that it would.

1432.—What do you consider the particular advantages of such a court?—I don't advocate that court, because, as I have said, I prefer a direct appeal to the Court of Session; but it has this advantage, that you would have the opinion of three judges instead of one.

1433. And you would have that at a cheaper rate than going to the Court of Session, I suppose?—According to the present rate of expenses, I believe it would be cheaper.

1434. What are the duties which the supernumerary substitutes perform at present?—They take declarations of prisoners very frequently. They sometimes preside at the trial of prisoners.

1435. Summary trials?—Yes.

1436. Never at jury trials?—No. We have a supernumerary who is an advocate. I don't refer to him; I refer to the others. They frequently dispose of important summary petitions.

1437. What kind of petitions?—For interdict, it may be, where there is a very delicate question whether the interdict ought to be granted or not.

1438. You mean that they dispose of questions of interim interdict?—Yes; and they sign general warrants.

1439. What do you mean by general warrants?—Warrants upon petitions of everyday occurrence.

1440. *Mr. Gordon.*—Warrants of service?—Yes.

1441. *Mr. Shand.*—Mere orders of intimation?—Yes. I would consider them administrative more than anything else.

1442. These duties are never performed by such parties except in the temporary absence of the Sheriff-substitute?—I don't say that exactly. Of course the Sheriff-substitute is occasionally from home, and very properly so; but even when he is in town he may not be in his chambers, and the matter being urgent, the clerk takes the first he can get.

1443. What is the remedy which you propose to cure that particular evil?—I think it would tend very much to facilitate business if the substitute were obliged to be in his chambers a certain number of hours every day when he is not in court.

1444. The supernumerary substitute you speak of could not assist in that matter?—No; he could only be asked to do work when the Sheriff-substitute was absent, or perhaps engaged in other business, so that he could not undertake the examination of the prisoner. But I don't know that even that might be necessary.

1445. You don't mean that the supernumerary Sheriff should be sent for to Edinburgh unless for a period of time?—No; I thought you referred to those holding the honorary appointments.

1446. You would only call his services into requisition during vacation, when the Sheriff-substitute was away?—I suppose the Sheriff-substitute is like other people; he may sometimes be oppressed with work for the time, and it must just stand over till he is at leisure.

1447. Is there any time in either division of the county of Ayr that it would be necessary to send to Edinburgh for a supernumerary Sheriff-substitute, except when the resident Sheriff-substitute was away?—I should say that, generally speaking, there is nothing to hinder the resident Sheriff-substitute from undertaking the work of his division of the county.

1448. Do you mean that a supernumerary Sheriff should be kept, to go to all the different counties in Scotland during those periods of vacation when the Sheriff-substitutes were out of their counties?—I think that would be necessary if you abolish the double Sheriffship; but if you keep it up, there might be an arrangement made by which the principal Sheriff might come and relieve his substitute.

1449. How many such supernumerary Sheriff-substitutes do you think it would be necessary to appoint in order to undertake the work in summer?—I cannot give an opinion on that. It is matter of detail, which could easily be managed, I think.

1450. The period of vacation is the same in all the courts throughout Scotland?—I believe so.

1451. And that is the time at which all the substitutes, as a rule, take their holidays?—I am not aware what the other substitutes do, and I am not aware that our own substitute takes his vacation at that time.

1452. Would that not require a considerable number of supernumeraries to be sent from Edinburgh?—There would be no necessity for a supernumerary if the principal Sheriff were continued; but if that office were abolished, I think some arrangement should be made by which the duty should be done for the time.

1453. What kind of arrangement other than you have pointed at do you refer to?—You would require perhaps to have a number employed, paying them for the time they are engaged, and not merely one or two to supply the whole of Scotland. But there might be a difficulty in the working of it.

1454. Do you mean a number of persons resident in Edinburgh or resident in the district?—I would not confine it to Edinburgh. I think you might get gentlemen in practice as lawyers who might undertake the duties.

1455. Residing in Ayr or Kilmarnock?—Quite so.

1456. Then you think that a writer of standing resident either in Ayr or Kilmarnock ought to have an appointment of that kind, with payment for it, if the office of Sheriff should be abolished?—I would have either an advocate or a writer.

1457. To be paid for his services?—Yes. The Sheriff is entitled to some relaxation, and it ought to be given him.

1458. Have you considered what payment would be adequate for the performance of such duties?—I have not. I think the Sheriff-substitutes are ill paid as it is.

1459. What do you think should be allowed in such a county as Ayr for the payment of such gentlemen as you speak of?—I should not like to put a figure on it; but it has always occurred to me as an anomaly, that County Court judges in England should be better paid than Sheriff-substitutes in Scotland.

1460. But what do you think ought to be paid to those legal gentlemen who should hold such offices as you have mentioned?—I suppose they are entitled meanwhile to £3, 3s. a day. I don't think that would be out of place.

1461. You would pay them by the day's work?—If it did not extend over a long period, or a sum might be paid for the discharge of the whole duty.

1462. But you have not considered that?—No, I have not. I never thought on the subject till the question was put to me.

1463. Are you aware of any other instance of an appeal from one judge to another judge in the United Kingdom?—There is the appeal from the Sheriff to the Lord Ordinary.

1464. Are you aware that there is such an appeal from the Vice-Chancellors and the Master of the Rolls to the Lord Chancellor?—I believe there is.

1465. Do you know how that works?—I do not. I suppose there is also a general appeal to the Home Secretary in almost every case.

1466. You mean in matters of administration?—Yes.

1467. Do you think that if the Sheriff, on appeal, should adhere to the Sheriff-substitute's judgment, it does not add weight to that judgment?—I think it does; but without appearing to be invidious, I may say that cases have occurred where there has been an appeal from what we would consider a superior to an inferior man, and hence there is not the same confidence in the judgment.

1468. If, on the other hand, the judge on appeal differs from the Sheriff-substitute, does not that give the party the means of judging with advantage whether the case is one in which he should incur the expense of an appeal to a superior court?—I should say generally, that where the Sheriff-principal adheres to the Sheriff-substitute's judgment, there is very little risk of its going further.

1469. Why?—Because you have got the opinion of two judges; whereas, when the judgment of the substitute is altered by the principal, it excites doubt and encourages litigation.

1470. Does it not rightly excite doubt?—Yes.

Henry Cowan Gray.

1471. And it gives a party better means of judging whether he should incur the expense of going further?—It encourages him to go further.

1472. Don't you think it is an advantage to a litigant that he should have that means of judging whether the case is worthy of being carried further, if the advantage is gained without great expense?—So long as you keep up the Sheriff-substitute that will be the case, but I don't think it is indispensable.

1473. Is it not an advantage?—It may be an advantage. He has a twofold decision there.

1474. *Mr. Gordon.*—How far is the Sheriff-substitute's residence from the town of Kilmarnock?—The Sheriff-substitute at Ayr resides in the vicinity of the County Buildings; the Kilmarnock substitute lives at Fairlie House, several miles from Kilmarnock.

1475. That is only three miles distant?—Three or four miles.

1476. Can you refer to any special case where inconvenience has resulted from the honorary substitute acting?—There is this inconvenience, that he has not been able perhaps to take up a particular case brought before him, and it has had to lie over. In most cases it is administrative, and he is not allowed to exercise much judgment except in summary trials.

1477. Do you refer to police offences, such as a Justice of the Peace could take up?—Yes.

1478. Or a bailie in a burgh?—In the burgh the Sheriff has no jurisdiction.

1479. But they are the same class of cases?—They are cases that may have been before Crown counsel, and are returned for trial; and the Sheriff-substitute may not be at hand.

1480. Are there many advocations from the judgments of the Sheriff-substitute in your courts?—I believe not recently.

1481. How many?—I could not say; but there are very few, I think.

1482. Then the parties almost invariably rest satisfied with the judgment of the Sheriff?—At present they do. There are exceptions, of course.

1483. Was it not so formerly—I mean within the last twenty years?—Old Mr. Bell was a very excellent judge, but he was pretty old before he retired, and he was succeeded by another very old gentleman; but since our present Sheriff was appointed, there have not been so many.

1484. Are you aware that the former Sheriff, Mr. Christison, was very highly esteemed as a lawyer?—There was not a gentleman who was more highly esteemed, and his judgments were almost invariably acquiesced in, I think,—at least generally speaking. I have no fault to find with either the one Sheriff or the other.

1485. *The Chairman.*—Do you say the same of Mr. Bell?—Quite so. There was not a more painstaking gentleman than old Sheriff Bell. I was under him as Sheriff-clerk-depute for many years.

1486. *Mr. Baxter.*—When you say that the appeal from the Sheriff-substitute to the Sheriff is not satisfactory, do you take into account that the Sheriff-substitute had the making up of the record, and that he took the proof and saw the witnesses?—There is no question that that is a very great advantage to a judge in disposing of a case, and especially in disposing of evidence; but as regards law, it does not affect the question.

1487. You stated that the honorary Sheriff-substitutes take prisoners' declarations?—They do.

1488. Have you been present at any of these?—I was for many years.

1489. Who conducts the declarations?—I am sorry to say that it is generally the Fiscal who puts the questions, and dictates the answers in presence of the Sheriff.

1490. Does the Fiscal dictate the answers under the supervision of the Sheriff?—He does. My nephew is Sheriff-clerk at the present moment; and I asked him before coming here if there was any change, and he tells me there is not.

1491. Do the honorary Sheriff-substitutes ever dispose of *meditatione fugæ* warrant cases?—I can't say, for my attention has not been called to that. I have no doubt that such a thing may have been done.

1492. Are you aware that it is an exceptional case to appoint as honorary Sheriff-substitutes gentlemen who are not lawyers, and that in most cases they are legal gentlemen, who are taken from the top of the profession?—I am aware of that, but I merely speak as regards my own county, and it is not so with us. None of them are connected with the profession.

1493. *The Chairman.*—You said that one of them was an advocate?—One of the honorary substitutes is an advocate, and he has frequently supplied the place of the Sheriff-substitute at Ayr when he was from home. I refer to Mr. Pettigrew Wilson. But there is not a single procurator that I am aware of in Ayrshire who holds a substitution.

1494. When you spoke of the Fiscal dictating the answers in taking prisoners' declarations, did you confine that to the case where the honorary substitutes were acting?—Not at all; and I have a remark upon that to make afterwards. It applies to both the regular and the honorary substitutes.

1495. *Mr. Webster.*—In both districts of the county?—I cannot speak as regards Kilmarnock. I can only speak to what has come under my own personal notice.

1496. *Mr. Harrison.*—Has it come under your own notice, that appeals are frequently taken from Sheriff-substitutes of large experience to Sheriffs-principal with little practical experience?—I think I answered that question already, when I stated that appeals were taken from superior to inferior judges.

1497. Have such cases come under your own notice?—I entertain an opinion myself, which is shared in by others, that we have had a substitute superior to the principal Sheriff. We had Mr. Sheriff Jamieson for a long time.

1498. *The Chairman.*—You talked in high terms of Mr. Christison as a lawyer, and of Mr. Bell, his predecessor, as a lawyer?—Yes.

1499. How far does that carry you back? When was Mr. Bell appointed?—Before I was born, I suspect,—about 1816 or thereabouts. I believe he was a Sheriff for about fifty years.

1500. Is your experience confined to the sheriffdom of Ayrshire?—I can only speak from what I have seen in Ayrshire.

1501. Did the appeals to Mr. Bell come from a superior lawyer to an inferior lawyer?—I should not like to answer that question. I don't think I should pass an opinion as to whether the one was superior or inferior.

1502. But you hold that Mr. Bell was a lawyer of eminence?—As long as he was actively employed, there was no gentleman who stood more high as a lawyer throughout Ayrshire than Mr. Bell,—or throughout Scotland, I should say.

1503. Do you say the same of Mr. Christison?—I do.

1504. Mr. Christison was succeeded by the present Sheriff?—He was; and our Sheriff-substitute, Mr. Robison, is generally admitted to be a first-rate lawyer, and a very superior man.

1505. *Mr. Morton.*—Have you yourself been in practice?—No; I have been a bank agent for a good many years; but I am constantly attending court.

1506. *The Chairman.*—What is the next matter to which you have to refer?—The next point in the notes is the jurisdiction with reference to limits. The jurisdiction might, I think, with propriety be extended, so as to embrace questions of heritage, questions of separation and protection of the wife's earnings on the husband's desertion, and provisions to be made to her under the Conjugal Rights Act; also questions of declarator, provings of the tenor, appointments of factors *loco tutoris*, of *curators bonis*, and factors or tutors to insane persons, trustees in lapsed trusts, etc. The proceedings in many of these are unopposed; but as matters stand at present, the heavy fees to counsel and agents in the Supreme Court is a great grievance.

1507. Would you make that extension in questions

of heritage, without limit as to the value of the matter at issue?—No; I think, as regards actions of declarator, they ought to be limited to subjects involving, say £100, —subjects which it would be very expensive for parties to go to the Court of Session with.

1508. Would you have any limitation as to the other subjects which you think should be brought within the Sheriff's jurisdiction?—I should think that the same remark would apply to provings of the tenor.

1509. How do you apply the remark to them?—If a proving of the tenor of any particular deed referred to a subject of very considerable value, I would still confine it to the Court of Session. I would transfer it to the Sheriff only if it was a subject under £100.

1510. *Mr. Baxter.*—Would you allow the Sheriff to appoint *curators bonis* and factors?—Yes; and also factors and tutors to insane persons.

1511. *The Chairman.*—Would you apply any limit to that?—I don't know that it would be necessary in these cases. If they found caution in the usual way, to the satisfaction of the court, that is all that would be necessary.

1512. Would you apply that to all parties within the territory of the jurisdiction of the Sheriff?—Yes.

1513. Whatever might be the value of the estate involved?—Yes. The higher the value, the greater would be the amount of the caution.

1514. Would you enable the Sheriff to nominate persons resident beyond his jurisdiction to hold these offices?—I don't know that it would be of very great importance whether he was beyond his jurisdiction or not. He would be amenable to his jurisdiction, I presume; and at the present moment it frequently happens that parties are cautioners in advocations who are not within the jurisdiction of the Sheriff. The subject would be within the Sheriff's jurisdiction.

1515. *Mr. Webster.*—Suppose it was money?—I presume that the party for whom he was appointed curator being resident within the jurisdiction of the Sheriff, that would be a sufficient ground for bringing the petition before the Sheriff.

1516. *The Chairman.*—How would the Sheriff exercise his jurisdiction over a party who was not resident within his jurisdiction?—I presume he would get the power as Sheriff to exercise jurisdiction over any one appointed by him, just as he has at present in other matters where he exercises his jurisdiction. The Sheriff should have as much power over him as if he were resident, in so far as obtempering his orders were concerned.

1517. Then you would extend the power of the Sheriff to persons beyond his jurisdiction?—Certainly I would, if he was appointed by the Sheriff.

1518. *Mr. Webster.*—Suppose a party had property in more counties than one?—In that case I think it would not be prudent to bring the matter before the Sheriff. It ought in that case to go to the Court of Session.

1519. Would you give the Sheriff the kind of power exercised at present by the Court of Session in regard to giving special powers to guardians to sell or burden property?—If it were a subject of small amount. I have known hardship to occur sometimes, from the inability of the parties to obtain these powers; but if the subject was very large, I question if it would be right.

1520. *Mr. Baxter.*—In small estates, do you think there would be any difficulty in the Sheriff obtaining a suitable person within his own jurisdiction?—None whatever. I don't see there should.

1521. Have you formed any opinion as to giving the Sheriff jurisdiction in heritage?—I cannot say that I have.

1522. *Mr. Shand.*—Have you known cases of hardship in your district, in reference to small heritable subjects—cottages and the like—where parties have been obliged to submit to great injustice from not being able to come to the Court of Session?—I cannot say that I can put my finger on a case, but I can fancy that the expense would perhaps eat up the whole subject.

1523. Have you not heard that made the subject of complaint?—I cannot at present recall any particular instance, but I know that it is the generally entertained opinion that hardship is suffered in such cases from the necessity for going to the Court of Session.

1524. *The Chairman.*—Have you formed any opinion as to jurisdiction in questions of legitimacy and divorce, and declarators of marriage?—These are rather serious matters, and I am not prepared to recommend the transfer of these cases to the Sheriff.

1525. Have you any observation to make on the Sheriff's jurisdiction in criminal matters?—I would be disposed to recommend that all cases in which imprisonment merely follows should be tried before the Sheriff. I would not give him the power of sentencing to penal servitude. I would leave cases involving that punishment to the Circuit Court judges or to the High Court of Justiciary.

1526. What do you mean by cases in which imprisonment merely follows?—Cases where imprisonment is the usual punishment. There are certain higher offences where imprisonment cannot be inflicted, such as murder and rape. I consider also that certain cases of forgery might come under that character, which I would leave to Crown counsel, as at present, to decide to what court they should be sent for trial when he examines the precognitions.

1527. You mean that if the Crown counsel who considers these precognitions is of opinion, from the aspect of the case, that it is one where the punishment should not exceed imprisonment, it ought in these circumstances to go to the Sheriff?—Decidedly so.

1528. And that neither the High Court of Justiciary nor the Circuit Court should deal with cases which are expected to result in imprisonment?—If the case is considered beforehand of a trifling nature, I presume it would not be brought before the Circuit Court, but still the Circuit Court might inflict punishment by imprisonment merely. It might turn out that the case was not so serious as Crown counsel was led to think it. But I think that all other cases in which imprisonment would be the natural punishment might safely be left to the Sheriff.

1529. Do you think that there is not a sufficient number of those cases which result in imprisonment sent to trial by the Sheriff?—I have seen cases brought before the Circuit Court which I considered much more trifling than some that were tried by the Sheriff.

1530. The public prosecutor has at present the power of sending cases to be tried by the Sheriff which he thinks ought to result in imprisonment?—He has.

1531. And he has the power of bringing them before the Circuit Court if he prefers it?—He has.

1532. And you think the Crown counsel should send to the Sheriff such cases as he thinks ought to result in imprisonment?—Yes.

1533. You say that you have seen more trifling cases tried before the Circuit than were sent to the Sheriff?—I entertain an opinion, from long observation, that there are many cases tried before the Circuit Court that might be as well sent to the Sheriff.

1534. I understood you to say cases of less gravity were tried at Circuit than some of those that were tried before the Sheriff?—I don't say that altogether, but I say that I have seen cases of more gravity tried before the Sheriff; or, I should rather say, I have seen cases brought before the Circuit that would not bear comparison in point of gravity with many that were brought before the Sheriff.

1535. Then you think that in these cases there was not a sound discretion exercised?—I have no opinion to offer about that. I don't at all blame the discretion of the Lord Advocate. I merely state my opinion that, without any harm to the administration of justice, many cases which are tried before the Circuit Court, might very safely be tried by the Sheriff.

1536. You think that cases ought to be more freely sent to the Sheriff?—I am not prepared to say that. I think they are pretty freely sent to the Sheriff.

1537. Then what is your view of the matter?—It is just what I have stated, that there are cases brought before the Circuit Court which might very safely be

Henry Cowan Gray.

left to the Sheriff. I don't impugn the discretion of the Crown counsel in sending them to the Circuit Court, but such is a general observation that many people make,—that there might have been no Circuit at all, considering the cases tried there.

1538. And you think they would have been more properly sent to the Sheriff?—I think so.

1539. You measure that by the amount of punishment which was supposed by the public prosecutor to be adequate to the offence as it appeared on precognition?—I should not be disposed to put it generally, because I can fancy that a party might be accused of a crime, and that it was of the utmost importance that he should have the discretion to be tried in the superior court if he likes. Therefore I would not say that every case in which imprisonment might be the appropriate punishment should be sent to the Sheriff. I would still leave it discretionary with the Crown to order certain cases which might be punished by imprisonment to be tried before the Circuit Court or the High Court.

1540. Is that not the state of the law and the practice at present?—I am not aware.

1541. Is it not the practice to send to the Sheriff such cases as in the discretion of the Crown it is thought ought to go there?—It is; but I have repeatedly seen cases tried, and it is not my own observation only, which I believe would not have been tried at the Circuit, except for the fact that the Circuit happened to occur immediately after the cases were reported.

1542. *Mr. Webster.*—Did one of your former answers imply that you thought the prisoner should be consulted as to the tribunal that he should be tried before?—I think that in certain cases a prisoner ought to make a representation on that subject, and that the Crown should have it in its power to pass judgment on that representation.

1543. *The Chairman.*—Is there anything in the nature of the cases which you think ought to guide the Crown counsel in trying them before the High Court or the Circuit Court, rather than sending them to the Sheriff?—I should leave it to the Crown advisers to form their own opinion as to which would be the proper court to send them to in the circumstances.

1544. Has it frequently occurred in your experience, that cases are tried before the Circuit Court which you think ought not to have been tried there?—I don't say that there is anything wrong in so trying them. It is a question of the necessity of trying them before the Circuit Court. I think there would be no harm, but otherwise, in trying them before the Sheriff.

1545. What would be the advantage gained?—There would be a more expeditious trial if the case occurred immediately after the Circuit, because they could then be tried before the Sheriff at once, without lying in prison till the next Circuit.

1546. Is that not a matter which is taken into consideration now by Crown counsel?—I should think so.

1547. Have you any further remarks to make about criminal jurisdiction?—No.

1548. *Mr. Baxter.*—What is your objection to giving the Sheriff power to sentence to penal servitude?—It is rather a serious punishment to inflict, and I don't know that the public mind is altogether prepared to transfer that power to the Sheriff.

1549. Do you know that in England the Chairmen of Quarter Sessions, whether barristers or not, have that power?—I am aware of that.

1550. Suppose a man convicted of theft, and sentenced to a long period of imprisonment, would there be any difficulty in trying that man again for a similar offence?—No; but where it was a question of degree of punishment implying penal servitude, I should not like to give the Sheriff that discretionary power.

1551. Do you think that is the public mind?—I think that it is a pretty general opinion among those I have met with in my district, but I am not aware what the public mind is on the matter. There is, however, a very general opinion that the powers of the Sheriff might be very safely enlarged.

1552. *Mr. Webster.*—In criminal matters?—In criminal matters as well as in civil matters.

1553. *Mr. Baxter.*—What is your opinion as to trying before the Sheriff robberies where there is no great violence?—That would be almost like a case of common theft; but I have said already, that if penal servitude was implied as a punishment, I am not prepared to go the length of transferring such cases to the Sheriff.

1554. *The Chairman.*—What is your opinion as to writs, pleadings, and procedure in the Sheriff Court?—I am much pleased with the Sheriff Court Act of 1853, but I complain much of the way in which its provisions are enforced. Frequent delay takes place in the minuting of a defence; orders for the lodgment of papers are postponed indefinitely, and these papers received of consent; orders pronounced, and again and again continued, without any reason assigned but the consent of parties; cases about to sleep, frequently revived for the same reason; proofs also postponed to suit the convenience of parties. The Act should be more stringent in making what is discretionary imperative, and mulcting the delinquent in the unnecessary expense incurred by his own act. I have always thought it a hardship to impose upon the Sheriff the writing of proofs. Great expense would be saved by having a shorthand writer. I have frequently seen a proof adjourned when only half of the witnesses had been examined, and the same witnesses have attended three different diets.

1555. Your observations apply not to the law, but to the manner in which it is administered in the court at Ayr?—I think that the Act is a good Act, if it were more rigidly enforced, and parties failing to obtemper orders had a fine imposed upon them in the shape of expenses, and another order issued peremptorie; but that not being done, cases are kept on the roll for years.

1556. Would you give delay at the wish of both parties?—Occasionally, for reasons shown to the satisfaction of the judge; but I would not give delay simply because a consent had been obtained.

1557. Do you think that delay brings a sort of scandal on the administration of justice?—I do. I know of cases that have been revived I don't know how often, and the only reason given is consent of parties. As I understand the Act, the judge ought to be satisfied that there is reasonable ground for the delay; but nothing appears in the interlocutor except 'Of consent of parties, revives the action;' and the consequence is, that clients complain, and the court is frequently blamed, where the fault is truly that of the agents.

1558. *Mr. Shand.*—Are proofs in your district taken up continuously, day after day, as in jury trials?—Not at all. That is done in some cases, but not generally.

1559. Are you aware that the Act of Parliament expressly requires that that should be done?—I cannot say that I am aware of that.

1560. Is it a common practice to adjourn proofs in Ayrshire?—It is a very common practice.

1561. And to adjourn them not till next day?—No, but to a day suitable to the parties. A proof lasts for a day; the Sheriff is engaged to-morrow, and cannot take it up; and in that case it is necessary to adjourn it.

1562. For how long is it adjourned?—It may be for eight days or a fortnight.

1563. How many such adjournments may take place as a common thing?—That depends altogether on the nature of the case. In some cases the proof is very short, and there is no adjournment; but where it is a heavy case, as we have had repeatedly, there have been three, or four, or five adjournments.

1564. Do you think that a number of these adjournments are unnecessary?—I don't say they are unnecessary. It is impossible that the Sheriff can undertake the manual labour; but if a shorthand writer were employed, all the witnesses could be examined at one sitting, instead of being obliged to go home, and return two or three times.

1565. Do you think the adjournments were unavoidable under the system which the Act of Parliament contemplates?—I think they arise in a great measure

from the fact that the duty of taking the proofs is imposed upon the Sheriff.

1566. Do you know whether there are shorthand writers in Ayrshire capable of taking the proofs?—In Ayr there are; and there might be a shorthand writer appointed for the court.

1567. *Mr. Baxter.*—Could they read their notes to the witness after he has been examined?—Yes, they could read what they have taken down, and extend it afterwards.

1568. Do you mean that the Sheriff is to dictate the evidence to them?—The Sheriff ought to be satisfied that the evidence is taken down as it was given.

1569. Don't you think it a right thing that the agents should know what is taken down while it is being taken?—I think so.

1570. Then do you think it would be right that the Sheriff should dictate the evidence to the shorthand writer?—I don't know that that is of much consequence, but he might dictate it.

1571. Would that not abbreviate it?—Yes, a great deal of irrelevant matter might be put down unless the Sheriff dictated it.

1572. *Mr. Webster.*—How would the agents know what was taken down unless it was dictated by the Sheriff?—Well, it might be advisable to let the agents know.

1573. *Mr. Baxter.*—Don't you think it an important thing that they should know?—I do.

1574. *Mr. Webster.*—Suppose that parties wished delay in a case, with the view or in the hope of a settlement, do you think that they should be deprived of the power of getting delay?—I do not, if it is with a view of settling the case; but I certainly object to the frequent revivals which take place at present.

1575. Suppose that an action is raised, well calculated to try the question between the parties, and proceedings have been taken, what is the advantage to the parties of having that action turned out of court, by statute or otherwise, and forcing them to bring a new action, and to go through a new set of proceedings?—I consider that an exceptional case. What I refer to is cases where delay by the parties takes place for delay's sake, without any object of settlement.

1576. *Mr. Orr Ewing.*—By parties, I presume you mean the agents?—Yes.

1577. Without the consent of their clients?—Yes.

1578. *Mr. Baxter.*—How do you know that they have not got the consent of their clients?—I cannot say what I am not privy to.

1579. *Mr. Orr Ewing.*—Is it not the interest of the parties to have a decision as rapidly and economically as possible?—No doubt of it; but I know that many cases are delayed simply for the convenience of the agents, without the knowledge of their clients, and that the court frequently gets the blame when it is the agents who deserve it.

1580. And the parties have no power themselves to force the case on?—They have no power.

1581. *The Chairman.*—Have you anything further to say upon that branch?—Nothing.

1582. Have you any observations to make in regard to criminal matters?—The recent change of having a double diet for jury trials has been a great improvement. I have no suggestion to make except as to the preliminary investigation by the Fiscal. A prisoner when under examination has no protection. He is, no doubt, cautioned that what he says will be used in evidence against him; but he is also told, that should he decline to answer, that will also tell against him.

1583. *Mr. Baxter.*—Is that so?—Invariably with us. The judge, in cautioning the prisoner, says: You are accused of such and such an offence, you are now at liberty to make any statement that you may think proper: what you do state will be taken down; and should you decline to answer, that also will be taken down.

1584. But not used against him?—His declaration will be used against him. If he refuses to answer, there is a certain inference drawn from that, and it does tell. Now, according to our mode of examination, the Fiscal proceeds at once to put questions *seriatim* to him, and dictates the answers. The questions are so put as more to entrap the prisoner, than to have a fair open statement of what he has to say; and all this is done without the accused being allowed the opportunity of consulting an agent. Generally speaking, a prisoner under examination is very excited, and far from collected; and he has, therefore, all the greater need of the assistance of an agent. When new facts have come out, I have seen a second declaration taken by the Fiscal, for no other object that I could see than to get the prisoner to contradict himself. There is certainly more protection for the accused when the regular Sheriff presides, but very frequently these declarations are taken by the honorary Sheriff-substitutes.

1585. *Mr. Webster.*—You are speaking of the Ayr district of Ayrshire?—Yes, South Ayrshire.

1586. *The Chairman.*—Do you state that with reference to the existing practice?—I was told before I came here by my nephew, who is Sheriff-clerk, that that practice still continues, and it was the practice when I myself was Sheriff-clerk.

1587. When did you cease to be Sheriff-clerk?—About eleven years ago. I hold a temporary appointment as Sheriff-clerk, but I don't act.

1588. The accused has the protection of the presence of the Sheriff?—Yes, the Sheriff is present, but he just allows the Fiscal to put the questions and to dictate the answers. Of course, if there was anything improper, the Sheriff would interfere; but I think it very objectionable in any case that the Fiscal should dictate. I think that should be done by the judge examinator.

1589. You say that the questions are frequently put with a view to entrap the prisoner?—Yes.

1590. But you say that if there is anything improper the Sheriff will interfere?—I mean that when the prisoner is brought up, he is told his offence, and that, if he has anything to say by way of explanation, that will be taken down; but the Fiscal, having a full knowledge of the facts, puts his questions in such a way that the party, being off his guard, gives an answer to inculpate himself.

1591. *Mr. Orr Ewing.*—The Fiscal puts the case as he knows the facts to be, and the prisoner admits the facts?—He may.

1592. That is not dictating an answer?—The Fiscal takes the answer as the prisoner gives it, but the question has been framed with a view of getting that answer.

1593. To elicit the truth?—I presume it is. I don't say otherwise; but when the answer is given, it is dictated by the Fiscal to the clerk.

1594. He interprets the language which the prisoner has used?—Well, we don't expect the language of the prisoner to be put down in his own words; but the answer, as put down, is the import of what the prisoner has stated.

1595. *Mr. Webster.*—Fairly?—Fairly.

1596. *Mr. Morton.*—Did you ever observe a prisoner object to the answer as dictated?—I have, and declining to open his mouth.

1597. But did you ever hear him object to the answer as dictated by the Fiscal? No. I thought you meant declining to answer the questions.

1598. *The Chairman.*—You think the answers are fairly put down?—Quite so. I don't profess for one moment to insinuate that there is any answer put down that is not in accordance with what the prisoner has admitted. It is putting the questions to the prisoner that I think an objectionable thing.

1599. Do you think it objectionable to put any questions to him?—I have always understood that no man should be called on to inculpate himself, and that, when he is brought before a judge, it is with the view of affording him an opportunity of giving an explanation as regards the particular offence with which he is charged, but that he is not to be questioned, as you would question a witness.

1600. Is he to be questioned at all?—Certainly.

1601. What kind of questions should be put to him?—I don't undertake to say. I am merely speaking generally.

Henry Cowan Gray.

1602. Do you object to putting any questions to him?—Certainly not.

1603. *Mr. Baxter.*—Do you object to the Fiscal putting any question to him?—No, I do not; but I think the judge examinator should attend to the answer that is given by the prisoner, and that he should dictate it, and not the Fiscal. That is all I mean to say.

1604. *Mr. Webster.*—Perhaps you would explain what you meant by saying that questions were put for the purpose of entrapping the prisoner?—I have already explained that the Fiscal, having a full knowledge of the case when the party is brought up, frames his question with the view, if possible, of getting a certain answer.

1605. *The Chairman.*—Your objection is, that the Fiscal dictates the answer, and not the Sheriff?—Quite so.

1606. But you say that if there is anything improper, the Sheriff protects the prisoner?—No doubt he would protect him.

1607. You said also that the answers are fairly dictated?—They are fairly dictated, inasmuch as they embody the statement of the party; but the Sheriff might put it in different words.

1608. Could he put it in better words than words which fairly embody the statement of the party?—If he embodied the statement of the party, it could not be put in better words; but there might be a slight variance.

1609. Would you take the words of the party?—I don't object to the words, provided they could be put down; but an illiterate man may not be able to use the words that should be put down. The judge examinator should exercise his judgment in that respect.

1610. What is the practical evil? You don't think it should be recorded in the very words of the party; you don't think that the Fiscal does anything else than dictate the substance of what the party says, and under the control of the Sheriff, who would check it if it was not so. Your objection, as I understand it, is that the dictation comes from the mouth of the Fiscal, and not from the mouth of the Sheriff?—Quite so. That is all I have to say on the matter,—that I think it is the Sheriff that should dictate, and not the Fiscal.

1611. *Mr. Campbell.*—Do you think that there is a danger that the prosecutor or Fiscal, dictating the answer, may in some slight degree colour the answer so as to suit his own purpose as prosecutor?—I have always thought that there is a tendency on the part of the prosecutor to make it almost a personal matter to obtain a conviction, and that there might be a gloss given to the statement; and it is to prevent that, that I think the Sheriff ought to dictate.

1612. *The Chairman.*—With regard to review in civil matters, have you anything additional to state?—I should prefer a direct appeal from the Sheriff to the Court of Session; or, if the double Sheriffship is not abolished, I think there should be circuit courts consisting of three Sheriffs.

1613. Do you think there should be an appeal from them?—I am not prepared to say that I am favourable to an appeal from them.

1614. Would you give a party his choice of going to the three Sheriffs, or of going to the Court of Session?—I had not thought of a court of appeal of three Sheriffs. My view was that there should be an appeal from the Sheriff direct to the Court of Session; but if the Sheriffs are to be continued, I think parties ought to have the power of going to the Court of Session if they prefer it.

1615. Do you think that a party should have the power to take his case from the Sheriff Court to the Court of Session before it is finally disposed of by the Sheriff; as, for instance, under the 40th section of the statute, which enables a party, before proof is taken, to have his case removed to the Court of Session?—I am not familiar with that section of the statute; but if the double Sheriffship is to be continued, I think it is right that the party should take the opinion of the Sheriff before going to the Court of Session.

1616. Have there been no cases in your time brought from the Sheriff Court under the 40th section of the Judicature Act?—I am not prepared to say. I am not familiar with it.

1617. But your opinion is, that if there is a Court of Sheriffs, the party should have his choice of going to the Court of Session?—I think so.

1618. *Mr. Webster.*—Would you give that power to the party who had lost before the resident Sheriff, or would you require that both parties should fix on the future tribunal?—It is the losing party that takes the appeal.

1619. *The Chairman.*—Then he makes his choice of courts?—Yes.

1620. Do you think the other party has no interest in that?—He has an interest; but the practice hitherto has been for the losing party to advocate the cause; and at the present moment he chooses whether he is to go into the First or Second Division.

1621. But he may be sent to the other Division?—Yes. The question put to me is one which I have not thought about.

1622. What is your opinion as to review in criminal matters?—Where a party can show that he has not had a fair trial, he ought to have some redress; but I am not prepared to say what that should be. A review seems almost impracticable, unless full notes of the evidence are preserved, which in summary cases is now rendered necessary. I don't see how there can very well be a review in cases in which notes of evidence are not taken.

1623. *Mr. Webster.*—What would be your test of a case having been fairly tried?—If a party was brought up without previous warning, and had not been allowed to get an agent, I think there would not be a fair trial there; or if there was certain evidence which he wished to adduce, which had not been received. I know that among the profession there seems to be an opinion that there should be review; but I think there is a difficulty as to that, in consequence of notes of evidence not being preserved.

1624. *The Chairman.*—Do you apply that to cases of any magnitude?—My remarks apply to summary trials before the Sheriff.

1625. *Mr. Baxter.*—Is there no appeal to the Circuit in jury trial?—I am not aware that I ever knew of any appeal in a jury trial.

1626. Do you know whether it is competent?—I cannot answer that question.

1627. *The Chairman.*—What have you to say upon the matter of costs?—The costs in Sheriff Court procedure are sometimes very excessive, and, but for the different steps which require to be taken, might be considerably lessened. A judge has a great deal in his power in this respect. I have known processes dragged along for upwards of two years, when one-fourth of the time would have been more than sufficient for exhausting the whole points at issue.

1628. What do you suggest?—I have already spoken about enforcing the Act of 1853, and that if orders were obtempered within a short time, instead of being frequent continuations or revivals, the expense would be considerably less than it is; and it would be considerably less if some mode were devised by which all the witnesses could be examined at one diet, which could be done if a shorthand writer were employed.

1629. *Mr. Webster.*—In many cases, would shorthand writers not add materially to the expense of a proof?—I don't know that it would. It would expedite business very much.

1630. Are there not many cases in which there are only two witnesses or so?—In affiliation cases there are sometimes only two or three witnesses, but sometimes there are long proofs. I don't say that in every case I would have a shorthand writer. I would only have it where the proof was to be pretty long.

1631. *Mr. Orr Ewing.*—And where the parties themselves wished it?—Yes. There would be no great hardship in the Sheriff taking the evidence of two or three witnesses; but when he has to write, day after day, a long proof extending to eighty or a hundred pages, it is very exhausting.

1632. And all Sheriffs have not the same facility of taking proofs?—No.

1633. *Mr. Shand.*—Can you state what is the average expense of a litigated case upon a proof in the Sheriff Court of Ayr, up to the point of the final decision by the Sheriff-principal?—That depends in a great measure on circumstances. There may be frequent debates, and every debate implies a fee of 30s. or £2; but in an ordinary case, where there is nothing out of the way, I should say the expense would be from £20 to £25.

1634. That includes the proof?—Yes. I recollect a case about the sale of a piano, where the expense came to £70.

1635. Laying aside exceptional cases?—Well, I think from £20 to £25 is the average expense which the party who gains the case would obtain from his opponent. Of course the expenses are double that. I speak, however, at random, as I have not turned my attention to that subject.

1636. *The Chairman.*—Do you think that costs are at all increased by the examination of an unnecessary number of witnesses?—I cannot say that that is my experience.

1637. Have you anything to say as to the privileges of agents?—I think it would be a great improvement if, instead of separate faculties, the whole legal practitioners in Scotland were admitted under the same regulations, with equal powers and privileges. The separate faculties might be retained so far as affects property belonging to them.

1638. Would you extend these privileges to practising before the Court of Session?—To act as agents I would, but not as pleaders.

1639. *Mr. Webster.*—You are aware that the custom is, that the agent borrows papers from the clerk to the process. How would you manage the custody of the proceedings where the agent was not resident in Edinburgh?—We have a regulation in the Sheriff Court, that no agent resident in the country shall be allowed to obtain possession of the process. It must be borrowed by a party resident in Ayr. I suppose the same would be the case in Edinburgh. An agent resident in Edinburgh must borrow it; and if he parts with it to a person in the country, he is responsible.

1640. *Mr. Harrison.*—Why would you propose not to permit agents to act as counsel if their clients were satisfied to employ them?—I don't see any great objection to their acting in course of time, but I question if you have a class of men qualified to take that position at present.

1641. Would there be any harm in leaving it to the client to judge?—None at all, if it was permitted.

1642. *Mr. Shand.*—Do you think that the bar would maintain its present standard in regard to legal learning and skill in pleading, or that the bench would have the same assistance as they presently have in the decision of causes, if country agents were to plead their cases in the Supreme Court?—Well, we have been always accustomed to look to the bar as possessing very superior talent, but we in the provinces sometimes think that we have got men who could plead fully as well.

1643. You have scarcely answered my question?—It is matter of opinion. I would not like to lower the standard. I would rather be in favour of keeping it up, and having a higher class of men in the Supreme Court.

1644. Do you think that what you have suggested would have a tendency to lower the standard?—I rather think it would.

1645. *Mr. Harrison.*—Even if clients were permitted to employ procurators from any part of the country, would they not in important cases choose men who have had large experience, and who were in practice before the Supreme Court?—Even if permission was granted, I don't suppose that many of the country practitioners would ever think of coming to plead before the Court of Session, because the remuneration would not cover their time and trouble. If they had the power simply to act as agents, it is all I would care for.

1646. *The Chairman.*—Are you of opinion that any great advantage would be gained by allowing them to come with their cases to the Court of Session?—There would be no great advantage so far as pleading is concerned; but I think it would be an advantage that a country agent should be allowed to put himself in communication with an advocate, instead of being forced to employ a second party as a medium.

1647. Do you think it is an advantage in the Supreme Court to have a separation between the duties of agents and counsel?—I do.

1648. You are aware that those very clever pleaders whom you have talked of as being in the local court might pass advocate and come to the bar of the Supreme Court if they chose?—I am aware that it is open to any man who thinks he has the qualifications to apply for admission.

1649. *Mr. Baxter.*—Do you think that agents in any inferior court should have exclusive privileges, and that they should prohibit agents from practising in their courts who have not served a special apprenticeship to members of their body, and paid them large sums of money?—There should be equal rights and privileges to all the faculties.

1650. You think there should be no exclusive privileges?—I think so.

1651. *Mr. Webster.*—Do you know whether the training requisite to enable an agent to practise in the Court of Session is exactly the same, or is higher than the training requisite for qualifying to practise in the inferior courts?—I am not aware what the training is. A certain apprenticeship must now be served by every one in a solicitor's office before he can pass as a procurator. I may be wrong, but I should fancy that the same training is sufficient to enable him to pass as a Writer to the Signet.

1652. If there be a difference, would you diminish what is requisite for a practitioner in the Court of Session to what is required in the country; or would you raise what is required in the country to what is requisite in the Court of Session, before enabling procurators to practise there?—I am not aware of the difference, but I think that the qualifications which a country practitioner now requires are quite sufficient to enable him to do anything that might be looked for from him in the superior court.

1653. *Mr. Harrison.*—I suppose any agent can appear before any court in the country?—Not at all. A procurator in Ayr could not appear before the Sheriff Court of Glasgow. The procurators there have exclusive rights and privileges.

1654. Can a solicitor or Writer to the Signet not appear before the Sheriff?—An agent in a superior court can appear in any inferior court—in sequestrations, for instance.

1655. *Mr. Webster.*—Is that not solely under the Bankrupt statute?—But at the present moment every faculty has certain peculiar privileges of its own.

1656. *Mr. Harrison.*—But in any special court there is no distinction between agents and counsel?—A procurator before a Sheriff Court of another county has no right to appear before the Sheriff Court of our county.

1657. Nor has a Writer to the Signet or a Solicitor before the Supreme Courts any right to appear as a procurator in the Sheriff Court of Ayrshire?—I believe not. We have two Writers to the Signet in our faculty, and they required to be admitted, but the production of their certificate was sufficient to obtain admission.

1658. With a payment?—We had no fees then.

1659. That was according to the rule of your faculty?—Yes, at that time.

1660. *The Chairman.*—Are there any other points on which you have any remarks to make?—The Debts Recovery Act is comparatively inoperative, only 40 cases or so having been raised in the southern division of Ayrshire since the Act came into operation in October 1857. It should be extended to embrace all debts, arising from whatever source, under £50. The cause of its being inoperative is that the faculty at Ayr have agreed not to take employment under it, in consequence of the fees not being remunerative. Only the

Henry Cowan Gray.

party himself, or one of his family or tenants, or a procurator, can take out a summons; and as no procurator will act, the consequence is that the procurator still brings his action into the ordinary court. Merchants from a distance are practically shut out from availing themselves of its provisions.

1661. What would put the Act into operation in Ayrshire?—Well, I suppose there would be nothing wrong in compelling the faculty to take employment under an Act, without leaving it to their discretion whether they would do so.

1662. How would you enforce that?—I should think the Sheriff has the power of issuing an Act of Sederunt, or the Court of Session might do so. The Sheriff may issue rules for the regulation of his own court; and if a party will not take employment, the Sheriff has the power of suspension.

1663. *Mr. Baxter.*—What is the reason why the procurators will not take employment under the Act?—Because the fees are not remunerative.

1664. Do you think it right to compel a man to work for unremunerative fees?—I think there ought to be a table of fees sanctioned by the Court of Session, instead of embodying the fees in an Act of Parliament. I think the agents ought to get remunerative fees.

1665. *The Chairman.*—You think they are not remunerative at present?—I don't know that they are in some instances. I think the work imposed is much greater than the fees remunerate for.

1666. Do you think there is anything wrong in the principle on which the remuneration is regulated by that Act?—I don't know on what calculation the fee was fixed.

1667. But I speak of the principle?—I see nothing wrong in putting a sum into an Act of Parliament, provided it has been fairly calculated beforehand that the fee is remunerative; but if it is not remunerative, there ought to be a remedy.

1668. The principle of the fee under the Debts Recovery Act is not to remunerate according to each piece of work, but to give a slump fee?—Yes, a slump sum to cover the whole case.

1669. Do you think that is a wrong principle?—I do. No judge can tell beforehand the ramifications of a case. There may be a great deal of extra trouble, and there is no provision in the Act to pay for that extra trouble.

1670. Then you think the principle of that is wrong?—I do.

1671. Is there any power in the Act to enable the Court of Session to revise the fees?—I don't know that there is.

1672. You were not aware of this clause, 'The Court of Session shall be, and is hereby authorized and empowered, after due inquiry, by Act or by Acts of Sederunt, from time to time to make such alterations, by way of increase or decrease, as to said court shall seem needful, in the fees or dues hereby authorized to be taken, or to frame a new table or tables of fees,' and so on?—I was not aware of that clause.

1673. But you think that not only the scale, but the principle of the charge, ought to be altered?—I think so.

1674. *Mr. Harrison.*—Are the procurators a numerous body in Ayr?—They are; I think there are about twenty-four of them.

1675. Have they united to refuse to work the Debts Recovery Act?—I understand the resolution was adopted, with two or three dissenting; but, generally speaking, they all decline to take employment under that Act.

1676. Do those who dissented take employment under it?—I believe there is no employment by any of them under it. I have made inquiry, and I find that the cases brought have been almost all cases of decrees in absence. I believe that the practice differs very much, and that in Glasgow summonses are issued to all and sundry. I believe that is also done in Kilmarnock; but at Ayr they don't issue them except to the party himself, his clerk, a member of his family, or to a procurator.

1677. *Mr. Orr Ewing.*—Does the faculty prevent individual members from taking up these cases?—I believe that, speaking generally, every case which might be brought under that Act is brought in the ordinary court in the usual way, and conducted by pleadings.

1678. In fact, there is a trades' union that prevents individual members from acting independently?—I merely state the fact, that they refuse to take employment under the Act.

1679. *Mr. Campbell.*—Are you aware that the Sheriff has power under the Act to check that, by refusing to award more expenses in any case which might competently be brought under the Debts Recovery Act, than would have been incurred had that course been followed?—I am not aware. I merely mention that the faculty refuse to take employment under it, as the fees are not remunerative.

1680. *Mr. Orr Ewing.*—And they have prevented individual members from taking them up?—I don't say they can prevent them, but I suspect that those who dissented would incur their disapprobation if they took employment.

1681. *The Chairman.*—Have you anything further to state?—The Small Debt Act, if extended to sums under £50, would be more beneficial, with a proviso that when agents were admitted they shall be allowed remunerative charges according to a table of fees to be sanctioned by the court. As at present, I know of merchants who would rather lose their debt than go to the Small Debt Court. Adjournments will sometimes extend over six months. The delay is thus vexatious and expensive; and the expenses, even when the pursuer has been successful, have sometimes exceeded the amount decerned for. The Sheriff at Ayr takes notes of all the evidence, and in trifling cases this will sometimes occupy the most of a day. Should such an exclusion as I have referred to be adopted, I would not recommend an appeal where matters of fact only are concerned; but it should be allowed on questions of law in a special case to be stated by the judge, if asked for at the time.

1682. I don't quite understand your statement as to extending the Small Debt Court jurisdiction to £50, which is the limits of the Debts Recovery Act?—It is in lieu of the Debts Recovery Act.

1683. Would you abolish the Debts Recovery Act?—I think we could do without it if there was an extension of the small debt jurisdiction to the sum allowed by the Debts Recovery Act. Under the Small Debt Act, though agents are allowed, there is no scale of fees; and I think that where agents are allowed, and they ought to be allowed at the discretion of the Sheriff, they should be remunerated by a scale of fees to be fixed by the Court of Session.

1684. Then you would just have one Act applicable to all cases up to £50, instead of two Acts?—Yes.

1685. You would amalgamate these two Acts, you would allow agents to practise in the Small Debt Court, and you would fix a scale of fees?—Yes.

1686. *Mr. Webster.*—Would you have any record of the defence and of the reply?—At present there is a book kept containing a record of the cases, and the judgment of the Sheriff. There would be no record otherwise.

1687. Where the pursuer's case in the summons is that I owe £20 for clothes furnished, and the defence is, 'There is a receipt for the money,' would you have any record of the matter in issue?—That perhaps might be necessary in the pleadings afterwards. There would be a debate at a future stage, and it would be necessary perhaps to have a short record.

1688. *The Chairman.*—Then you would have a statement of the case by the Sheriff?—I don't know that that is necessary in the Small Debt Court.

1689. But in a claim of £50?—I don't anticipate any appeal except on the law, so that I don't see much necessity for any record. It is to be presumed that the procedure is very summary.

1690. You propose to investigate the fact?—Quite so.

1691. Would you have no record of what the fact was that you were going to investigate?—Under the Debts Recovery Act there is some such provision as that; and I see no objection to such a clause as there is there being extended to small debt cases, extending it to all kinds of cases up to £50.

1692. Does that not come more to extending the principle of the Debts Recovery Act to sums below £12?—It is more extending it to sums up to £50, arising from whatever cause.

1693. Your proposal would make a considerable innovation on the Small Debts Act?—It would.

1694. Perhaps even more than it would do on the Debts Recovery Act?—Yes.

1695. But the substance of what you wish to get at is, that all debts under £50 should be recovered in a certain summary manner, and without distinction as to the amount of them?—Quite so.

1696. *Mr. Webster.*—And without any appeal except on a point of law on a case stated?—Quite so.

1697. *The Chairman.*—And without any record of the evidence?—If the Sheriff was called on to state a case, he would require to keep a note to enable him to make it up. I suppose he would state the law as applicable to the case before him.

1698. Would you have any record of the evidence?—I think not. I would anticipate a summary procedure altogether.

1699. Up to £50?—Yes.

1700. Would you give the parties power to require a note of the evidence to be taken?—I don't see that there would be any necessity for that, if there was to be no appeal. I would allow no appeal in sums under £50, except on questions of law, and in a case to be stated by the Sheriff at the time.

1701. You would allow no appeal as to the admission or rejection of evidence?—I would anticipate that it would be such a case as the Sheriff at present requires to prepare for the Court of Session under the Registration Act.

1702. Would you give the Sheriff any power, in cases of difficulty, to transfer them from that roll to the ordinary roll?—I should not like to deprive the Sheriff of that discretion.

1703. It is not for the benefit of the Sheriff, but for the benefit of the parties?—If the parties required, and made a joint request to the Sheriff, I don't see that there would be any hardship at all in granting that request. But unless it were a general point of law that might affect cases of much larger amount, I don't see any necessity for remitting to the ordinary court.

1704. Do you think it would be a satisfactory thing to determine questions of the value of £50 in that summary way?—Compared with the evils which presently exist, I think it would be preferable, and give more satisfaction.

1705. Under the Debts Recovery Act, cases up to £50 can be tried?—Yes.

1706. And the evils that you allude to are the evils existing in Ayr, where the Debts Recovery Act is not put in force?—The evils I refer to are the evils connected with litigation in the ordinary court for sums up to £50. I would get rid of these, and have a more summary procedure by which a pursuer would obtain a decree much more quickly.

1707. Can these be got rid of more speedily under the Debts Recovery Act than in the ordinary court proceedings?—I believe so; but I have not seen the Debts Recovery Act in operation.

1708. But the Debts Recovery Act is intended to provide for a speedy decision of certain cases up to that amount, though in Ayr you don't avail yourselves of it?—Not generally. There have been forty cases since the Act came into operation, but these were almost all decrees in absence.

1709. The reason of its not being resorted to is, that the practitioners don't consider the table of fees remunerative, and that they have resolved not to act under that statute?—Yes.

1710. Have you considered the statute yourself?—I have looked at the clauses with reference to the cases intended to be brought under it. I think it ought to be extended to cases of every kind under £50.

1711. *Mr. Webster.*—What proportion of the industrial community in Ayrshire would have cases involving so large a sum as £50?—Do you mean the working classes?

1712. Yes?—Very few, I should say.

1713. Then the remedy of going to other courts would be limited to a very few?—Comparatively speaking; but there is a most important section that are deprived of it,—merchants, for instance, dealing with traders.

1714. *The Chairman.*—Have you any further observations to make?—I have been a magistrate for two years, Dean of Guild for five, and I have had experience in the Justice of Peace, Bailie, and Police Courts. I would be disposed to abolish all Justice of Peace and Bailie Courts, and in room of them have stipendiary magistrates. The assessor in these courts is virtually the judge. Justices of the Peace, by allowing themselves to be canvassed beforehand, subject themselves to influences which destroy their impartiality. I would still retain the Justices of the Peace to take affidavits, or even to commit a party to prison until examined. A stipendiary magistrate having the fear of dismissal before him, would act more uprightly. It is notorious that Justices of the Peace are frequently canvassed to go and support a case before they know its merits or have heard the evidence; and certainly, when the avenues of justice are interfered with in that way, we cannot expect that these parties will act very impartially.

1715. Do you allude to cases of debt or to cases of crime?—I have seen various cases where there has been a complete canvass beforehand with reference to the Quarter Sessions, and the court has been crowded by gentlemen who have been got, through personal influence, to support a particular party.

1716. What class of cases do you refer to?—To road cases especially. I remember one road case which was litigated very keenly not long since in the Petty Sessions. It was brought before the Quarter Sessions, and a canvass went on there.

1717. *Mr. Gordon.*—Was it as to shutting up a road?—It was as to how wide the road should be.

1718. *Mr. Shand.*—Is it so in licensing cases?—In poaching cases and licensing cases in particular.

1719. *Mr. Orr Ewing.*—Would you transfer the power of licensing public-houses to a stipendiary magistrate?—I certainly think so. I don't think gentlemen in business should be entrusted with that.

1720. Do you think a stipendiary magistrate would have the feelings of the community so much at heart in granting licences as the Justices?—I expect he would ascertain the feelings of parties, and give them an opportunity of being heard before him, and then form an impartial judgment.

1721. Do you think the public are dissatisfied now with the action of the Justice of Peace Court in licensing public-houses?—I think the public generally are dissatisfied with the mode in which licences are granted.

1722. You would have a stipendiary magistrate to grant licences?—Either a stipendiary magistrate, or, if the Sheriff is not overwrought, I would transfer it to him.

1723. Would you not think it preferable to allow the Excise to do it, as in England?—I would not consider it preferable, but I would take any person but the Justices of the Peace, as the thing is at present administered.

1724. Are you aware that it is objected that the system in England is far inferior to the system in Scotland?—That may be; but I know that, according to the way in which it is wrought in Scotland, after a licence is refused, there is a mode of application by which the Excise will give a permit for a certain time, so that the Justices' decision is virtually disregarded.

1725. Do you allude to Ayrshire?—No; I find that it prevails generally. I have studied the subject, and corresponded with parties, and I find that we are no worse than our neighbours.

Henry Cowan Gray.

1726. Then you think that exists all over Scotland?—I believe so.

1727. *The Chairman.*—Do you think the Justices are too lax in granting licences, or too rigid?—I think they are wrought upon by personal influence too much. In the majority of cases they are too lax, but in some cases they are disposed to be rigid.

1728. Are there some who are against licensing at all?—No, but they are perhaps much more stringent in granting a licence, and others again are more easily influenced to grant the licence. Very frequently it is a personal matter in a great measure.

1729. *Mr. Baxter.*—And there is a canvass beforehand?—Yes; and parties brought up specially to vote in a particular direction before they have heard the merits of the case.

1730. *The Chairman.*—Do you think there is any risk, if there was a stipendiary magistrate, that the wants of the community would not be so well known or understood as when the Justices from different parts of the county deal with the matter?—I don't think so. I have a very decided opinion that a gentleman appointed by the Crown, whether a stipendiary magistrate or the Sheriff-substitute, would do the work much more satisfactorily to the public.

1731. There are persons who are opposed to granting any licences, and there are associations for the purpose of promoting that state of matters. Do you think there is any risk that a stipendiary magistrate might take up one view or take up the other, and be guided by his own notions of general public utility more than by the immediate wants of the district or the desire of the community?—I don't think so. I may state for myself that I am not a teetotaller, neither am I opposed to licensing. At one time I entertained the opinion that almost every one should get a licence, but I think that has proved elsewhere to be productive of bad consequences. I think that a sound discrimination should be used in granting licences; and should a stipendiary magistrate, in the case which your Lordship has supposed, attempt to refuse licences where the general public wished to have them, the remedy would be, upon a complaint being lodged, he should be dismissed or reprimanded.

1732. *Mr. Orr Ewing.*—In the event of his being desirous to grant too many licences, what would you do?—A complaint would be made in the same way.

1733. Would you still give the public power to remonstrate against the granting of too few or too many licences?—In every case I would allow the public to make a representation, and it would take place in open court.

1734. And you would bind the stipendiary magistrate to take into consideration the wants of the district?—Quite so.

1735. Would you tie him down to a certain number of licences to a certain population?—That would not work in every case. Ayr is a county town, and requires more public-houses than for the same population elsewhere. If you measure the public-houses according to the population, you would say that we are a drunken town; but on market and fair-days the public require accommodation, and hence there are more public-houses than the population of the town requires. But in country places, where there is no great demand, I think the population and the character of the population ought to be taken into consideration.

1736. Supposing the stipendiary magistrate was a teetotaller, and took a very stringent view in granting licences, would it not be a dangerous thing to give him the full power of refusing to grant them?—I would not give him power to act on his own individual whims in that matter. There should be a law stating that there ought to be public-houses within reasonable distances from each other, for the accommodation of the public, and the stipendiary magistrate should not have power to refuse licences altogether.

1737. You would put him under statutory obligation as to the number of public-houses?—He should be obliged to administer the law.

1738. But what would you make the law?—I would make it that he should not have the power to deny licences right and left, but that the public ought to have certain accommodation. But if you take population exclusively, you would go wrong; sometimes it is a particular kind of population, and it would be wrong to give them too many public-houses.

1739. *Mr. Shand.*—Have you anything to say as to Dean of Guild Courts?—Dean of Guild Courts are unknown to us. I had not one during the five years I was Dean. The Guildry meet once a year and elect a Dean, with the view of giving the Chairman of Works in the Council the qualification for acting as a Justice of Peace or Commissioner of Supply. The powers formerly exercised by the Guild Court are now exercised by the Police Commissioners under the Police Act for Scotland.

1740. *The Chairman.*—What is done as to buildings?—We have the power under the Police Act, as regards buildings, to see that the street is kept in a line. If a house is taken down, we have the power to put any new building back to the line of the street. All these powers, formerly exercised by the Dean of Guild Court, are embodied in the Police Act.

1741. *Mr. Gordon.*—Do you refer to the General Police Act of 1862?—It is the General Police Act for Scotland—not Mr. Lindsay's Act, but the prior one.

1742. You have adopted it?—In Ayr, but not in the suburbs.

1743. *The Chairman.*—Have you Burgh Courts?—We have not such a thing as a Bailie Court; it used to be held by the magistrates appointed by the Town Council, but the powers are now transferred to police magistrates, and it is in our character as police magistrates that we sit as bailies.

1744. Do you try offences?—Yes; all offences under the Police Act to which I have referred.

1745. Is that satisfactory?—I have included police magistrates or bailies under the category of Justices of the Peace. I would have a stipendiary magistrate or Sheriff-substitute to try all these cases. At present the assessor is virtually the judge.

1746. *Mr. Baxter.*—You have no Burgh Court for civil cases?—No, not now. The only other matter is as regards cases of aliment,—parties imprisoned for debt, and applying for aliment under the Act.

1747.—The Sheriff has a cumulative jurisdiction with you in regard to that?—Quite so.

1748. *The Chairman.*—Have you anything more to say?—I am not conversant with, and therefore not particularly qualified to speak as to the Court of Session; but generally we complain much of the hardships arising from cases of small amount being brought in the Court of Session instead of the Sheriff Court; and it would perhaps be advisable that some remedy should be applied, to the effect that the parties bringing cases, say under £100, into the Court of Session, should only get such expenses as they would have received had their action been brought in the Sheriff Court.

1749. *Mr. Gordon.*—Is that not the rule at present, under the Act of 1853, limiting the sum to £25?—Yes; but beyond £25, and up to £50, you can bring them into the Court of Session.

1750. But, by the Debts Recovery Act, is it not provided that you shall not recover more expenses than you would under that Act?—I cannot speak to that. That Act, as I have said, is a dead letter with us.

JOHN DOVE WILSON, Esq., examined.

1751. *The Chairman.*—You are a member of the bar?—Yes.

1752. How long have you been so?—Eleven years.

1753. You are Sheriff-substitute of Kincardineshire?—Yes; I have been so for the last seven years.

1754. There is only one locality of a court in that county, I believe?—Yes; at Stonehaven.

1755. You are the only Sheriff-substitute in Kincardineshire?—Yes.

1756. Have you any observations to make, or opinion to give, as to the constitution of the Sheriff Court, as consisting of Sheriff and Sheriff-substitutes?—I don't understand that question as referring to the matter of appeal. But it seems to me that the constitution of the court, by which there are two persons with the powers of judge ordinary, one of them employed to do the duty regularly, and the other with the power of interfering in it at any stage, is not good, and that there ought to be but one person with the powers and duties of doing the work of judge ordinary.

1757. What are the evils that you think arise from the interference that you talk of?—I think that it lowers the position of the person who is regularly charged with doing the duty of judge ordinary. I think that our position suffers materially from the uncertainty attaching to it. I consider that it is a bad thing that the resident judge ordinary should be liable to be superseded in his duties at any moment. And, when you look to the occasions on which the resident judge is actually superseded, the thing is even worse. The practical result at present is, that the resident judge ordinary gets all the work of judge ordinary, while the non-resident judge gets all the honours of the office. I think the present system is bad in this further respect, that a person is put at the head of it, with the duty of judge ordinary, who never in practice discharges any of the duties. In so far as these duties are concerned (and frequently in so far as any kind of duty is concerned), he is almost a pure sinecurist; and it has a bad effect upon the whole system, to put at the head of it a person, having nominally duties to perform, but who does not perform them. There is a tendency in the whole Sheriff Court system for one person to throw the duty upon the other. The Sheriff throws all the work of judge ordinary upon the Sheriff-substitute; the Sheriff-clerk often throws as much of his work as possible upon the Depute-clerk; and the Fiscal often throws as much as he can upon the assistant-fiscal. That, of course, does not happen as a rule, but there is a tendency to do it; and it is done to a far greater extent than the public interest justifies. It seems to me, further, that as long as there are two persons with the power of interfering with the duties of judge ordinary, you never can hope to have a permanent settlement of this Sheriffs' question. So long as you have a system under which you give the work to one man, and all the honours to another, I don't think you can reasonably hope to have a permanent settlement of the question. I don't think the elements are there for it. Now it appears to me that you might very well make the resident Sheriff the sole judge ordinary of the county, without the smallest inconvenience. The duties which the non-resident Sheriff at present does as judge ordinary are of the very smallest amount. In the ordinary civil processes I may say that he does nothing. In the Small Debt Court he takes the circuits once a year; but I think it is a public inconvenience for him to take that circuit, because the result is, that when cases are continued from one court to another, as must sometimes happen, the Sheriff hears the beginning, and it comes to be finished very possibly by the Sheriff-substitute, who does not understand what has gone before, and *vice versa*. I think his interference in that rather tends to the public disadvantage than otherwise. The only other matter which the non-resident Sheriff does in civil business, is the duty of revising barrister in the Registration Courts. Now, it appears to me that if a man is qualified to do all the other work that falls to the duty of resident Sheriff, it may fairly be assumed that he is fit for the work of a revising barrister also, and that, without disadvantage to the public, that might be transferred to us. Then, in regard to criminal work, the interference of the non-resident Sheriff is very small. With the preliminary investigation he never interferes at all. With the giving of instructions as to the conduct of criminal investigation he rarely interferes; that is all done by the Lord Advocate. With the summary trials he never interferes. The only criminal matter he does anything in, is trial by jury; and there what he does is so very small, that it might, without any disadvantage whatever, be all entrusted to us. From the statistics which we have got with reference to the Sheriff Courts, it appears that in 1863 the non-resident Sheriffs tried only some 10 per cent. of the whole criminal trials; and if these cases are analyzed, it will appear that there would have been no difficulty in that 10 per cent. being done by the resident Sheriff. There were about 400 cases altogether for 1863. Of these, 39 were tried by non-resident Sheriffs, and they were tried in this proportion: 2 were tried by the non-resident Sheriff of Clackmannan, 3 by the non-resident Sheriff of Kincardine, 1 Kirkcudbright, 3 Peebles, 22 at Cupar, 2 Dunfermline, 5 Linlithgow, and 1 Dunblane.

1758. *Mr. Baxter.*—Is that for all Scotland?—Yes, exclusive of Edinburgh and Glasgow, where the principal Sheriffs are resident.

1759. For what year is the return?—For the year 1863. I am speaking from the returns got by Sir Wm. Dunbar.

1760. These returns show the number of jury trials?—Yes. Now, if it is meant to be said that these cases were so important that the resident Sheriff could not have tried them, this result must be come to,—that in 1863 there were no important cases except in counties such as Clackmannan and Peebles, and the others I have mentioned; for the principal Sheriffs of such counties as Stirling, Forfar, Dumfries, and Aberdeen, did not try a single case by jury in 1863. Out of the 50 districts into which Scotland is divided for the purposes of the Sheriff Courts, there were, in 1863, cases tried by jury, by the non-resident Sheriffs, only in 8.

1761. *Mr. Orr Ewing.*—And Glasgow and Edinburgh?—Yes. In Glasgow there were tried by jury by the Sheriff-substitutes, 78 cases, and by the principal Sheriff 3. For Edinburgh the returns are not very clear, the number of persons tried being given, instead of the number of cases; but I have tried to reduce it to cases from information given in another part of the return, and I think there were 40 cases tried in Edinburgh by the principal Sheriff, and 42 by the Sheriff-substitutes. Now I think that, for the sake of the very small quantity of work (taking both the civil and the criminal departments) which is done by the non-resident Sheriffs as judges ordinary, it is not worth while to keep up their power of acting in that capacity.

1762. *Mr. Campbell.*—Can you state the number of jury cases tried in Renfrewshire, in its two wards, that year?—In the Lower Ward there were 28 trials by jury in 1863, and in the Upper Ward 5; all tried by the resident Sheriffs. I am speaking throughout of trials at the second diet—not merely the taking of pleas at the first diet. I would suggest that the duty of judge ordinary should be left to the resident Sheriff, and entirely separated from the duty of judge of appeal. I would further suggest that the districts of the resident Sheriffs might be increased in size and diminished in number. There are a great many districts just now where the work cannot be sufficient for a resident Sheriff, and where, I think, a resident Sheriff might, without public inconvenience, be very well dispensed with. It is impossible to go into the details of that; but I think that from the 55 resident Sheriffs which there are at present, we might cut off 15, so as to bring them down to 40. A further suggestion which I would make with regard to the constitution of the court is, that there is no proper provision just now for a resident Sheriff being absent from his county.

John Dove Wilson.

We get the assistance of honorary Sheriff-substitutes, and very valuable it is at times; but we cannot throw upon these gentlemen the duty of taking trials. If the resident Sheriff should happen to take unwell on the eve of a trial, there might be nothing else for it at present but to postpone it. It is out of the question to send to Edinburgh for the principal Sheriff, who very likely could not come; but if one resident Sheriff had power on an emergency to act for another, we would be able to get over such difficulties, and should also be able to arrange with one another so as to have a suitable vacation in the course of each year. At present we can hardly get out of our counties; but if one resident Sheriff could act for another, we could arrange that with each other, and at the same time be of great additional use to the public. These are all the suggestions I have to make on the first point.

1763. *Mr. Gordon.*—Have you yourself experienced any interference on the part of the principal Sheriff with the ordinary roll of your court?—No. He does not interfere with the ordinary roll of the court. He has occasionally taken jury trials. But it is not of any interference as being disagreeable to my feelings that I am complaining; it is more this, that the present system unnecessarily takes away from the position of the resident magistrate.

1764. I thought you were talking of the experience of your own case?—Not in particular.

1765. Have you ever heard any of the public state that such an occasional acting by the Sheriff-principal in the ordinary court affected the position of the Sheriff-substitute?—I think there is a very general opinion that the resident county judge ought not to be the substitute of a non-resident. There is a use of that word substitute,—trifling enough in itself,—which shows, however, how the public regard it. Whenever it is wanted to depreciate us, that word comes to the surface; and sometimes almost a kind of sneer is implied in its use. I recollect a good instance of the kind of use made of it in a newspaper I happened to pick up. A gentleman had given a considerable donation to a society, and he was entered as Mr. Sheriff A. B., and was referred to as the learned Sheriff. A few columns on he was represented as Sheriff-substitute A. B., and the cause of the change apparently was, that he had given an unpopular decision.

1766. *The Chairman.*—Was there any sneer there? I suppose it was the fact that he was the Sheriff-substitute in giving the decision?—Yes; but what I point out is, that the substituteship was mentioned in connection with the unpopular decision, and was not mentioned in connection with the popular act.

1767. But the one thing would be done by the person who made up the list of donations, I suppose?—Quite so. And what I wish to say is, that this name of substitute, when unnecessarily brought forward, is seldom used except in some kind of case where it was not wished to speak favourably of him.

1768. But the instance you gave is an instance where there was a decision, and there was a distinction taken that it was the decision of the Sheriff-substitute. Perhaps the grievance was that he was designated as Sheriff in the other list, because it might make people think that it was not he, but his principal, who gave the donation; but I suppose you are usually addressed in society in Kincardineshire as Mr. Sheriff Wilson?—Usually; but I have always a little feeling, when I am so addressed, that I am indebted to courtesy only for the title, and I think that the resident judge ought to have it by law.

1769. *Mr Gordon.*—I suppose no difficulty is experienced in finding gentlemen to take the office of Sheriff-substitute?—I have heard that there was often considerable difficulty.

1770. Are there not a great many candidates for vacancies that occur?—There are; but I have often heard that persons who were thought suitable would not accept the office.

1771. When you yourself were appointed, were there not many candidates for the office?—I cannot tell, as I was not a candidate. I was offered the office without any application. In fact, the first I heard of there being a vacancy in it, was on its being offered to me.

1772. Don't you know that there are really a great many applicants for the office when there is a vacancy?—Yes, there are; but that is hardly a good test, I submit; and besides, I don't mean to say that ours is a bad office. What I mean to say is, that if a certain thing, which serves no useful purpose at present, was altered, you would make it a much better office, and that it would stand much better with the public.

1773. *Mr. Orr Ewing.*—There is no advantage at present in the Sheriff-depute superseding you in your court?—I don't think there is.

1774. It is not generally taken advantage of?—No.

1775. And it would be more agreeable to the feelings of the Sheriff-substitute if the Sheriff-depute should not have such a power?—I think so.

1776. *Mr. Webster.*—Do cases not occur in practice where a Sheriff takes a trial at the request of the Sheriff-substitute?—Such cases have occurred where the resident Sheriff was connected or intimate with a party, but very rarely; and I propose to provide for such emergencies much more effectually by putting it in his power to ask a neighbouring Sheriff to take the case.

1777. *Mr. Campbell.*—It follows from what you have said, that the resident Sheriff should sit under a commission from the Crown, and be appointed by the Crown?—Quite so.

1778. Do you think that would be an advantage?—I think it would be a great advantage. I think we would stand higher in the popular estimation if we held a commission from the Crown.

1779. And that would remove the peculiarity of the position of the Sheriff-substitute, which is, that he, as an ordinary judge, does not sit as an officer of the Crown?—Yes. I think that a judge, with duties attached to his office such as a resident Sheriff has, ought to be appointed by the Crown, and ought to hold his commission directly from the Crown.

1780. *The Chairman.*—Is it consistent with your observation that the Sheriff-substitute is a person respected in his district and held in estimation?—I think so; but that depends a good deal on the individual character of the Sheriff-substitute.

1781. But as matters stand, is the Sheriff-substitute a person who is generally respected in his locality?—Yes; though I don't think they have the influence which they ought to have.

1782. But he is a person generally respected in his locality?—Oh yes.

1783. *Mr. Orr Ewing.*—But you think he would be more respected if what you say were done?—I think so.

1784. *The Chairman.*—You said the Sheriff had all the honour, and the Sheriff-substitute all the work; is not the office of Sheriff-substitute held in respect, and is it not an honourable office?—It is.

1785. What did you mean, then, by saying that the Sheriff had all the honour?—A great many of the duties are of an honourable kind; and so long as the honour is inseparable from the work, it falls to us. But in many cases they are separable; and what I say is, that on such occasions the resident Sheriff gets the work, and the non-resident Sheriff gets the honour. Whenever there is any public occasion on which the Chief Magistrate of the county falls to be recognised, it is not the resident Chief Magistrate who gets the recognition, but the non-resident Chief Magistrate.

1786. What kind of thing do you allude to?—I can give an example. If there is a public work going on in the county, all the duty connected with keeping the peace and taking the requisite precautions for the public safety, while that work is going on, falls to the resident Sheriff; but if there is a formal opening, with Her Majesty present, then the person who is recognised as magistrate is the non-resident Sheriff; and I don't think that is right.

1787. *Mr. Webster.*—That occurred at the opening of the water-works at Aberdeen; but does it frequently

occur?—I don't wish to give particular instances, because I don't want to make the question an individual question; for I quite see that so long as the non-resident Sheriff is in the anomalous position of combining the commission of judge ordinary with that of judge of appeal, he often cannot, without disrespect to others, be absent on many of those occasions.

1788. *The Chairman.*—What you refer to is occasions of ceremonial?—Yes. If there was any public advantage connected with having these things given to a non-resident man, I should at once say they were not worth talking about; but for the sake of no public advantage, you put the resident officer to a certain degree in a false position.

1789. That is what you meant by saying that all the honour goes to the Sheriff?—The example I gave shows my meaning very well, but there are various other occasions on which the same kind of thing happens. There are county meetings and the Circuit Courts of Justiciary, for instance. Every public appearance, indeed, of an honorary kind falls to the non-resident Sheriff; while every public appearance where there is any work to do, falls to the resident Sheriff; although with this last I am not finding fault.

1790. *Mr. Baxter.*—Elections?—I don't think there is much work in the elections taken by the non-resident Sheriff.

1791. But there is the public appearance?—Yes.

1792. You spoke of honorary substitutes; are they gentlemen of the legal profession?—Not very often. They are bankers, or else legal gentlemen of good standing, who do not practise much in the court.

1793. What do they do?—Their duties consist mainly in taking any summary trial that occurs in the course of a necessary absence, or signing warrants which are required.

1794. Formal warrants?—Formal warrants generally.

1795. *The Chairman.*—What is the next suggestion you have to make?—The next matter is jurisdiction with reference to limits: 1*st*, as to civil matters; and in the first place, with reference to the form of action. At present, out of the four forms of action, only two are competent in the Sheriff Court—petitory and possessory actions; and it sometimes happens that we are obliged to sist such actions till an action of declarator or reduction has been settled in the higher court. Now, I don't mean to say that we should have complete jurisdiction in declarators and reductions; but I say that when an action comes before us of a kind that we are competent to deal with, we should be allowed to deal with declaratory and rescissory matters arising in its course, and should not be obliged to sist the action, and put the parties to the expense and trouble of bringing an action in another court, before we can give them a remedy.

1796. Would you put it in the power of the party to go to the other court if he thought proper, as under the 40th section of the statute?—Does your Lordship mean if the parties chose to go?

1797. Or if one party chose to go?—If a proper jury question arose in this way, and it was considered expedient that parties should have the power given by the 40th section at all, it might be used in that case. In suspensions in the Sheriff Court we have jurisdiction just now to the extent of £25; but I cannot see why the jurisdiction should be so limited. If action were brought on a bill in our court, we could entertain it, whatever the amount; and because the pursuer chooses to begin by way of summary diligence, I don't see why the defender should be obliged, before he states his defence, to go to the Court of Session if the amount is over £25. I don't propose to alter any of the rules as to finding caution. Let it be found in the Sheriff Court as it is found in the Court of Session.

1798. *Mr. Webster.*—Would that not be giving the defender, in place of the pursuer, the choice of the court?—No; because the pursuer, if he wishes to go to the Court of Session with it, can take out his summary diligence in the Books of Council and Session; and in that case the suspension would go there too. I would refer next to the subject-matter of actions in our court; and taking, 1*st*, heritable title, I confess I have never been able to see the grounds for the distinction made between the power of deciding an heritable title, and the power of deciding upon any other kind of title to property. But I am afraid it would be too extensive a change to propose to give full jurisdiction in heritable matters at present; and I would not propose to ask it to the full extent. But there are many cases where the Sheriff's want of power to deal with heritable title operates to the public disadvantage. Where the value at stake is small, there is virtually a denial of justice. If the property is small, it will not bear the expense of going to the Court of Session, and we can't try disputes about it. In cases of small properties in country villages, disputes go on chronically about the title; the possessor gets the best of it; nobody dreams of bringing it to the Court of Session, because the whole property would be eaten up; and we cannot interfere. In that respect the exclusion of the Sheriff's jurisdiction to deal with heritage operates to public disadvantage; and I would propose, in all cases where the annual value does not exceed say £50, that we should have jurisdiction in matters of heritable title.

1799. *The Chairman.*—That involves the construction of rights?—Yes, clearly.

1800. *Mr. Murray.*—Suppose the subject was a house attached to an estate, but that the value of it was under £50, would you give the Sheriff jurisdiction in that case?—If the pursuer claimed only the part worth £50, I don't see why the action should not be brought before the Sheriff.

1801. But it might be of great value to the larger estate, the amenity of which might be affected by it?—In that case the defender would be able to appeal if the Sheriff did not do him justice.

1802. *Mr. Baxter.*—Don't you think that if a party was suing for a large estate, he would naturally go to the Court of Session?—Quite so.

1803. *Mr. Murray.*—You are not asking it in the case of a large estate?—No. I think we should also have jurisdiction in cases such as those which come under the Pupils Protection Act—for the protection of the property of pupils, minors, absent and insane persons, where the value of the property is not of a large amount. At present, if the property is small in value, it might be entirely thrown away before a factor *loco tutoris* or *loco absentis* was appointed in the Court of Session. It is anomalous that while we can commit an insane person to an asylum, if he has a little property, we cannot take care of it for him. I think if the property did not exceed £500 in extent, we might very fairly have that power; and we might have similar powers in dealing with trusts, where the trust estate was not larger than £500, appointing trustees in lapsed trusts, and so on. I also think that there is often public inconvenience from the want of a power in the Sheriff to protect the persons of pupils. In my own experience it has happened two or three times that disputes have got up in country districts as to who was entitled to the custody of a poor child. The parties were in such circumstances that it was utterly out of the question for them to go to the Court of Session to have it settled; and I had so limited a power that I could only give interim orders, and those only for such time as the party might require to go to the Court of Session. Now that is virtually an exclusion of the power of protecting the persons of these pupils altogether; and I think that, without disadvantage to any one, we might have power given us to protect the persons of pupils. It is not possible to put a pecuniary limit to that, but the right of appeal would always exist. I think further jurisdiction might also be given to Sheriffs in actions of aliment. Where a husband or wife is suing for aliment, and a consistorial question is stated in defence, it is at present held that we must sist the action of aliment till that question is settled. I would propose that we should not be obliged to sist actions of aliment of any kind, but should (for the purposes of the action) be held competent to settle such

John Dove Wilson.

questions. With regard to criminal matters, I think that the distinction between the pleas of the Crown and other cases is often more a nominal than a real distinction. There may be cases not among the pleas of the Crown much more important than those which are pleas of the Crown. Wherever the public prosecutor thinks that the amount of punishment which can be awarded in the Sheriff Court is adequate to the offence, we should have jurisdiction whether it falls within the pleas of the Crown or not; such as the case of robbery or of fire-raising, where two years' imprisonment would be considered sufficient punishment. With reference to offenders who have been tried repeatedly for an offence which, had it been committed for the first time, we could have tried, I think we should have jurisdiction to sentence to penal servitude. If a person commits theft, say three times, we can try him each time, because we can award an adequate punishment; but if the same person commits a fourth theft, though the trial may be a more simple matter, we cannot try him, because we cannot award an adequate punishment. I would propose that, as regards all those cases which would have been competent to be tried before the Sheriff had they been a first offence, our jurisdiction should not be excluded because it happens to be a third or fourth offence, and we should have power to sentence to penal servitude in such cases.

1804. *Mr. Adam.*—There is no distinction between a third or fourth offence. I suppose you mean just more or less numerous previous convictions?—Yes.

1805. *Mr. Baxter.*—Or where there are aggravations?—No; only that the number of previous convictions should not be an obstacle. I have looked at Sir Robert Anstruther's return, to see the effect these two proposals would have in lightening the labours of the Justiciary Court; and I find that at the Glasgow Spring Circuit of 1866, if effect had been given to such a view as I have now stated, out of 68 persons who were tried, 45 might have been competently tried before the Sheriff, which would have left only 23 cases to be tried before the Circuit Court, and would have left time for the disposal of civil business. In those 45 cases the length of the imprisonment before trial would also have been greatly shortened.

1806. *The Chairman.*—Don't you think that would be burdensome on the jurors of the district?—Not more so than at present.

1807. At present, if they are tried before the Circuit Court, Kincardineshire does not send all the jurymen?—Kincardine might have to provide more jurymen for its own cases, but then it would be benefited by having fewer to provide to take a share when Aberdeen cases were being tried.

1808. *Mr. Baxter.*—Do you find that at the first diets the prisoners probably all plead guilty except one, who is afterwards tried by a jury, and the same jury might try three or four cases?—Yes. I find the proportion of those who plead guilty at the first diet is very large.

1809. And therefore you would not require more jurymen though there were more cases to try?—No.

1810. Have you formed any opinion as to declarators of marriage or of divorce?—I rather think that is a matter for the public.

1811. I shall read to you an excerpt taken from a report of a committee of the United Presbyterian Synod, which the Commissioners on the Marriage Law embodied in their report: 'That, in cases of disputed marriages, the present law, which renders actions of declarator of marriage competent only before the Supreme Court, involves a process so expensive as in many cases to render its benefits beyond the reach of the humbler classes, to the deepest injury of the wife and children; and that to remedy this great evil, jurisdiction should be extended to the Sheriffs to dispose of such cases, subject to appeal to the Supreme Court.' Do you agree with that?—That is a matter involving a great many considerations besides matters of law. If it is thought for the public interest that the remedy of divorce or declarator of marriage should be made more accessible, I don't see why the actions might not be tried fairly enough in the Sheriff Courts. I don't know that the questions involved are much more difficult to try than questions that occur in other contracts. If the public wish it, I think we might be able to try those cases; but that is a matter more for the public than for the Sheriffs.

1812. *Mr. Orr Ewing.*—Would it not conduce to the public advantage that these cases should be competent in the Sheriff Court, seeing that there are many poor people who cannot come to the Court of Session?—That is an open point. Some people think that it is not an advantage that the remedy of divorce should be made too easy. It is not a question of law, it is a question of morals and of politics.

1813. And of expediency?—Yes.

1814. *Mr. Baxter.*—Do you think that questions under the Conjugal Rights Act, such as petitions for protection of a wife's earnings, should be competent to the Sheriff Court?—Such questions could be well enough tried in the Sheriff Court.

1815. Don't you think it is a hardship on poor women to be obliged to go to the Court of Session in such cases?—When it is merely a question of protecting her property, I cannot see why the Sheriff should not have jurisdiction.

1816. Don't you think it a hardship?—It is. The property may be so small, that it is not worth going to the Court of Session about. There must be many cases in the country of poor women making small earnings which are carried off by their not being able to have protection at present.

1817. Do you think that extraordinary removings should be competent in the Sheriff Court?—I see no reason why they should not.

1818. *The Chairman.*—What is your next suggestion?—With reference to civil proceedings, the first thing I would suggest is, that it would be a great advantage if we had all our proceedings brought under one code of regulations. At present we have a great many statutes to consult—not under forty, I should think—and a great many Acts of Sederunt, some of which are not in a very convenient form. If these could all be brought into one code of regulations, it would be a great advantage. That might be easily done if some such plan were taken as was followed in England, where a commission of five County Court judges was appointed to draw up a set of regulations.

1819. Was there not a similar course taken in regard to the earlier code of regulations for the Sheriff Courts?—There was something similar under the Act of 1838.

1820. But at an earlier period there was a Commission, of which I think I was a member?—Yes, I think there was. But I think such a Commission is more needed now than ever it was, and I should propose for it a scheme much more extensive than anything hitherto attempted,—a scheme which should commence with the matter of jurisdiction, and extend over the whole range of practice.

1821. *Mr. Baxter.*—How many forms of process are there at present?—Three for actions for the payment of money; and for applications for other remedies, I really cannot tell the number. Beginning with ordinary actions, I think our forms of process might be simplified a good deal. The libelled summons stating the grounds of action is a longer document to begin a process with than there is any necessity for; and it would be quite sufficient to begin the action, if we had a writ simply stating the remedy claimed, with enough of specification to enable it to be identified. I think that in place of the condescendence, we might very well have something like the English declaration, containing nothing but the grounds of action, stated in single propositions; and instead of the defence, a minute something analogous to the English plea. But to meet cases of equity and complicated cases when they arise, I would give power to the judge ordinary, on motion, to order a statement of particulars to be given in any case. The present system of allowing an option between the short and the long form of record does not work very well. When gentlemen come up and state on their professional re-

sponsibility that they think a long record to be necessary, we have great difficulty in refusing it, and we often in the end find that they have been over anxious, and that it has not been of the least value. I think if it was provided that the record was always to be in a short form first, but with power, in occasional cases, to order details, we should be able to make our records, as a rule, shorter and better than they are.

1822. *Mr. Baxter.*—You spoke of a declaration and a plea. Would you not require a replication?—Yes, with power to have a replication wherever the pleas raised matter not raised in the declaration. There is a great deal of time lost just now in the technical process of adjusting and closing the record. I scarcely ever saw an alteration made in adjusting that was of the least consequence. I think that might be all done away with, and the record held to close of itself as soon as the pleadings were put in,—but with a power to amend at any stage on payment of expenses.

1823. *The Chairman.*—Do you think there would not be a great risk of slovenliness in that case?—No. I think we could check that by the provision as to expenses. With regard to the Debts Recovery Act, I have not had much experience of it; but if such a simple form of process as that which I have suggested were given, I think the form contained in that Act might be limited to actions not exceeding £25 in value. If that were done, I think the Act might be made to apply to debts of every description. With reference to the investigation of fact, I think that where both parties consented, power might be given to have certain facts tried by jury in the Sheriff Court. I don't think it would be much used, but it might meet cases which are at present not easily dealt with. It is often unsatisfactory to have the evidence brought before a single judge; and it is equally unsatisfactory to have the result which he arrived at, after seeing all the witnesses, reversed by a judge who has not seen any of them.

1824. *Mr. Baxter.*—What number would you propose as the jury?—Seven or eight.

1825. *Mr. Adam.*—Would you require unanimity, or only a majority?—A certain number of votes—say five.

1826. *Mr. Webster.*—Would you prefer the decision of five out of seven untrained men, not accustomed to judge of evidence, to the decision of a local judge?—It is impossible to leave the matter solely to the decision of such a judge, and there might be cases in which the parties would prefer a jury.

1827. What class of cases?—Cases, for instance, where they thought the judge ordinary had strong views upon particular matters; and, on general grounds, I think actions of damages are often better disposed of by juries.

1828. *Mr. Baxter.*—You would only have a jury where the parties wished it?—Where both parties wished it.

1829. *The Chairman.*—Perhaps the strong views of the Sheriff on the subject would be an inducement to one of the parties to refuse his consent?—It might. But I was just going to have stated that I would also give power to the appeal court, where they thought there had been a miscarriage before the resident judge, but still were not certain that the result opposite to that which he had arrived at was correct, to remit the case to be tried before a jury.

1830. *Mr. Webster.*—Where there had been a jury trial, would you have any power of review?—Yes, by bill of exceptions, in the same way as in the Court of Session.

1831. With or without the details of the evidence?—With the notes of evidence.

1832. Do you know whether jury trial has been found to be a very costly or a moderately expensive thing?—It has been found very costly in the Court of Session, but there are various reasons for that which would not apply in the Sheriff Court: 1*st*, you would have all the witnesses on the spot; 2*d*, you would in general have no counsel; 3*d*, there would be no expense of printing; and 4*th*, there would be no expense of issues, because I would propose that, as in England, we should send the case to the jury at once upon the record. I may state, as to criminal matters, that I think the declarations should be taken in public. I am not fond of the Scotch and foreign system of taking the declarations in private. I think they should be taken in public, and should be limited to telling the prisoner that he is accused of a certain offence, and asking him if he has anything to say.

1833. *Mr. Baxter.*—Is that not very much the system that is adopted?—Yes; but it is competent to go on and examine him in the details.

1834. But in practice is not that very much the system which is followed?—It is. Then I think that our forms of complaint and indictment might with advantage be shortened a good deal, so as to take more the form of a notice, telling the person that he is to be tried for a particular offence.

1835. Do you mean that you would alter the form of the indictment, which at present contains major and minor propositions?—Yes.

1836. What would you make it?—I would make it a simple writ, telling the accused to take notice that he is to be tried for the crime, say of theft, committed by him at a particular time.

1837. And at such a place?—At such a place.

1838. Would you give any power of amendment of slight errors during the trial?—Yes; of slight errors. I think that might very well be given.

1839. *Mr. Adam.*—Would you still take the precognitions in private?—Yes: they are the prosecutor's case, and I think he should not be asked to disclose it in an incomplete form.

1840. *The Chairman.*—You think the syllogistic form of the indictment is not good?—It is very good, but it is more involved than there is any occasion for.

1841. *Mr. Baxter.*—Have you known miscarriage to arise from it?—I know that it is very troublesome to frame, and that technical objections are often sustained to it, which would not be the case if there was a simpler form.

1842. *Mr. Gordon.*—What would you omit from the indictment?—I would merely name the crime by its name—theft; then mention the time and the place where it is said to have occurred, and nothing more.

1843. *The Chairman.*—All you would say would be, You are accused of stealing a certain thing at a certain time and place?—Yes; and from that I think the prisoner would understand quite well what he had to do in the way of defending himself.

1844. *Mr. Baxter.*—That is very much the English form?—Yes.

1845. *The Chairman.*—That is very much limiting it to the minor proposition?—Very much.

1846. *Mr. Adam.*—Would you allow previous convictions or habit and repute to be proved before the jury retired, or after they came back?—I think it would be better to take those matters after they came back. I may add that I think we have very absurd limits as to the kind of previous convictions that may be used. The value of a previous conviction is as showing the character of the man; and I think the prosecutor should be at liberty to bring up every kind of previous conviction which he thinks relevant to affect the amount of punishment.

1847. *The Chairman.*—Whether of that crime or of another?—Yes. If it was not relevant, the judge would pay no attention to it.

1848. *Mr. Baxter.*—And that after the verdict was given?—Yes. It would be no disadvantage to the prisoner. If evidence of that kind were to be brought before the jury retired, I can see good reasons for limiting it strictly to the kind of crime charged; but when not brought till after the verdict is given, I think the public prosecutor should be at liberty to mention to the judge all the previous convictions that he thinks relevant.

1849. *Mr. Adam.*—At present the prisoner, in practice, and as matter of right, leads evidence as to the goodness of his own character?—Yes.

John Dove Wilson.

1850. The prosecutor has no such power of leading evidence of the prisoner's bad character?—No; but I think he ought to have that power. Where the prisoner sets up his character, I think the prosecutor ought to be able to reply; and in that case I would allow the prosecutor to bring every kind of evidence, including previous convictions, before the jury retired.

1851. *Mr. Baxter.*—That is, where he put his character in issue?—Yes.

1852. *Mr. Adam.*—Would you require previous notice from the prisoner that he was going to plead his good character?—That might be requisite.

1853. Or would you allow the prosecutor to lead evidence upon that point, without serving a list of witnesses?—I would not allow the prosecutor to lead evidence upon character until the panel had led his.

1854. But would you require that the prosecutor should give a list of witnesses?—No, I think not. If the accused opened the matter of character, he would have to be prepared to hear counter evidence.

1855. *Mr. Baxter.*—You are aware that the prosecutor is bound to give fifteen days' previous notice of his witnesses?—Yes.

1856. Suppose that within two days the panel says that he is to put his good character in issue, would you require the prosecutor to give notice of the witnesses that he was to call?—These are matters of detail, on which I could not very well give an opinion at once.

1857. *The Chairman.*—Do you think the prosecutor should be allowed to prove previous conviction, and bad character, after conviction?—Yes.

1858. Should the prisoner not have some notice of that, in order to rebut it?—Yes, I think so, where the prosecutor opens the subject; but I would not put it in the indictment. I would make it a separate writ.

1859. But you would give him such notice?—Yes. I would make a separate writ, which I would serve on him a certain number of days before the trial, telling the accused that in the event of his being found guilty by the jury, the public prosecutor will lead evidence to show that he has been habit and repute a thief, or that he has been previously convicted.

1860. Would you give him then a list of the witnesses that were to prove that?—Yes, indorsed on that writ.

1861. Would you get from him a list of the witnesses to character whom he was to adduce?—Yes, when he gives his other witnesses, I would make him include these.

1862. *Mr. Adam.*—Did you ever see, in your experience, a case in which an innocent man suffered prejudice by the present form of taking declarations?—No, I cannot say that I have.

1863. *Mr. Baxter.*—Has that matter been very tenderly dealt with, so far as you have had an opportunity of judging?—My opportunities of judging have chiefly been in cases in which I have been the presiding magistrate, and I have always endeavoured to deal as fairly with the prisoners as I possibly could. But my objections to the system of private examinations of the accused are, that it may be abused; that it is unnecessary; and that it is hardly fair, when publicity is inevitably given to the charge, not to give equal publicity to the answer made to it.

1864. *The Chairman.*—Have you any other suggestions to make?—The number of jurymen that are cited seems to me too large. We have often, in my county, cases where one person is to be tried for not a very grave offence, and we are obliged at present to cite 45 jurymen, while of course 30 of these are not called. I think it would be no disadvantage to the panel if the number were reduced to 25.

1865. *Mr. Webster.*—Would you still keep up the number of 15 as jurors?—I think that might be reduced to 12.

1866. *Mr. Adam.*—Then you could not have a majority?—You might have it in this way, that no verdict was to be given unless 8 were agreed.

1867. *The Chairman.*—How would you deal with challenges?—I would not make any difference in the number of challenges. At present, I think, a man may challenge 2 special and 3 common jurors. The 25 still gives him a good margin.

1868. *Mr. Baxter.*—Suppose there were two or three prisoners under one libel, and each had a challenge?—You might have to cite more jurymen at times; but if you had to cite 25 where you had only one or two cases to try, you would, in the course of the year, relieve the jurymen of a great deal of trouble.

1869. *The Chairman.*—You would make it competent to cite only 25?—Yes.

1870. *Mr. Harrison.*—Do you suppose that the ends of justice would suffer by reducing the number of the jury to a still greater extent, say 7?—It might. I would not like to go so low as that. I don't think that any country which has adopted jury trial has gone below 12 in criminal cases; but I think it might be reduced to 12 without the smallest disadvantage.

1871. *The Chairman.*—And a verdict by a certain proportion of these?—Eight votes to acquit or convict, which is the same number as you have at present. You can have no verdict at present till 8 are agreed.

1872. But they are 8 in the 15?—Yes; but I think there are very few cases where 8 jurymen out of 12 would not agree.

1873. *Mr. Campbell.*—Do you approve of the aggravation of habit and repute without previous conviction being proved in criminal cases?—I think, if it were only proved after the verdict, there would be no harm in it, but on the contrary, advantage, even though there were no previous convictions. There are many characters well known to the police as thieves whom they have never been fortunate enough to catch.

1874. *Mr. Baxter.*—The only rule as to whether bail is admissible or not, is whether the crime is capital?—Yes, or rather if it was capital at one time.

1875. Do you think that operates well?—No, I don't think it does. I think the distinction between crimes that were capital once and other crimes is often not a very sound one. There are crimes that were capital once, which are really very much smaller crimes than others that never were capital.

1876. When a person is accused of three several acts of theft, you don't admit him to bail?—I think not.

1877. If he be a fraudulent bankrupt to any extent, you do admit him to bail?—Yes.

1878. If the charge is reset of theft, you admit him to bail?—Yes.

1879. Don't you think it would be better to trust that matter to the discretion of the bailing magistrate?—I rather think it would. The present rules for our guidance are not satisfactory, and I doubt if it be possible to frame any kind of satisfactory rules without leaving a good deal to discretion.

1880. Of course it would be under right of appeal?—That would not be very easily arranged, I am afraid.

1881. *Mr. Adam.*—You think the prisoner should not get it as matter of right?—I think not.

1882. *Mr. Baxter.*—Do you think the public prosecutor should get notice of any application for bail, so that he might attend for the public interest?—I think so; and in my county he always does know of it.

1883. *Mr. Adam.*—Do you think the privileges in the Act of 1701 as to forcing on a trial should be extended to a person out on bail?—No; I think he should have a certain power of forcing on his trial, but not the same power as a person who is in jail.

1884. *The Chairman.*—What is your next suggestion?—I come next to review in civil matters, and to inquire what appeals should be allowed, and who should judge on the appeal. On the first of these points, I think that we are at present rather too liberal in allowing appeals. Appeals are allowed at four stages of the case—namely, when the proof is ordered, upon the admission of evidence, upon the merits, and on the question of expenses. A little ingenuity often contrives to get more, though these appeals are very seldom all taken. The average number is perhaps two in each case in place of four. But they are all used just in the kind of cases where they ought not to be used, where the pleas are utterly bad, and where the party is fighting

for delay. I think that in all appeals, except those upon the merits, there should be a power to the judge ordinary to refuse to allow the appeal. I think that would diminish the number of appeals nearly by one-half. With reference to the court of appeal, I am not prepared to say that the appeals should go direct to the Court of Session. No doubt it is by far the best and weightiest court, but the practical disadvantages in the way are too great. The unavoidable expense is too great; and even after reducing the number of appeals as I propose, the influx of business would be too great; and there is a certain disadvantage in removing the administration of justice to any extent from the county. I think it requisite, therefore, to retain an intermediate court of appeal. What I said of the propriety of cancelling the honorary commission which the non-resident Sheriffs hold as judges ordinary, does not imply that they might not be retained as judges of appeal, if they were thought to form an efficient tribunal. But, speaking with due deference, I hardly think they do form such a tribunal. To appeal from one person to another, seldom of conspicuously higher standing, does not appear to me to be satisfactory. And I think it is essential that whoever hold the appeal courts should not be practising members of the bar. I think that, in theory, the appeal from one judge should always be to a higher judge; and in practice, if you take the appeal judges from the practising bar, they cannot possibly hold their appeal courts so frequently as the public convenience requires. We have at present three modes of disposing of appeals,—one without any argument, which appears to me a very unsatisfactory way. The second mode is with written pleadings. That also is bad, because it is very expensive, frequently coming up to £7 or £10 on each side. I therefore come to the conclusion that oral pleading is the only way of settling appeals. Under the present practice, when the members of the bar hold the appeal courts, the average time for disposing of a case under oral pleadings, as taken for the returns of 1863, varies from 40 days, which is the least average, up to 237. I think that is far too long an interval; and the returns conclusively show that that is not to be attributed to any fault in the appeal judges, because the cases only lie, after being heard, from 10 to 20 days on an average. There are exceptional cases, but that is the ordinary time. The real loss of time is in the long interval during which the judges are practising in the Court of Session, before they can come to the county to hear appeals. Therefore I think that, if you are to have a satisfactory tribunal of appeal, it must consist of men who are not practising at the bar; and then, I think that each court should consist of two judges. For the purposes of the appeal courts, I propose to divide the country into circuits,—say four circuits. The number of appeals just now, according to the returns, is about 2000 in the course of a year. I think, by limiting the right of appeal as I have suggested, you might reduce them to 1000, and four circuits might easily dispose of that number of appeals in the course of a year. I propose that the courts should sit once a month in the larger towns, and once in two months in the more distant localities. In cases where the court of appeal has adhered to the decision of the judge ordinary, I think there should be no appeal to the Court of Session without caution.

1885. Caution for what?—For expenses.

1886. Only?—Yes; or consignation of a sum to meet expenses.

1887. *Mr. Webster.*—Supposing the two judges not to agree?—In that case I take it for granted that the system of the Lords Justices of the appeal court would be followed, and the judgment of the judge ordinary adhered to.

1888. *Mr. Campbell.*—Do you consider that it would be decidedly preferable to have two gentlemen going together on circuit, as appellate judges, than one?—I think so. It could only be reasons of economy, I think, which would limit such a court of appeal to a single judge.

1889. *Mr. Webster.*—How would you conduct the cases before them. Would you have the papers printed?—No. When in court, the judges could very well have the papers between them; and when they came to consider the case, one might take the process for a time, and then hand it to the other.

1890. *Mr. Campbell.*—That was the course followed in the appeals in civil cases to the Circuit?—Yes. I think it would not be any more expensive to the litigants to have two judges than to have one, though of course it would be more expensive to the country.

1891. *Mr. Baxter.*—Do you think that the present mode of taking down the evidence by the Sheriff-substitute is satisfactory?—No, not quite; I think it would be better to have the evidence taken by shorthand writers.

1892. Dictated by the judge?—Yes.

1893. At present, I suppose, the agents don't know what is being taken down?—No, they don't hear it till the end of the examination. Besides, it is a very laborious thing to the judge to take down the evidence; and it so engrosses his whole attention, that he has almost no time to think of questions to put to the witnesses, and no proper opportunity of watching the demeanour of the witnesses.

1894. Do you think it is of great importance to see the witnesses?—I think it is. At present the Sheriff is kept writing constantly the whole time; and when he has written for seven or eight hours as constantly as he can, he has not the same power of asking questions and observing the witnesses that he would otherwise have.

1895. You think that the present review by the Sheriff on the notes that the Sheriff-substitute has taken is not satisfactory?—I don't think it is very satisfactory. I think, when you go from one judge who has seen the witnesses to another judge, who is at the disadvantage of not having seen them, you are always open to remark that the judgment of the first judge is really the better of the two.

1896. *The Chairman.*—You would still allow an appeal to one judge?—Yes, if the country refused the expense of having two judges, I would still allow an appeal to one judge, because I think it is better than no appeal at all.

1897. But you prefer two?—I do much.

1898. If these two judges concur in altering the Sheriff-substitute's judgment, you would allow an appeal to the Court of Session?—Yes.

1899. If they agree in affirming, would you allow any appeal?—I would; but only with caution.

1900. If one of them was for affirming and the other for reversing, would you not allow the appeal without caution?—I would. In the event of any difference of opinion among the three judges, I don't think caution should be required.

1901. *Mr. Harrison.*—Might not a wealthy man still have it in his power to ruin a poor man by vexatious appeals, even though the check of consigning expenses was applied?—That is a matter inherent in any system; but I think it well worth consideration, whether some means might not be taken of limiting the number of instances, so that, at all events, there should never be more than three in any one cause.

1902. Would not justice be satisfied by permitting only one appeal if the first decision was affirmed?—I think you might very well say, that if the amount at stake were less than £50, there should be no appeal to the Court of Session.

1903. *Mr. Murray.*—How do you reconcile that with the answer which you gave to me formerly as to heritable subjects?—I spoke of £50 a year as to heritable subjects.

1904. But there might be an heritable subject of the value of £50 which might greatly affect the amenity of a larger estate?—I would allow an appeal in that case.

1905. I thought you stated just now that you would not allow an appeal under £50?—Do you mean where the whole value of the heritage is under £50?

1906. Yes?—Well, if it was only worth £50 in all, I don't see why there should be an appeal.

John Dove Wilson.

1907. But the party might consider it worth more, as affecting the amenity of his large property?—I think a special provision might be made to meet that case, and that if it affected larger interests there should be a right of appeal.

1908. Would you give the judge in such cases power to allow an appeal?—Yes, or allow it in that case whether the judge thought right or not.

1909. *Mr. Adam.*—Do you think that caution affects a poor man, and prevents him from getting a remedy?—No, I don't think so. You allow juratory caution, which the poorest man may find, if he has a stateable case.

1910. *The Chairman.*—As to appeals, you think the Sheriff should have power to allow or not to allow appeals at certain stages?—Yes.

1911. And practically you think that would result in there being no more than an average of two appeals in a case?—I think it would reduce it to an average of very little more than one appeal in a case.

1912. Suppose there is a preliminary plea, which if settled in one way would dispose of the whole case, and the party against whom the judgment upon that plea is pronounced desires to appeal, what would be the rule in that case?—I think you might safely trust to the discretion of the judge ordinary to allow the appeal in that case. We have no interest to take unnecessary proofs, but rather the other way.

1913. Then you would be against allowing a party to follow out his own inclination in regard to appealing in such a state of matters?—Yes.

1914. It might turn out advantageous to him in a particular case, but you think it would be a privilege or allowance that might be abused?—Yes; and it actually is abused to a very great extent.

1915. You would keep that in check by a discretionary power in the judge as to the time at which he would allow it?—Yes; and I have no fear of the discretion being abused, because the judge's interest is to allow an appeal on preliminary pleas whenever they are important.

1916. *Mr. Adam.*—Might there not be danger of the judge allowing them too easily?—Yes; but the court of review could keep him in check. If they gave encouragement to appeals being allowed at every stage, his inclination would be to allow them; but the court of appeal would probably express an opinion on that, and keep him in check in that way.

1917. *Mr. Baxter.*—I suppose many appeals are taken for the sole purpose of delay?—A large number.

1918. *Mr. Webster.*—Would there not be more delay in many appeals under the system of an appeal court than takes place under the present system with a Sheriff-principal?—No. Even with written pleadings just now the delay is very considerable. The written pleadings take a long time in preparation. In cases where written pleadings are lodged for both parties, the average time varies from 15 days, which is the shortest, up to 155 days, which is the longest; and such numbers as 52 days, 58 days, and 60 days, are quite common in the list. Now if there was a court sitting once a month, as I should like it to do, or even once every two months, you would have the appeals disposed of more quickly.

1919. *The Chairman.*—Would you have that court to sit at every seat of the resident Sheriff?—No. It should hold courts at particular points over the country. Aberdeen, for example, might take all the district round, namely—Aberdeen, Stonehaven, Peterhead, and Banff. It would be no great inconvenience to the practitioners to go to Aberdeen and return home again the same night.

1920. You would hold the courts at convenient points?—Yes, so as never to oblige the practitioners to be a night from home.

1921. Would the Sheriff-clerks attend with the processes?—That would hardly be necessary.

1922. The Depute-clerks?—That would be matter for arrangement; probably the Depute-clerk of the place might be empowered to act. There is a kind of review which I think is required from the Small Debt Court. Just now we have often cases coming one after the other, raising the same point of law, and some Sheriffs decide these points continually one way, and others decide them continually the opposite way. Now I think it might be left to the discretion of the Sheriff to permit an appeal upon a case stated, with the view of getting such points settled. For example, there was the case about the liability of a man to support his mother-in-law, and it was decided in Small Debt Courts in different counties in different ways for a long time. There was no appeal at all; and even when cases were remitted to the ordinary court, the amount being below £25, the review of the principal Sheriff was all that could be got. The case could not be sent to the Court of Session.

1923. *Mr. Webster.*—Would you send the special case to the Court of Session or to the appeal court?—If there was an appeal court of two judges, I don't see why it should not go to them.

1924. *The Chairman.*—If the object was to obtain a rule to regulate in all places and secure uniformity, would not that be better attained by going to the Court of Session?—Yes, probably it would.

1925. *Mr. Baxter.*—You mean an appeal on matters of law on a case stated?—Yes. In regard to criminal matters, there is no review just now, and I think it would be an advantage to allow a review such as is allowed in England, on reserved points,—giving the judge a power at the request of the prosecutor or the panel of reserving a point of law for the decision of the Supreme Court.

1926. *Mr. Webster.*—A discretionary power?—Yes, the same as in England.

1927. *Mr. Gordon.*—Can you not at present take an objection, and then suspend the sentence?—You can take an exception to the relevancy of the indictment, and appeal on that; but as to anything occurring in the course of the trial, I think you have no appeal just now.

1928. Is there not a power of appeal upon irregularities in course of trial?—Yes, but that is all, and it does not meet the case of there being difficulty about the law that is applicable to the facts brought out in evidence. There is another right of appeal which I think it would be necessary to have in the event of giving the Sheriffs power to pronounce longer sentences, in order to secure uniformity of practice over the country. A Sheriff might take up a peculiar view as to these sentences, and I think there should be a power of appealing to the Court of Justiciary simply upon the indictment and notes of evidence, the Court of Justiciary to have power to say whether they think the sentence unreasonable or not, and to alter it accordingly.

1929. *Mr. Adam.*—In that case the Court of Justiciary would not know the facts?—They would have the notes of evidence. The same kind of review is allowed in France and Prussia just now.

1930. *Mr. Webster.*—Don't you think that, with the publicity which exists as to sentences, the Sheriffs would come to know the practice?—They might; but they might think the practice wrong. Then, as to the privileges of agents, I think that our present system of splitting up the agents into numerous separate corporations is not a good one. I think there is no reason why a person who has been duly admitted as an agent, should not, in the same way as a person who has been duly admitted as a counsel, be able to practise before any court. But I see difficulties in the way of allowing one set of agents to have power to act both in the Court of Session and in the inferior courts, and I don't think it necessary to carry out the principle so far as that, but I think that agents admitted before any of the inferior courts should have power to practise before all of them.

1931. *Mr. Baxter.*—Are you aware that procurators are now examined in a different way from what they used to be, by examiners appointed by the General Council under the Procurators Act?—Yes; but the admission is still local, although the qualification is nearly the same everywhere. The Procurators Act made things worse in some respects; and if the present system goes on, the smaller counties will soon be left with

almost no procurators at all. A lad of 15 will hardly bind himself down to a county for the rest of his life; and since the Procurators Act passed, in April 1865, only one apprentice has enrolled himself in our county. I think that agents in the inferior courts should be admitted by some central body, and should have power to practise in all the inferior courts, and I think they might also with advantage get power to conduct appeals in the Court of Session. I don't think that power would be much used; but I think it is a privilege which they ought to have, to carry on, to their legitimate conclusion, causes which they have begun.

1932. *The Chairman.*—Do you think there would be any propriety or impropriety in altering the law as it is understood to stand, against the legality of participation in profits between country agents and agents in the Court of Session?—I think there would be advantage in altering that law.

1933. Would that accomplish the object which you contemplate, of the country agent being able to follow his cause to its conclusion?—I am not quite sure that it would. If you gave the country agent the power of saying to the Edinburgh agent, 'If you will not agree to my terms, I will come and conduct the case myself,' he would have the power to contract as to a participation in the profits; but unless the county agent got the power to act himself, the Edinburgh agent would be contracting with an agent whose hands were tied.

1934. Would you have the country agent to come to Edinburgh and be responsible for the custody of the process?—I don't anticipate that it would be much done in practice; but I think the mere power of doing it would put him in a position to contract with the Edinburgh agent on reasonable terms.

1935. Don't you think there would be a sufficient opening for him to contract, seeing the number of agents in Edinburgh?—But they could come to an understanding with each other on such a matter.

1936. How would you get over the difficulty as to the custody of the writs?—The custody would be with the clerk of court.

1937. But the country agent would borrow the process?—He would only require to come up and borrow it, and take it to his counsel.

1938. But what becomes of it?—He remains responsible for it.

1939. But where is he?—He is still in Scotland.

1940. He goes to Kincardine with the process?—He is still within reach there.

1941. *Mr. Baxter.*—Supposing he had the privilege, do you think it would be often used?—No, I don't think so. The Commission has invited observations on other points, and I intend to make a suggestion with reference to the Sheriff-clerks. At present we have a system which I might almost call a contract system with the Sheriff-clerks. When a Sheriff-clerk is appointed, an estimate is made out of what he is likely to require for the expenses of his office; and he is paid in each year a sum calculated to meet these expenses, and at the same time to remunerate himself.

1942. *Mr. Murray.*—That was done when the salaries were fixed. It is not done on each occasion?—No, not on each occasion.

1943. *The Chairman.*—It is not a recurring thing; it was done when the salaries were adjusted?—Yes. That is so. But it is a contract system. The Sheriff-clerk contracts for a slump sum, to do the whole work of all the courts in his county, however numerous, and to supply certain record books and stationery. Now I think that is fundamentally a bad system. It gives the Sheriff-clerk an inducement to conduct the establishment of the courts on the smallest possible scale; and although these gentlemen, as a whole, do their duty well, we know that there are cases where too much of the work is thrown on the Sheriff-clerk-deputes, who are often ill paid, and who have no sufficient staff of other assistants at their disposal. This has a bad effect also upon the Sheriff-clerk-deputes. The only official whom the Crown recognises is the principal clerk; but we are more dependent on having good depute-clerks, for we see more of them than of the principal clerks; and yet they have no sort of position. They are ill paid, and liable to be dismissed at a moment's notice; they have no retiring allowance if they are dismissed; and, in the way in which things are at present managed, they have little or no prospect of promotion to the office of Sheriff-clerk. I would suggest that the system of contracting with the Sheriff-clerks should be abolished, and that the Sheriff-clerk and his staff should be put upon the public service, keeping each court entirely separate; and also that the clerks should give their whole time to their duties, and not engage in other business. I think that in the end it would be a more economical system for the country, and would be very much better for the administration of the office.

1944. You would fix the extent of his staff?—Yes.

1945. Would you give him the appointment of these persons?—I don't see any reason why the Sheriff-clerk should have the appointment of the subordinates. I think their appointment would probably be better in the hands of the Crown. I would not object, however, to leaving the nomination of them to the Sheriff-clerk, provided the Sheriff had a veto on their selection or dismissal.

1946. *Mr. Baxter.*—Does he not attend and do his own duty?—Some of them don't attend.

1947. Should they not?—Yes; I think every Sheriff-clerk should attend and do his duty. But that is impossible under the present system, for the same clerk is commissioned to act for different courts,—in one case, for as many as seven courts.

1948. *The Chairman.*—Those appointed after a certain date require to be resident?—Yes.

1949. *Mr. Harrison.*—If the jurisdiction of the resident Sheriffs were extended as you have proposed, do you think that competent persons could be obtained for the office at the present salaries?—I think that our salaries, considering the duties that are imposed upon us, and the position that we are required to hold in our counties, are not adequate. When an English County Court judge is paid £1500 a year, and an Irish assistant barrister about £1000 a year, it is unreasonable to pay a man who has higher duties, more power entrusted to him, and whose time is in general more fully occupied, a salary not much more than one-half.

1950. *Mr. Baxter.*—If the number were to be reduced as you propose, the burden of increasing their salaries would not fall so heavily on the country?—No.

1951. *Mr. Harrison.*—Some proceedings were taken a few years ago on the part of the Sheriff-substitutes; was any pledge of an increase given to them on the part of any one in authority?—Both the late Government and the Government before it sanctioned the general principle that we were entitled to more salary, and the only thing which prevented that being carried out was a financial difficulty connected with the state of the Treasury at the time.

1952. *The Chairman.*—What sort of remuneration do you think the resident Sheriffs, according to your plan, ought to receive? Ought it to be varied according to the extent of territory; or what would be the average?—I think the aim should be, as much as possible, to make the districts equal, and therefore to make the salaries equal. But as it is not possible to make the districts entirely equal, I think you must allow some effect to difference of amount of work. Looking to how other professional men are paid, I think we might very fairly expect an average salary of £1000 a year.

1953. As to the appeal Sheriffs, who on your plan would go once a month and review the resident Sheriff's judgments, I think you have stated you would require them to relinquish their practice at the bar?—Yes.

1954. What emoluments would you give to them?—I think their salary should be upon the same scale as that of the Sheriffs of Edinburgh and Glasgow—£1700 to £2000 a year. I don't think you could expect well-qualified men to relinquish their practice for any smaller amount than that.

1955. *Mr. Webster.*—Preferring as you do two

John Dove Wilson.

judges in the appeal court to one, what would be the cost of the staff of appeal judges according to your proposal?—If there were to be two appeal judges for each court, the circuits would require to be limited to four. That would be eight judges at £2000 a year—£16,000.

1956. *Mr. Baxter.*—How many Sheriffs are there just now?—Twenty-three.

1957. You would reduce the 23 to 8?—Yes. I think their total salaries just now amount to upwards of £18,000 a year, so that the new system would not in that respect be more expensive than the present.

1958. *Mr. Murray.*—Would it not be so if you give the resident Sheriffs £1000 a year?—That is a separate point, but even taking the whole into view, I think the cost of the two systems would be nearly the same. At present I think over £18,000 a year is paid to the principal Sheriffs.

1959. *Mr. Gordon.*—Does that not include the salaries of the Sheriffs of Edinburgh and Glasgow?—Yes; but I propose to ask them to take circuits also. I propose to reduce the number of resident Sheriffs to 40, so that each appeal court might very well review the decisions of 10 resident Sheriffs. The staff would then be: 8 principal Sheriffs at £2000 a year—£16,000; and 40 resident Sheriffs at an average salary of £1000 a year—£40,000; making a total of £56,000,—the present amount being, I think, about £54,000. If the appeal Sheriffs' salaries were fixed at £1800, the cost of each system would be very nearly equal.

1960. *The Chairman.*—How would you deal with the case of Glasgow?—The Sheriff of Lanarkshire at present reviews the decisions of seven Sheriff-substitutes, and he reviews them upon a system which allows double the number of appeals that I would propose to allow under the new system. I think that under the new system there would be no difficulty whatever in his taking a share of a circuit which would include ten resident Sheriffs.

1961. Would you have him to be a non-resident Sheriff?—I don't see any reason why he should not continue to reside in Glasgow. I think he ought to continue to reside there.

1962. Do you say the same as to the Sheriff of Edinburgh?—Yes. Allowing him to take a share of a circuit of about the same extent.

1963. *Mr. Gordon.*—Would you allow the Sheriff or the Sheriff-substitute to elect to take the salary of £1000 as resident Sheriff?—It would be less of a change to say that the men who reside in the county, and do the work, should continue to reside and do the work, than that the men who reside in Edinburgh, and never do the work of judge ordinaries, should go to the counties; and I think you should take the course that involves the least change.

1964. *Mr. Webster.*—Would the same class of men accept the office of appeal judge who at present accept and hold the office of Sheriff-principal, with the advantage that they have of practising at the bar?—We know that the privilege which they have of practising is not exercised to any great extent by a large number of them; and I think that, upon the whole, if you hold out a prospect of a salary of £1800 or £2000 a year, you would probably get better men than you get on an average salary of £600 a year.

1965. *The Chairman.*—You would limit their duties entirely to appeal?—Yes; and make them devote all their time to their duties. I have two more suggestions to make. One of them is for a system of annual inspection of the records of the Sheriff Courts. I believe there is such a system in the County Courts in England; and I believe it would be useful here if we had an officer to go round and see that the records were in a proper state.

1966. What records do you mean?—The various records of our courts.

1967. Do you mean the register of deeds?—The register of deeds for preservation and execution; of probative writs; the Commissary Court books. We keep the processes, and the warrants for extracts. The criminal records are also kept. It is not an easy matter to have all these properly kept and indexed; and a newly-appointed Sheriff-clerk may, with the best intentions, not keep them on the best system.

1968. Would you propose a uniform system?—Yes.

1969. Would you propose that the books should be sent from the Register House?—A number of them are so sent just now; and I think every book required should be sent. I would also propose that all printed forms of every kind should be sent from a central office. At present each Sheriff-clerk prints for himself all the different prints that he requires. He does that at a considerable waste of money, and they have all slight variations in form. I believe that if we had a central office for making such prints, as they have in England, I believe, for the County Courts, we should have them much better arranged.

1970. What kind of prints do you allude to?—At present we print the summons in the Small Debt and Debts Recovery Courts, and the complaints in the Summary Criminal Court, and a large number of other forms,—capable with great advantage of being still more increased.

1971. If there was a form prescribed for these summonses and complaints, they would be printed the same?—Yes; and it would be a great advantage to have more authoritative forms, but still it is a great waste of money to set up the type for each county. With reference to the other local courts, I cannot see the advantage of keeping up the Commissary Courts as separate courts. We do the duties of the Commissary Courts just now, but under a separate commission; and we have separate clerks. I think the Sheriff Courts and the Commissary Courts might well be consolidated, and the duties of the Commissary-clerk done in the Sheriff-clerk's office. I think that would be more convenient, and less expensive.

1972. Would you make an addition to the salary of the Sheriff-clerk for that, or how would you defray the expense?—There are fees at present drawn in the Commissary Court which go to remunerate the Commissary clerks. These fees would go, under the new system, to the Crown, and out of the fees the Sheriff-clerk should be paid a suitable remuneration for his trouble.

1973. *Mr. Baxter.*—These fees are very high?—Yes.

1974. *The Chairman.*—Would you keep up these fees?—Yes.

1975. At such an amount as would give a reasonable remuneration to the Sheriff-clerk?—Yes.

1976. *Mr. Baxter.*—Do you think these fees are too high at present?—Yes.

1977. *Mr. Murray.*—Would it not be a convenience to the public to allow confirmation to be taken out either in the county, or in the Commissary Court at Edinburgh?—Yes, I think it would.

1978. *The Chairman.*—Have you anything to say as to the Justice of Peace Court?—I have little or no experience of it. The Justices do little or nothing in my county, and there seems to be great difficulty in getting any one to do the little that there is. They try a small number of statutory offences—public-house cases, game cases, and road cases.

1979. *Mr. Baxter.*—Do they hold Small Debt Courts?—Not in my county.

1980. *The Chairman.*—Do they dispose of revenue cases?—Very few of them; but they have had one or two such cases.

1981. *Mr. Webster.*—Do you approve of their having jurisdiction in game cases and revenue cases?—I cannot say that I do. It is more a matter for the public to say which court they think offences should be tried before; but I think a professional judge is more likely to give a satisfactory decision in cases of that kind than non-professional judges.

1982. *Mr. Baxter.*—Have you any Burgh Court in Stonehaven?—No; I do the whole police work of the county.

1983. *Mr. Murray.*—Would you consider it an ad-

vantage that the Procurator-fiscal should be debarred from private practice, if the salary could be arranged?—I think it would. There would be a difficulty in carrying that out in the smaller counties, because you could not give him full employment, nor a large enough salary; but in every case where the salary permitted, it would be an advantage. I cannot say, however, that I have seen any bad effects from the present system. *John Dove Wilson.*

1984. *Mr. Baxter.*—If you confined the Procurator-fiscal's duties to his public functions, don't you think he should have a retiring allowance?—Yes, probably he should.

TUESDAY, 22D DECEMBER 1868.

Members present:—

LORD COLONSAY.	JAMES ADAM, ESQ.
E. S. GORDON, ESQ., Q.C.	JAMES WEBSTER, ESQ.
JAS. CAMPBELL, ESQ.	J. B. BAXTER, ESQ.
GEO. HARRISON, ESQ.	

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

J. COMRIE THOMSON, ESQ., examined. *J. Comrie Thomson.*

1985. *The Chairman.*—You are a member of the Scotch bar?—I am.

1986. How long have you been so?—Since 1861.

1987. You are one of the Sheriff-substitutes of Aberdeenshire?—I am.

1988. At Aberdeen?—Yes.

1989. How long have you been so?—Since January 1866.

1990. There are two substitutes in that county?—Yes.

1991. The other is at Peterhead?—Yes.

1992. Who is the Sheriff-substitute at Peterhead?—Mr. James Skelton, a Writer to the Signet.

1993. Have you any suggestion to make as to the constitution of the Sheriff Court as consisting of the Sheriff and Sheriff-substitutes?—I am of opinion that there is room for some change in that matter, considering the great importance that has recently come to be attached to the duties which the Sheriff-substitute has to perform. He is now a final judge in questions up to £12; he is final, except for the appeal to the Court of Session, in bankruptcy cases; and he has to administer a large number of Acts of Parliament which have been passed within the last ten or fifteen years, in which I think it is generally understood there is no appeal from his judgment to that of the Sheriff-depute, such as the Public Health Act, the Nuisances Act, and so on. And I think I may be permitted to say that a different class of men have come to be appointed, at all events within the last twenty-five or thirty years, from those appointed for the half-century preceding that time. I do think that it would be advisable that the Sheriff-substitute should not be any longer the substitute of the principal Sheriff, but that he should be appointed by the Crown. If the Sheriff-principal is retained, I think his duties should be confined as much as possible to those of an appeal judge, and the Sheriff-substitute should be allowed to act as the judge ordinary of the district. I think that the present system has sometimes the effect of discrediting the Sheriff-substitute with his practitioners, and with the public of his county. When the Sheriff-principal visits his county, the Sheriff-substitute is necessarily by the operation of the existing practice set aside; and although that may come very near a mere sentiment, yet I think it is not without some effect on the Sheriff-substitute's position. I ought to say that I have not suffered personally in that way. The Sheriff-principal of Aberdeenshire has been all his life a Sheriff-substitute, and he is almost entirely a judge of appeal. He is careful of his substitute's position; but I know that it is a universally expressed feeling among my brethren, that they should like to hold a more independent position in connection with their Sheriff-principal. I am not aware of any other suggestion that I have to make as to the constitution of the courts as consisting of Sheriffs and their substitutes.

1994. What would you suggest as the system that should be adopted?—That the Sheriff-substitute should be appointed by the Crown, and that the Sheriff-principal, supposing that office remains as it is now, should be solely an appeal judge.

1995. Do you think the office should remain as it is, confining his duty to that of an appeal judge?—I am not prepared to say that. I think it is a little delicate for a Sheriff-substitute to express a strong opinion one way or the other on the subject. I think it is rather for the practitioners and the public to say whether they are content with the mode of review which at present exists. But putting that feeling aside, there is, in the first place, no question that the present system affords a very satisfactory mode of having the Sheriff-substitute's judgments corrected. It is a great relief to the mind of a Sheriff-substitute to know, that for a small expenditure his errors will be put right, or will probably be put right. On the other hand, I do think that to have 25 Sheriffs-depute, as I think there are, is having too many men for the work that they have to do. I believe that theoretically it would be very much better that there should be an appeal direct from the Sheriff-substitute to the Supreme Court. But I cannot conceal from myself that there are great difficulties in the way of that, and that it might operate as a hardship, especially upon the poorer classes; because it certainly would be, according to our present system, a much more expensive mode of appeal than that from the Sheriff-substitute to the Sheriff-principal. There is one thing which I am satisfied is an abuse; and that is that the Sheriff-principal should review the Sheriff-substitute's judgment on questions of fact, upon the Sheriff-substitute's notes of evidence. I think that, however well and carefully these notes may be taken, they do not put the Sheriff-principal in so good a position, though his experience may be greater, and his talent greater for disposing of a question of facts, as his substitute has been in. If one man who has not seen the witnesses has to review the findings of another man upon points of fact, that other man having seen the witnesses, then I think the evidence should be taken down in a much more careful and elaborate way. It should be taken down in the form of depositions in the presence of the Sheriff-substitute, probably by a shorthand writer, and dictated to him by the Sheriff-substitute; but I am convinced that there is a considerable chance of miscarriage of justice when the Sheriff-principal reviews the Sheriff-substitute's judgment on questions of fact, the material on which he proceeds being the Sheriff-substitute's notes of the evidence. I must say for myself that I have never been able to see why we should not have the advantage of juries—small juries, perhaps,

J. Comrie Thomson.

not necessarily twelve men—to determine questions of fact in the counties; or if it be found inexpedient to introduce jury trial to any extent in the country, then I think that the Sheriff-substitute's findings in fact should not be reviewed by the Sheriff-principal at all, but that, if they are to be reviewed, they should be reviewed by the Court of Session, and that the ground on which they are to be reversed or altered should be something like the ground on which the verdicts of juries are at present reversed or altered, namely, that the finding is against evidence,—not that the reviewing judges would have been disposed to take a different view, but that the evidence to no extent whatever supports the finding. That is my opinion as to review on questions of fact. As to questions of law, perhaps there is a little more difficulty. I think there also, theoretically, it would be better that we should get as soon as possible to the Supreme Court, and have the judgment of a tribunal of weight on the question of law; but unless that could be done somewhat cheaply, I think it would result in hardship. If the records of our court were made much shorter than they are—if a short form of pleading were made imperative, or were made the usual form of pleading, probably the expense of bringing the whole case under the review of the Court of Session need not be very great. At all events, the expense of printing, which is always a formidable expense, would not be great; and if it were possible to allow one counsel to plead the case on each side, then a review of the Sheriff-substitute's judgment on the whole case might be got for something like ten or twelve guineas in an ordinary case, and I do not think the country would look upon that as a very great hardship. But if taking the case direct from the Sheriff-substitute to the Court of Session is thought impracticable—and there are great difficulties in the way of it—then I would favour a large diminution in the number of the Sheriffs-principal; and I would say that perhaps six or eight men should be appointed, two of them constituting an appeal court from the judgment of the Sheriffs-substitute,—that these two gentlemen should not be attached to any particular district, but that they should be entitled to deal with appeals from any district of Scotland; for instance, that one pair of them should to-day sit in Glasgow, and the same pair on this day month should sit in Aberdeen, and that they should be purely appeal judges. I think it might be a reasonable thing to put it in the option of the appellant in every case either to go to this mid-appeal court or to go to the Court of Session, as he thought right; and in the course of six or seven years the country would be able to decide what probably there has not been material for satisfactorily deciding yet, whether the local practitioners and their clients wanted to go straight to the Court of Session, or still desired to have a mid-tribunal of appeal. We would then have two gentlemen of experience whose duty should be confined solely to that of appeal judges, and who should perambulate the country, sitting to-day in Glasgow, to-morrow in Perth, the third day in Aberdeen, and so on, taking the place of the Sheriff-principal as appeal judge; and I think we could do without a Sheriff-principal in every other part of his functions.

1996. Would you have them dispose of criminal cases too?—No.

1997. Only civil cases?—Yes. I would be disposed to give more facility for appeal in points of law in all cases. I think it is dangerous to extend the small debt jurisdiction, for example—to make any one man final above the present amount upon a question of law; and I think that these judges might very well dispose of questions of law arising about the smallest sum. The mode in which a question of law might reach them with reference to small sums would require to be considered. Probably an adjusted case would be the most convenient way of raising the question in regard to sums up to £25 or so.

1998. Would you apply that to sums below £12?—I would. I can see no objection to that. I know that sometimes very difficult questions of law arise in the Small Debt Court, and one has to do his best with them; but the points are sometimes extremely fine, and it would be a great satisfaction to the Sheriff-substitute, and I believe also to the public, if he had it in his power to take the opinion of a more competent and experienced tribunal.

1999. *Mr. Baxter.*—You have no time to decide points of law in the Small Debt Court?—I never hesitate to make avizandum in the Small Debt Court if I feel any difficulty about a case; but it cannot be done in many cases.

2000. *The Chairman.*—Have you the power of sending the case to your ordinary roll?—Only of consent. But my experience is, that when that is suggested, the parties would rather take a judgment and be done with it.

2001. They would rather take a judgment and be done with it, knowing that that judgment is to be final?—Yes.

2002. How often would you have these appeal judges to sit in each place?—Of course that would depend on the amount of business ready for them. I should say that in the larger towns once in the six weeks or two months would be quite sufficient. The Sheriff-principal of Aberdeenshire comes about once in the two months, and does at least one good day's work of appeals on these occasions. That is exclusive of cases in which there are reclaiming petitions.

2003. Would you have the country divided into districts, and each pair of judges on their circuits to go through a district, holding their courts at certain towns in it?—I would propose that the country should be divided into districts, but I do not see that any benefit would arise from allocating a certain pair to that district.

2004. I do not mean permanently allocating them, but that on each occasion you would have a defined circuit through which they would travel?—Yes, I would propose that.

2005. That is to say, you would have four or five districts, and within each district there would be certain towns in which the judges should hold appeal courts?—Yes.

2006. And these appeals courts should be held in each town once in six weeks or thereabouts?—Yes; but it would not be necessary to sit in many towns, because, for example, a very large district might be attached to Glasgow, and a very large district might be attached to Perth. It would be unnecessary to hold any appeal court except in Perth, for some counties round. Such a large mercantile centre as Dundee might require a regular session to be held there; but probably twelve towns in Scotland would be all that they would require to sit in.

2007. Would you have all the districts which now exist as seats of Sheriff-substitutes continued?—Your Lordship means with a Sheriff-substitute resident there?

2008. Yes?—No, I think the Sheriff-substitutes are far too numerous.

2009. How many would you take off?—I cannot specify any particular number; but I know that several of my brethren complain that they have not got work to occupy their time.

2010. *Mr. Adam.*—What is the case in your own county?—I can speak to my own two nearest neighbours. I do not know whether Mr. Dove Wilson made any statement on the subject when he was examined; but I know from himself that he has sometimes no more than one full day's good work in the week, and I should imagine that Mr. Skelton has not anything more at Peterhead.

2011. *The Chairman.*—How would you deal with these two places?—That comes to be a very personal matter.

2012. It is a matter of allocation?—It is very easy for one to say that he can take any amount of work and do it; but my attention has been turned to that question, and my belief is that if Kincardineshire were thrown into Aberdeenshire, and if there was only one Sheriff-substitute in Aberdeen, the Sheriff-substitute at Aberdeen would know scarcely any perceptible difference in the amount of his work.

2013. Would that interfere materially with the con-

venience of the inhabitants?—Of course it would be more inconvenient for a man living in Peterhead to have to come to Aberdeen, than it is for him at present to take his case before the Sheriff-substitute resident there. In the same way, it is more inconvenient for a man living at Stonehaven to come to Aberdeen, than to go before a Sheriff-substitute resident there; but I believe there would be no inconvenience except at these two places. There would be no inconvenience to the district of country immediately adjoining them. For example, a representation was made a few years ago by the people of Fraserburgh, which is a large town on the same coast of the Buchan district of Aberdeenshire as Peterhead is, and ten miles farther from Aberdeen than Peterhead is, and they stated that they would very much rather come to Aberdeen than go to Peterhead. The arrangement of railways is such that they have to go round half a circle to get to Peterhead, and it suits their convenience very much more to go to a large town like Aberdeen, where they can do other business, than to go to Peterhead. Mr. Dove Wilson has to come to Aberdeen very often, in order to get to some parts of his county, to a circuit town, Banchory, and other places; and I am persuaded that if he were in Aberdeen, he would do the business for the inhabitants of Kincardine just as conveniently as he now does residing in Stonehaven. Aberdeen is on the border of the two counties, and there is just the river Dee running between.

2014. You have said that the resident Sheriffs should be appointed by the Crown. What should be their qualification?—Probably if the Sheriff-substitute were made the resident judge, and he was to be the judge ordinary of the bounds, and have the full duties that at present fall to the Sheriff-principal, except that of appeal judge, the Government would see proper somewhat to increase the emoluments of these gentlemen, and a more experienced class of men would seek to be appointed to these offices than seek them at present. The qualification of having been three years a member of the bar, or three years a practitioner, might perhaps be very properly extended; but I believe that whenever a vacancy occurred, men of larger experience in their profession, and who had had greater success in their profession, would apply for these offices than at present, and that if they were well remunerated there would be no difficulty in getting thoroughly competent men to discharge these duties.

2015. What amount of remuneration do you point at?—In a large place with a large population attached to it, where a man's time is fully occupied every day, and where a certain position must be maintained, I think from £1500 to £2000 a year would be a moderate allowance at present.

2016. Then, as to the judges in the ambulatory court, what should be their qualification, and what sort of emoluments would you suggest for them?—I would suggest that they should certainly not have less than £2000 a year, and I think that might secure a very good class of men; and it would be well if it were understood that naturally the Sheriff-substitute who had given satisfaction to the public, and whose judgments were respected, might succeed to an office of the kind, as being one of greater dignity and of less labour than that of a resident Sheriff.

2017. Would you require a resident Sheriff to be a member of the bar?—That is a matter which I have not considered. We have Sheriff-substitutes appointed both from the bar and from faculties of procurators in the country, and I am not prepared to say that those who have been appointed from our own bar have been more satisfactory Sheriffs than the others. As a member of the bar myself, I should prefer certainly that they were appointed from the bar; but I am not prepared to say that it should be made imperative that they should always be taken from the faculty of advocates.

2018. Would you have the ambulatory judges members of the bar?—Certainly, because their duties would be to dispose of questions of pure law to a very great extent.

2019. Is there a large proportion of the cases that come before you as Sheriff-substitute, of the class that have evidence taken in them?—The great majority are questions of fact.

2020. Are there many appeals upon these questions of fact?—Almost every case is appealed to the Sheriff-principal. Of course there are certain cases that are settled after my judgment, but any case that admits of the least doubt is generally taken to the Sheriff.

2021. Probably when a new Sheriff is appointed there is a run of cases to test his decisions?—Very likely.

2022. *Mr. Baxter.*—Are the appeals from ultimate judgments decreasing?—We have very few appeals except from ultimate judgments. There are rarely appeals on the proof. There is a very good body of procurators in Aberdeen; and when a question arises about evidence, I talk it over with them, and it is an extremely rare thing that they do not acquiesce in my view. Now and then an appeal is taken when a proof is allowed—that is, on the relevancy—but even that is rare.

2023. Are appeals not taken on dilatory defences?—Very rarely.

2024. *Mr. Adam.*—Then they are not taken for the purpose of delay?—I think the final appeal may sometimes be taken for the purpose of delay; that must be so, because there are some cases that are quite clear. I do not believe that, except for the great cheapness of getting the Sheriff's opinion, there would be nearly so many appeals. There would not be so many if it was a more formidable thing to do; but I have no doubt they say to themselves, 'The Sheriff-substitute may be wrong, and we will take our chance of trying the Sheriff; and it is always a few weeks' delay.'

2025. *The Chairman.*—Do you think there would be a greater number of appeals if you had the ambulatory judges you spoke of, and the right of appeal in cases below £12?—I don't believe that it would make any difference, always assuming that the expense of appealing to these judges was about the same. I would be disposed to do away with written arguments in the appeal to such a court as I have proposed. I think these judges should have oral hearings, and that need not be a very expensive matter. I do not think it would make much difference in the number of appeals.

2026. Would you limit the right of appeal to the Court of Session to any different amount from what it is now?—The country seems perfectly well satisfied with the present limit. I must confess that I am against finality. I think that in almost every case, however small the amount, there should be an appeal to another court. But it just comes to be a question of a choice of evils, and the present limit seems to give satisfaction.

2027. You think that a judge reviewing the judgment of the judge in the first instance, has an advantage that the parties come to see more where their case is by that time, and put it to him probably on some different footing, which was not properly presented to the judge in the first instance?—Certainly. They have the advantage of a rehearsal before the Sheriff-substitute; they have the advantage of his note stating the grounds of his judgment. They know, when they come before the appeal judge, that it may be their last chance, or, at all events, that the next step involves considerable expense, and I have no doubt they prepare themselves more carefully. I suspect we all know something of that in the Court of Session.

2028. Is not your experience in the Court of Session consistent with this, that after a case has been considered and disposed of by the Lord Ordinary, when it is appealed to the Inner House, it is presented in a different view, and put upon different legs, so to speak, from what it was before the Lord Ordinary?—I think there is no doubt of that; but I think if the parties in the Sheriff Court knew that the Sheriff-substitute's judgment was not to be so easily got rid of or revised as it is now, they might present their argument to him in a more careful and exhaustive way, particularly in regard to authorities, than they do at present.

2029. Would you impose any further restriction on their going to the court of appeal which you suggest?

J. Comrie Thomson.

—If an appeal were to be given on questions of law in small debt cases up to £25, I think it would be only fair that the appellant should deposit a small sum—say five guineas—by way of preventing the abuse of such appeals; but in ordinary actions above that sum I don't see why any obstacle should be put in the way of such appeals. The Legislature has already done away with caution in advocations, and I am not aware that there is any objection to the principle of that enactment.

2030. In small debt cases under £12, you would give a power of appeal which does not now exist?—I would be disposed to do so on questions of law.

2031. The persons who are litigants in such cases are frequently persons of very limited means; would you require them to make a deposit of five guineas, while you would not require that from parties appealing as to larger sums?—I think that might be met by making it competent to the judge to give leave to appeal without consignation.

2032. Do I rightly understand your scheme to be this, that the office of Sheriff-substitute should cease to exist, and that a Sheriff appointed by the Crown should be resident, doing in person the duties both official and executive, without the aid of any substitute; that his judgments in his judicial capacity should be subject to appeal to an ambulatory court such as you have described, consisting of judges travelling to different districts of the country, and holding courts in certain places at stated intervals of about six weeks?—That is my view.

2033. And that the judges of that ambulatory court should be members of the bar; but you have not expressed an opinion as to whether the Sheriff should be a member of the bar or not?—Your Lordship will allow me to add, that although that is the scheme which seems to me to be the practicable scheme at present, I am of opinion that, if it were practicable, an appeal from the resident Sheriff to the Court of Session is theoretically a better plan; and if it were possible to do away with the mid appeal, it would be desirable. But I can't see that the country is demanding that at present, or that it is very easily carried out at present; and I would give the option to the appellant to take his case to these ambulatory judges or to the Court of Session as he thought fit, and a few years would enable the Legislature to judge whether they would abolish or retain these mid appeal judges.

2034. *Mr. Baxter.*—And one great reason you have is the present expense of an appeal to the Court of Session?—I think so.

2035. *The Chairman.*—Have the litigants at present an opportunity of appealing to the Sheriff from the judgment of his substitute, or going direct to the Court of Session?—There is, I think, some doubt as to that.

2036. They generally avail themselves of the judgment of the Sheriff?—I believe there is some doubt as to the competency of going straight from the Sheriff-substitute to the Court of Session; but, in point of fact, they avail themselves of the appeal to the Sheriff in preference.

2037. *Mr. Baxter.*—You never knew an instance to the contrary?—No.

2038. *Mr. Adam.*—Do you think that before such a court as you have pointed out, counsel would come to be employed?—I think it is extremely likely in some places.

2039. Would you be prepared to allow the expense of counsel as against the opposite party?—Yes; I don't see why you should not, with a limit as to the amount. That is just a case in which the ordinary discretion ought not to be allowed, and there should be some scale of counsel's fees in such a court, or it might come to be an abuse.

2040. *Mr. Baxter.*—At present, when the Sheriff comes round in his appeal courts, counsel are not employed?—No; not in Aberdeen. It is too far from Edinburgh. They are often employed in Glasgow and Greenock; but it is a very serious matter to take counsel to Aberdeen.

2041. *Mr. Adam.*—Would you allow an appeal in all cases to the Court of Session from the judge of the perambulatory court?—No; I think there should be a limit of amount.

2042. *Mr. Baxter.*—Up to what sum?—£50.

2043. *Mr. Adam.*—Would you make any limit in the case of difference of opinion between the judges?—I am rather disposed to think that, in difference of opinion, the judgment of the resident Sheriff should come into force.

2044. But if both concurred with the resident Sheriff, would you still allow an appeal to the Court of Session?—I think it should be in the power of that court to raise questions of law for the consideration of the Court of Session. That would rarely happen.

2045. You would not allow it as matter of right?—No; but as matter of competency to the court itself to go to the Supreme Court for its opinion on a question of pure law.

2046. *The Chairman.*—You would not allow it as matter of right, however great the amount at stake?—No; I would not be disposed to do so; but I would leave it entirely in the discretion of the court itself to allow a case to go to the Court of Session for this reason, that it is just possible that these pairs of perambulatory judges might in pairs take different views of the law, and there would be no means of settling it unless there was a power of taking it to the Court of Session, which would settle it for the whole country. I think it is dangerous to shut parties out of an appeal in a question of law.

2047. Would you, whatever might be the amount at stake, exclude them from the absolute right to appeal to the Court of Session?—I would not be disposed to go that length.

2048. *Mr. Baxter.*—Up to £50 I understand you to say, that if the two judges adhered to the Sheriff-substitute's judgment, you would give no right of appeal?—No.

2049. Supposing they differed?—Then I think there should be a right of appeal on law.

2050. Even below £50?—Yes.

2051. *The Chairman.*—Would your scheme of resident judges be accomplished by this, that the Sheriffs who are appointed by the Crown, and who are barristers, should be required to go and reside in their counties, and that the Sheriff-substitute should be dispensed with?—I should think that probably it should be left with the Sheriff-principal to say whether he chose to resign his office or go to his county; and if he took the option of going to his county, then the Sheriff-substitute must shift for himself. Doubtless the Government would give him proper compensation. But your Lordship's question was whether that would consist with the plan I have been suggesting. I say, Yes—that the Sheriffs-depute should go to the counties if they chose.

2052. *Mr. Adam.*—Have you ever seen in your own experience cases where, from local prejudice or otherwise, it was desirable that the Sheriff-depute should try them, and not the local judge?—I never have. Of course it is the duty of the Sheriff-substitute, if he is to prevent an awkwardness of that sort arising, not to mix himself up with public matters, or to become a shareholder of local companies, for example (if he ever has money to do so), and to keep himself apart from the people of the place, except in a social capacity. I have never seen any case in which local prejudice embarrassed a Sheriff-substitute.

2053. *Mr. Baxter.*—Nor heard of it?—Nor heard of it; but of course a man must walk warily in that matter.

2054. *The Chairman.*—Are these all the observations you have to make on the constitution of the courts?—I think so.

2055. The next matter is the jurisdiction with reference to limits?—The first point is as to civil matters. Here also I feel a little delicacy in speaking, because it is rather for the practitioners and the public to say whether we Sheriffs should have more important duties than we have at present. But I do think that some hardship arises to the public from the present limitation of our jurisdiction. For example, in regard to questions of heritable right, there is a great deal of heartburning

in country districts from disputed questions of heritable right of small value. Persons of small means fight about some small patch, and that goes on for generations, from father to son. They are debarred from having it settled, because they cannot afford to come to the Court of Session; and I don't see why they should not be allowed to go to the Sheriff Court.

2056. *Mr. Baxter.*—Don't they often raise the question in a possessory action?—They do; but that is not a satisfactory mode of disposing of it.

2057. The question often comes to be, whether it is a possessory action?—Yes; and very often one sists procedure till declarator be brought. But I must say that, when my attention was first directed to this matter, I felt a little timid in going further than that the Sheriff Court might have jurisdiction up to say £50 in value in heritable questions; but I have come to think that there is truly no good reason why, provided you have competent men to fill the office, the Sheriff Court should not have jurisdiction in heritable matters to any extent, with an easy appeal to the Supreme Court. The difficulty about limiting it in any way that occurs to my mind is this: Suppose the Sheriff is to have heritable jurisdiction up to £50 in value, or £50 of yearly rental, there will be a dispute as to what is the value, that may occupy months in settling; and, on the other hand, if you were to have a hard and fast line, such as the valuation roll, to fix the value, there would then be this hardship, that many bits of property have not their value truly represented in the valuation roll. There is a *pretium affectionis* which makes a piece of land very valuable to its possessor, which cannot be reached by figures made up by an assessor. There is that great objection to limiting the heritable jurisdiction, if it is to be given to the Sheriff Courts. It is true that we have not the advantage of great lawyers conducting the pleadings in the Sheriff Court, yet we have the assistance of the men practically engaged in constituting feudal rights every day, drawing deeds and considering progresses of titles, and so on. These are duties of immense importance. But looking to the value of the causes already imposed upon the Sheriff-substitute, I have come, not without hesitation, to be of the opinion I have now expressed, that the Sheriff Courts might entertain questions of heritable right within their districts, whatever be their value.

2058. Don't you think that if a large estate were in question, the case would naturally go to the Court of Session?—No doubt, just as now in a question of moveable right. No man tries a question involving £5000 in the Sheriff Court. He goes to the Court of Session.

2059. *The Chairman.*—Would you propose any other extension of the jurisdiction?—Another class of cases would be cases involving status.

2060. *Mr. Baxter.*—Would you make removings of all kinds competent to the Sheriff?—Yes. In the case of irritancy of a lease,—an extraordinary removing, do you mean?

2061. Yes?—Yes, there can be little doubt of that.

2062. *The Chairman.*—You were speaking of cases of status?—I think there is very great difficulty indeed as to such cases. On the one hand there is the hardship that a poor person who has been irregularly married, and who has children, cannot have her marriage declared, or her children legitimated, without coming to the Court of Session. I believe there are many cases of great hardship of that sort. In divorce cases the present system is very demoralizing. Very many married men and women are living together among the humbler classes, and one or other of them to the knowledge of the other living with a paramour. These are two strong reasons why I would make it competent to come to the Sheriff Court with declarators of marriage and actions of divorce. But, on the other hand, I have no doubt that if you were to make declarators of marriage competent, one half of the actions of affiliation would become actions of declarator of marriage on the ground of promise *subsequente copula;* and if actions of divorce were competent in the Sheriff Court, there would be great risk of collusion. I think there is very great difficulty about that. It is a choice of evils, and I have not yet made up my mind as to which is the most satisfactory way. I don't see my way out of the difficulty. A good deal depends on the district, whether there is great wrong done by the present system, or whether the wrong done is comparatively trifling. I think in Aberdeen there is very great hardship on both sides. I know that there are cases such as I have referred to, of men and women living as man and wife in presence of their children, and one or other, to the knowledge of both, living in adultery. As to declarators of marriage in the same way, people who have been truly married for perhaps a quarter of a century, cannot get their marriage declared, and after the death of one of the spouses great injustice is done.

2063. *Mr. Baxter.*—And the children are bastards?—Yes. But whether the danger of such delicate questions being brought in the Sheriff Court is not greater than the effect of these abuses, I don't feel myself competent to say. I don't think I have had enough of experience to say. But these views occur to me on each side of the question.

2064. *Mr. Adam.*—Why do you think there is more danger of collusion in the Sheriff Court than in the superior court?—The number of cases would be very much increased for one thing; and there is a solemnity about the Supreme Court, and about the whole procedure there, that does not belong to the Sheriff Court, and never will.

2065. *Mr. Baxter.*—You don't say that would prevent collusion?—I don't say so. If the Procurator-fiscal or some other public official were to intervene, as in England, and to see all divorce proceedings, that might prevent or lessen collusion between the parties; but that collusive actions would be brought I have no doubt whatever.

2066. *The Chairman.*—From the observation which you made, I understand you to be of opinion that the facility of divorce tends to promote morality and check immorality?—No, I don't go that length; but what I say is this, that when there is adultery on the part of one of the spouses, the sooner they are divorced the better; and that being obliged to come to the Court of Session, it is not easy for them to get divorce, however flagrant the conduct of one of them may be.

2067. Is there any other class of cases in which the jurisdiction should be extended? Do you think it should be extended to the appointment of factors *loco tutoris*, tutors, and so forth?—Yes. I would be disposed to extend the jurisdiction to that; in fact, subject to the remarks I have made as to the difficulty in questions of status, I would be disposed to extend the civil jurisdiction of the Sheriff Court to an extent co-ordinate with the Court of Session, except in the class of cases in which the Court of Session is exercising its *nobile officium.*

2068. Supposing it were to be considered dangerous to give the power of divorce *a vinculo* to the inferior courts, do you think it would be expedient to give them the power of divorce *a mensa et thoro*?—Yes, I think that it might be expedient to give them the divorce *a mensa et thoro*, although it would be inexpedient to give the other.

2069. *Mr. Adam.*—Would you give them jurisdiction in petitions for protection of property?—Yes, that belongs to a different class of cases. I think that it is very desirable that the Sheriff should give protection to a wife's property.

2070. *Mr. Baxter.*—You think it is a hardship to be obliged to come to the Court of Session in these cases?—I think so.

2071. Are you in the practice of granting letters of arrestment against foreigners for the founding of jurisdiction?—Yes.

2072. Do you see any reason for not bringing the action against the foreigner in the Sheriff Court, when you have founded jurisdiction, instead of going to the Court of Session?—I do not.

2073. Suppose you have a small claim against a foreigner, is it not a hardship to have to go to the Court of Session?—I have heard complaints such as you suggest.

2074. Do you see any objection to going to the

J. Comrie Thomson.

Sheriff Court in such a case?—I cannot say I do. It is a remnant of the old system, when the Sheriff Courts were very different from what they are now. I cannot understand that there should be objection to it. I have already stated that I would be disposed to retain appeals in matters of law in cases that deal with small sums. With an appeal on the law I would be disposed to extend the small debt jurisdiction to £25; that is to say, to make the judgment of the Sheriff who tries the case final, except on a stated case in law, up to £25; and I would also make it competent to bring suspensions of charges on extract registered protests above £25, where the line is already drawn.

2075. *Mr. Baxter.*—Charges on bills?—Yes.

2076. To any amount?—Yes.

2077. Do you think it a hardship that ministers should be obliged to come to the Court of Session for power to feu their glebes?—I do. I think the Sheriffs might well be entrusted with that class of cases. That always resolves itself into a remit to the best men of skill you can find.

2078. *The Chairman.*—Rescissory actions?—I think they might be brought in the Sheriff Court. Allow me to go back upon the questions of status for a moment. I find in the report of the Marriage Law Commissioners a strong expression of opinion by one of the dissenting bodies in Scotland.

2079. *Mr. Baxter.*—Is this what you refer to: 'That, in cases of disputed marriages, the present law, which renders actions of declarator of marriage competent only before the Supreme Court, involves a process so expensive as in many cases to render its benefits beyond the reach of the humbler classes, to the deepest injury of the wife and children; and that to remedy this great evil, jurisdiction should be extended to the Sheriffs to dispose of such cases, subject to appeal to the Supreme Court'?—Yes, that is the extract I refer to. It is from the Report adopted by the Synod of the United Presbyterian Church.

2080. Do you agree with that?—I agree in the statement of fact that there is great hardship, and I see that there would be great advantage in allowing the Sheriffs to deal with these cases; but there is a danger on the other side, as I have already explained. I am not aware of any other extension of jurisdiction in civil matters to which I wish to refer.

2081. *Mr. Baxter.*—Would you approve of a rule similar to what obtains in reference to the County Courts in England, that whenever a decree is pronounced in an action originally brought in the Court of Session for a sum less than £50, the pursuer should only be entitled to Sheriff Court expenses, unless the judge in the Supreme Court shall certify that there was something peculiar in the case which rendered it proper to be brought before the Supreme Court?—Yes, I would agree to that rule. Its principle has been recognised in the Debts Recovery Act. It is only permissive in one sense; but it is enacted that, if you choose to bring your action in the ordinary roll, and it was a competent action to bring under the debts recovery roll, you shall only get debts recovery expenses. The principle was recognised in that Act, and I think it works well.

2082. *The Chairman.*—Was it not recognised in the Small Debt Statute?—Yes, it was. There is another suggestion which I would be disposed to borrow from the County Courts Act. I think it might be competent for the Sheriffs to try cases in a county not their own, or in a district not their own, in the necessary absence of the resident judge of that district. The want of a power to do that at present operates very inconveniently. For example, I find that it would be a very easy thing for a Sheriff-substitute to do the work of his neighbour in his temporary absence; but at present he has no competency to do so. That is a small matter of reform, but it might lead to very good consequences.

2083. Might it not be got over by a substitution?—At present the practice is to give a substitution to a professional gentleman resident in the town. These gentlemen act with judgment, but they don't care to undertake the responsibility, for example, of stopping a work, in a case of interdict, or of dealing with serious offences; but if a judge ten miles away, accustomed to deal with such matters, were competent to deal with them in another county, it would be a great convenience.

2084. Might not your Sheriff give the power to the Sheriff-substitute at Peterhead to try cases in Aberdeen, and a power to you to try cases at Peterhead?—The commissions both of the Sheriff-substitute at Peterhead and of myself extend over the whole county. I am not speaking of my own personal experience of inconvenience, but I know that in other places it is found to be inconvenient, where there are not two Sheriffs within the county.

2085. *Mr. Baxter.*—Many of the Dundee merchants live in Fife; they have large transactions in Dundee; but as they have only their counting-houses there, and live in Fife, that is not thought a ground of jurisdiction in the Dundee Sheriff Court?—It so happens that no part of the town of Aberdeen is on the other side of the river at present. There is a part of the county of Kincardine, however, which runs into Aberdeenshire, and of that part Banchory is the principal village. Many Aberdeen people live in Banchory, and Kincardineshire people have transactions with them. Now it is a great inconvenience to have to sue people living in that part of Kincardine in Stonehaven.

2086. Don't you think that if the transactions took place in counting-houses in Dundee, that should be sufficient to found jurisdiction?—It certainly would be more convenient, but I don't know that the law ought to be amended in that respect. Generally with merchants the difficulty is got over by us by a prorogation of the jurisdiction on the part of the defender.

2087. *The Chairman.*—If the jurisdiction was extended to heritable subjects of the largest amount, and also to questions of status such as you have described, and other cases you have mentioned, that would, in reference to parties within the area, be co-extensive with the jurisdiction of the Court of Session?—It would.

2088. *Mr. Adam.*—Suppose the jurisdiction was extended as you describe, would you still think the number of Sheriff-substitutes too large?—I would, and badly scattered.

2089. *Mr. Baxter.*—You think they would have time for all the increased duties?—That is a matter of which one cannot judge speculatively. Time would show.

2090. *The Chairman.*—In what localities where there are now Sheriff-substitutes has it occurred to you that they ought to be dispensed with?—I think that might best be determined by looking to the statistics of population and the number of cases. Such a place as Kinross, for example.

2091. Something would depend on the convenience of the locality?—Yes; and also upon the railway arrangements of a district.

2092. Facility of communication?—Yes; now that there are railways, and no other means of communication, people are entirely dependent upon them.

2093. You were going to enumerate some places?—I mentioned Kinross. There is a cluster of Sheriff-substitutes in that part of Scotland. There are Cupar, Dunfermline, Kinross, Alloa, Stirling, Falkirk, Dunblane, and Linlithgow. I cannot but think that two men could do all that work, or at most three; and I know that is the opinion of some of the gentlemen who hold office within that circle.

2094. Are there any other districts in your view?—There are some in the Highlands, where, of course, there is this difficulty, that summary criminal work might not be very easily dealt with except after the lapse of a considerable time, unless there was a resident Sheriff-substitute; but at present, in many places, the Sheriff-substitute has really almost nothing to do. I think I noticed in the last statistics that the Sheriff-substitute at Tobermory had about 47 summary criminal trials in the whole year, and his civil business was very small indeed. Of course it would be inconvenient for the people of Mull not to have a Sheriff-substitute there; but it is rather an anomalous thing that a Sheriff-substitute should be paid to do so very little work. I have no doubt the same thing applies to other parts of the Highlands; but they are perhaps exceptional.

2095. That raises the question of locality?—Yes, on account of the difficulty of transit during so many months in the year. Then I believe there is no necessity for a Sheriff-substitute at Dunblane as well as one at Perth; and I am sure there is no necessity for a second Sheriff-substitute in Aberdeenshire. There are no jury cases tried at Peterhead, nor cessios, nor services of heirs. All these cases come to Aberdeen.

2096. Would there be any inconvenience as to civil matters, such as interdicts, removings, etc., in these outlying districts, if the Sheriff-substitute were taken away?—There certainly would be inconvenience, but it would be a small amount of inconvenience; and it would be compensated by the better use of the time of the gentleman who holds the appointment, and of the money with which he is remunerated. It would be a very convenient thing to have a Sheriff-substitute in every small place for the people of that place.

2097. But would there be great inconvenience?—I don't think there would.

2098. *Mr. Campbell.*—You are aware that in Ross-shire there are two Sheriff Courts held, the business of each being very trifling, and the two towns are not more than an hour's distance by railway from each other; but in each there is a Sheriff-substitute. Might not one of these be dispensed with?—I think so. Elgin and Nairn are in the same position. In Ross-shire you have Dingwall, Tain, and Lewis. Of course Lewis is in the position of Tobermory, and probably worse; and you could not very well dispense with a local judge there for police purposes. I may add that I think no alteration has been made upon the distribution or the number of the Sheriff-substitutes since the increased facilities for transit in the country came into operation; and now that we know what these are, I think it would be proper to have some change made in regard to the local judges, both as to their number and their distribution.

2099. *The Chairman.*—Would you have the Sheriff-substitutes to go into their districts to hold Small Debt Courts?—In some cases, I believe that the necessity for having Circuit Small Debt Courts has been very much diminished within recent years. In Aberdeenshire I take three Circuit Small Debt Courts; and at all events with reference to one of these, which is within fifteen miles by railway from Aberdeen, there is no necessity whatever for it. The people can perfectly well come to Aberdeen, and would just as soon come there. With reference to those farther off—at Huntly, at Tarland, at Turriff, and at Fraserburgh—I think it is very important to continue them. They are very beneficial, and I would have the Sheriff continue to hold these. I think the Small Debt Circuits might, on the whole, be diminished in number. One was abolished in Aberdeenshire last year. It died a natural death. Only two or three cases came to it in the course of a year, and the Home Secretary put an end to it.

2100. *Mr. Baxter.*—Where was that?—At Old Deer.

2101. *The Chairman.*—Take such a case as Campbelton, in Argyleshire, which is sixty or seventy miles distant from Inverary; what would you do in such a case as that?—That is a case where there would be considerable inconvenience from not having a Sheriff-substitute, and it would, I suppose, be looked on as a very bold innovation not to have a Sheriff-substitute at Inverary; but if there was to be any change at all, it would probably be in that direction; for I take it that the business at Inverary is less than at Campbelton, and they are nearer another Sheriff at Inverary.

2102. What other Sheriff are they nearer?—Well, I suppose Dumbarton or Greenock is the nearest. That is a case in which there would be great difficulty; but these exceptional cases will be found all over the Highlands.

2103. In the Hebrides particularly?—Yes.

2104. *Mr. Campbell.*—There has been no increase in the facilities of communication there within the last thirty years?—No; they remain with steamboat and coach travelling.

2105. In the case of the populous parts of Scotland, circumstances have entirely altered?—Yes, and it is there that a new distribution of Sheriffs is wanted.

2106. *The Chairman.*—Have you anything to say about the jurisdiction in criminal matters?—Well, I must say I have been struck with what I cannot help calling the waste of the valuable time of the judges of the Supreme Court in their Justiciary Circuits. We have this very day a judge of the Supreme Court trying in the second court in Glasgow what are for the most part police cases, and they are tried there merely because they are cases of accused persons who have been previously convicted; and now that the amount of penal servitude is regulated so carefully by Act of Parliament, I venture to think that there might be a power entrusted to the Sheriffs to sentence to penal servitude up to seven or eight years. I would be disposed to extend the jurisdiction in that direction.

2107. *Mr. Adam.*—Would you give them power in the class of cases you have mentioned, or in all cases?—I think that clearly two of the pleas of the Crown should not be given them, viz. murder and rape. I think these cases should be tried in Edinburgh. The more solemnity that can be made to attach to the trial of these cases the better. But I don't see why they should not try robbery; and if the Sheriff may, with the assistance of a jury, send a man to prison for two years for his first offence, I cannot see why he should not be entitled to give him seven or eight years' penal servitude for his sixth offence, with the assistance of a jury.

2108. *Mr. Campbell.*—In point of practice, I suppose you very often find cases tried before the Sheriff and a jury, and punished with two years' imprisonment, which are quite as aggravated cases as those tried before the Circuit Court, and punished with penal servitude?—Repeatedly.

2109. *Mr. Baxter.*—Have you ever known cases where it was an instruction not to libel on a previous conviction?—I have known that very often, and I have no doubt every Procurator-fiscal knows it. In regard to summary criminal jurisdiction, I think it might be extended. My own opinion is, that the more of jury trial we have in criminal cases the better; but it is impossible to have juries to try every criminal case; and there are some cases which I think might very safely be entrusted to the Sheriff, provided he kept a note of the evidence. I think if it is found that the Justices in England, and the police magistrates in London, can imprison for six months, there is no reason why the Sheriff should not do so; but I think in every case, however trifling, the Sheriff should be bound to preserve a note of the evidence. Under the Summary Procedure Act, it is not imperative on him to do so; but I am of opinion that it should be imperative on him in every case to preserve a note of the evidence, from which, at all events, he may be able to justify his conviction, whether he may be able to justify an acquittal or not.

2110. *The Chairman.*—Would you have his judgment reviewed on the notes of evidence as regarded the facts?—I think it might stand as now, under 9 Geo. IV., so that an appeal would be competent, and that it would be open to the appeal court to call for the notes of evidence if they thought proper; and in cases tried before a jury, I believe the intervention of the Secretary of State serves all practical purposes in case of any gross miscarriage of justice.

2111. *Mr. Campbell.*—Do you proceed in your summary court in Aberdeen under the Summary Procedure Act?—No; because I begged that the fiscal would not use it. I don't like it.

2112. You are aware that in several counties that Act is not proceeded under?—It was used in Edinburgh while I acted for a short time as Sheriff-substitute, and it was there I learned my dislike to it. The trouble of keeping the notes is infinitesimal, and the satisfaction to the judges arising from doing so is very considerable.

2113. *Mr. Baxter.*—Would you have any objection that at a trial by jury there should be a power to amend the libel in comparatively trifling matters, where the

J. Comrie Thomson.

amendment would not prejudice the pursuer?—Well, I would leave the law pretty much as it is. I don't see any use of meddling with things unless there are very decided grounds for it.

2114. There was a case in Fife where the prisoner's house was described as being in the wrong parish, and thereby the prosecution failed?—I am against giving more liberty to prosecutors in such matters. I don't see why it should have been described as in the wrong parish.

2115. In another case, where a witness described the property as belonging to himself, and where it was libelled as belonging, say to John Robertson, it turned out that it belonged to John Robertson & Co., and the prosecution failed?—Of course that is a miscarriage, but I think the evil of allowing anything of that sort to be amended would be greater than the evils of the present system.

2116. *Mr. Adam.*—Would you allow an amendment of the libel with the consent of the prisoner?—Of course in summary complaints it is very different: if you are under the Summary Procedure Act, you may amend. It is in the discretion of the judge, unless it involves a change in the nature of the charge. I don't see why that power should not be extended to all summary complaints; but in a formal libel or indictment I see no reason why it should not be incumbent on the public prosecutor to be precise. The prosecutor has plenty of time to prepare his case. Very often a prisoner is not advised to take an objection to relevancy, because it would be worse for him if it were sustained.

2117. *Mr. Baxter.*—I don't allude to material alterations?—Suppose there is an error in the designation of a witness, and that is stated at the proper time, and the prisoner does not say that he has suffered any hardship, that might be easily altered; but I think it would be very dangerous to introduce looseness or inaccuracy in the description of the locality in a criminal libel.

2118. *The Chairman.*—Have you any other observations to make?—In regard to the form of record, I think we have got a very good form of record for the trial of the great majority of cases in the form that has been introduced by the Debts Recovery Act. It seems to me that the great mass of the cases that come to the Sheriff Court can be very well tried by a short summons, and by the parties at the first hearing, stating to the Sheriff-substitute what are their pleas. Thereupon he records the pleas of the defender, and, if need be, the reply of the pursuer. I find that this works very well under the Debts Recovery Act, and I find that the short form of record under the Sheriff Court Act of 1853 works very well, except that there is no power to record the pursuer's reply under it. I think the discretion should be given to the Sheriff of settling whether that is to be the form of record or not, because there are undoubtedly some cases which, in my opinion, won't try with a short record, and which must have a long record. The best classification that I can give of the cases that require a long record, and those for which a short record is sufficient, is this: cases that naturally would be tried in the Common Law Courts, if we had such a distinction here, might very well be tried with a short record; but equity cases require to have full pleadings —condescendence and defences. In an immense number of cases the short record of summons and minute of defence is used, and found to do very well; and I believe that in almost every case, excepting equity cases, the summons, with a short note of the pleas of both parties, would suffice.

2119. *Mr. Baxter.*—Has not the Sheriff power at present to determine the kind of record?—Not as I read that clause of the statute; at least what happens practically is this: You have two experienced agents before you, who state to the Sheriff that this is a case in which it is absolutely necessary to have a record. They explain the nature of the case to you, and you feel there is a little doubt about it; and that it would not be easy to reduce the defence to a minute, and that the summons wants amplification in the way of a condescendence. They are at that stage the best judges whether the record should be full or short. I think that, unless the discretion were left in the hands of the Sheriff by Act of Parliament, it would be improper to allow a right to a full record in every case. At present I can rarely have a short record unless both parties agree to have it. In actions of filiation I almost never have a record—I find that they are tried perfectly well without it; and the great class of cases in which the defence is, Never indebted, or prescription, we never think of having a record.

2120. Where agents come and state that there should be a long record, do you often find that there is really no use for it?—I have found cases in which I came to be of that opinion, and in which I gave effect to the opinion by not allowing the expense of the long record, but very few.

2121. *Mr. Campbell.*—Do you think that the summons in all causes in the Sheriff Court should be in the form of a summons under the Debts Recovery Act?—I think the form of the summons is not a very important matter. Our old form, beginning with the name of the Sheriff-principal, is probably not a bit better than the ordinary English writ, beginning 'Take notice.' I think that is a matter of little importance. Anything that discloses the ground of the claim is sufficient.

2122. *Mr. Webster.*—And which specifies the demand?—Yes, and the diet of compearance.

2123. *The Chairman.*—Do you think that much could be done to produce a similarity of procedure in the different classes of cases before the Sheriff?—I think so. I think it is unnecessary that we should have three forms of process, as we have at present—the Sheriff Court form, the Debts Recovery form, and the Small Debt form. As I have said, it matters very little what is the form of the summons, so long as it contains the demand and the diet of compearance; and I see no objection to introducing the Debts Recovery Act form into the whole of the courts of the Sheriff. Whether there is any necessity for recording the defender's pleas up to cases under £12, I am not prepared to say. People are well enough satisfied with cases being tried as they are. In point of fact, particularly when agents appear in the Small Debt Court, the Sheriff hears the defence, and for his own guidance notes it, and he regulates the evidence by the defence he has noted. I don't see why he should not note it as matter of necessary form, and make it part of the process. But I think we might have similarity of process in all the three courts.

2124. *The Chairman.*—And blank forms of summonses printed?—Yes.

2125. *Mr. Baxter.*—To serve the whole three?—Yes.

2126. *The Chairman.*—Would you give the party notice which court he was to attend?—Yes, by the heading of the summons.

2127. That might be in writing?—Yes, or printed. At present we have printed forms for the Small Debt, and for the Debts Recovery Act.

2128. And that system might be extended to ordinary cases?—Yes.

2129. *Mr. Webster.*—Have you anything to say as to summary procedure—petition, and interdict?—I think the answers I have given as to proceedings begun by summons apply there too,—a short note of the pleas in answer, and where absolutely necessary a record.

2130. But commencing, as at present, with a petition?—Yes. It may be called a bill, and made shorter, but I don't think that makes much difference.

2131. *Mr. Campbell.*—Would you give the same direction that is given now, that in petitions in summary proceedings, the forms of the ordinary court should be as closely observed as possible?—Yes, that is so at present, and should be continued.

2132. *Mr. Baxter.*—Have you had any appeals in cases under the Debts Recovery Act?—There have been some.

2133. What does the Sheriff judge on in these appeals?—I am not aware of any appeal except where there were notes of evidence.

2134. Can the Sheriff have an oral hearing in those cases?—No.

2135. He has the summons, the note of defence, and the evidence?—Yes, that is all.

2136. *Mr. Adam.*—He has not the advantage of hearing parties?—No; the only additional assistance he has is a note of authorities.

2137. Do you think that is satisfactory?—No. I have mentioned that the form of record in the Debts Recovery Act is working very well; but there is scarcely any other part of the Act of which I can speak in the same way.

2138. *Mr. Campbell.*—The Sheriff may order a case to be re-heard?—That is by the Sheriff-substitute; and he may order a new trial.

2139. But you don't think he has any power to hear argument before himself?—No.

2140. *The Chairman.*—You say you approve of the form of record, but that you cannot speak with the same approval of other parts of the Act. What, in your opinion, are the prominent objections to it?—In the first place, I think that there is a very artificial limitation of the cases to which it applies. There is no reason why it should apply to certain debts only. But it is more in matters of detail that I object to it, and on account of its unworkableness. For example, one of the Lords Ordinary has held, with reference to appeals, that as both parties are not before the Sheriff-principal, his judgment must be dealt with as a decree in absence requiring a charge before diligence is done.

2141. *Mr. Webster.*—When a case has come to appeal to the Court of Session under the Debts Recovery Act, is it not held that the case must go back to the Sheriff to give a workable decree for the expenses, and that the Court of Session cannot give decree even in that court for the costs incurred?—I believe that has been held. So far as I have been able to gather from my own experience, the Act is found to be unworkable more from oversight than anything else. It might very easily be re-written without changing any of its general principles, except that I think it is desirable to extend it far beyond the debts to which it applies. If it were recast, I think it might easily be made a most workable statute; but there are so many small omissions in it, that it is found very difficult to work it securely. For example, it says you may plead as a counter claim another debt of the same nature and amount as those which may be sued for under itself. Now, this case has happened: a man sues for a book debt amounting to £13, being £1 above the Small Debt limit: the person he sues has a counter claim against him amounting to £11: it has been doubted seriously whether he can plead the counter claim of £11 as against the principal claim of £13, because the Act says it must not only be of the nature, but of the amount which may be sued for under the Act. That is one of the difficulties which need not be found in the Act, for it was not intended; but it bristles with little points of that sort.

2142. *Mr. Campbell.*—Is there not an obvious omission in regard to sequestrations *currente termino*?—Yes. There is an endless variety of questions as to the interpretation of the class of cases to which it applies; and I have felt, when parties agreed that a particular case was a proper one to try under it, that it was a pity for the judge to refine too much as to whether it fell under the old triennial prescription statute or not; and I suspect many judgments have been pronounced throughout the country which might be reducible, as not referring to claims which fell within the Act. I am quite sure that a little revision would put it right; but at present it is not easily worked.

2143. *The Chairman.*—You approve of its general principle?—I do.

2144. *Mr. Harrison.*—You have not found that many parties have attempted to reduce the judgments?—I am not aware of any such case in Aberdeenshire.

2145. So that the public have appreciated the benefits conferred by the Act, and have overlooked its imperfections?—It is very much used in Aberdeen. I have a roll of cases under it every Friday. Generally, half of them are decrees in absence; but that is a great advantage to the public, because they get their decrees in absence for 3s. 1d.

2146. *The Chairman.*—Have you found any objection among the practitioners in your court to the remuneration to which they are entitled under the Act, or to the principle by which it is regulated?—Yes, they object to the amount of the remuneration in contested cases, and to the principle by which it is regulated. I think they feel themselves insulted by the principle, and they complain of it as not the way in which professional gentlemen should be dealt with. They have felt it very much. In many cases it is a great hardship; and if a man is to do the work which he must do to carry his client's case through, he ought, in many cases, to get a great deal more than the £3, 3s. or £5, 5s. which he is allowed. He does far more than £3, 3s. worth of work. That is a matter on which I am certainly prepared to express my unqualified disapproval of the Act, and I know that the Aberdeen advocates would join with me in doing so. Some of them look on it in this light, that if a man has a great deal of business of that kind, it will pay very well on the whole, and that argument has been used to me in reference to modifying expenses. They say, 'You must not modify here, because, though we get £3, 3s. here for little work, we have done £9, 9s. worth of work in another case, for which we only got £3, 3s.' There is a great deal in that. But I don't think it is a fair position to put members of the profession in.

2147. Do you think you have the power to modify?—I did not, till I saw an opinion of the Supreme Court, which made me doubt.

2148. Do you think there ought to be a more particular table of fees and an account rendered?—I think it should be regulated by the ordinary table of fees. The cases are between £12 and £50. I would reduce the court dues to a minimum, but I don't see why the practitioners should not be properly remunerated for their work. There is an option to the parties to appear without agents, so that no man is debarred from coming there; and if the practitioners are not properly remunerated, that class of cases will fall into the hands of men into whose hands it is better that they should not fall.

2149. *Mr. Adam.*—Do you think the Act would be more used if the agents were better paid?—I am sure it would be no less used.

2150. *Mr. Baxter.*—Do you find cases brought into your ordinary court below £50, which might be brought under the Debts Recovery Act?—No; I am not aware of any. The plea would be sure to be stated that only debts recovery expenses could be given.

2151. *Mr. Campbell.*—Is it the practice in your court, where the proof is taken, for the parties to request that the Sheriff-substitute should make a note of the evidence?—In about one-half of the cases I am asked to take notes, and in about one-half they say they don't wish it. I always rather encourage the taking of the notes almost as a matter of course. I rarely put the question, but set the clerk to take them.

2152. You generally employ the clerk?—Always; and unless they say they don't want the notes taken, I let it be done, because I am not disposed to have finality in questions, unless it be very clearly expedient; and if the case is to go to the Sheriff, it is a pity that it should go to him without the merits being before him.

2153. Unless the request is made that you should note the evidence, the party in whose favour you pronounce judgment is entitled to say that the notes shall not be used?—That may be so, but I am not aware of it.

2154. *The Chairman.*—Have you anything to state in regard to the investigation of facts in civil cases?—I think there is room for some change in that matter. There is a considerable number of cases in which it is a great pity that in the Sheriff Court we should not have the advantage of a jury, particularly cases of damages. I don't know any class of cases which puzzle me more than cases where I have to assess damages. Take a case of slander, for example. It requires a knowledge of the circumstances of the parties, of the tone of the district, of a hundred little things that a judge is not likely to pick up very quickly, and which perhaps a

J. Comrie Thomson.

judge is not entitled to use in coming to a decision, which would be perfectly well known to five or seven jurymen; and I am certain that their judgment on a matter of that kind would give a great deal more satisfaction than that of a single judge. I think I have already said that it appears to me to be very unsatisfactory, that one man who has not seen the witnesses should review the decision of another man who has seen them, upon the facts, particularly when the materials for that review are the notes of evidence which have been taken. If the facts are to be left to the determination of the Sheriff-substitute in the first instance, with a review by the Sheriff-principal, then I am of opinion that the facts should be more carefully recorded; and, putting aside that, it is very hard work indeed to be taking constant proofs. I believe it would be more for the interest of the parties, with the view of the appeal Sheriff dealing with the case, if a shorthand writer took the notes to the dictation, but only to the dictation, of the Sheriff.

2155. That is, where you have no jury?—Yes.

2156. *Mr. Baxter.*—Do you think it a matter of consequence that the agents should see what is going on, and that the Sheriff-substitute should not write continuously, without their knowing what is being put down?—To have the agent superintending your writing, according to the common system, is simply intolerable. That is a thing that I think no Sheriff in Scotland is likely to stand, because it puts him out altogether. My practice—and I find it to work pretty well—is to take all my proofs in court. The witness is put into the witness-box; the agents stand and examine the witnesses; and the case is conducted as much as possible like a jury trial, but no one knows what I have written till I read it to the witness.

2157. Is that satisfactory?—It is quite satisfactory so long as my judgment is to be final, because my notes will always contain what is sufficient for my own judgment; but I don't think it is satisfactory for the judge of review.

2158. *The Chairman.*—You read over the notes to the witness?—Yes, in presence of the agents, and any suggestion is attended to at once; but it is impossible to be constantly stopped by the questions, 'Have you got down so and so?' or, 'What have you got down?' That would prevent any one from taking notes with intelligence.

2159. *Mr. Baxter.*—How does the agent know that another question may not be necessary in consequence of what you have taken down?—That is the defect of the system.

2160. *Mr. Campbell.*—When the evidence is read over to the witness, the agent ought to notice whether anything particular has been omitted, and the omitted question can then be put?—Of course.

2161. *Mr. Baxter.*—But perhaps it does not suggest itself when the evidence is read over in that way?—No doubt.

2162. *Mr. Campbell.*—In such a place as Aberdeen, have you any difficulty in finding a competent shorthand writer?—No difficulty.

2163. *The Chairman.*—With a jury, how would you do?—I think their verdict should only be subject to review on the ordinary grounds, by a motion for a new trial on the footing of the verdict being contrary to evidence.

2164. By whom reviewable?—That would raise the question we have already been speaking of. I should say by the Court of Session, or if not, by the two judges of appeal.

2165. *Mr. Webster.*—Suppose the present system of the double Sheriffship to be continued, would you allow the judge who presided at the trial to set aside the verdict?—Sitting alone?

2166. Yes?—No, I don't think so, because that would virtually be the judge setting up his own opinion against that of the jury. But I think it would make a very satisfactory tribunal to review the verdicts of juries if the two perambulatory judges were to deal with evidence on a motion for a new trial, with the assistance of the judge who presided at the trial.

2167. In what form would you present the evidence to the appeal judges?—The judge's notes.

2168. Then these appeal judges would judge from the materials which you deem unsatisfactory according to the present system?—Yes; but on a perfectly different footing. They would deal with the evidence in the way in which a Division of the Court of Session deals at present with the judge's notes in considering the verdict of a jury. That is a totally different thing from a note of the evidence which has formed the ground of judgment of A., being transmitted to B. that he may form his judgment on it, and say which way the proof tends. It is quite possible for a judge to deal with depositions where every word that the witness says is taken down. The Sheriff-principal is perhaps a much better judge of that than the Sheriff-substitute; but he is not nearly so good a judge of facts when he has only notes of the evidence before him.

2169. *The Chairman.*—The result of the ambulatory court being of opinion that the verdict was not right, would be the granting of a new trial?—Yes; but I would limit the use of a jury to a certain class of cases. I am not prepared to say that the time may not come when it may be extended to all questions of fact; but I think it is desirable to have it now, in cases where damage requires to be assessed, because I think any single judge is not a good judge of the amount of damage.

2170. *Mr. Webster.*—From your experience and observation as to the amount of damages awarded by juries and the amount awarded by Sheriffs, which would you say was the fairest tribunal in the assessment of damages?—You find juries sometimes making outrageous blunders. I don't think you will find Sheriffs making such outrageous blunders, but it is always a very difficult thing for a Sheriff to say in an action of slander whether he is to give, for example, £5 or £50. That depends on a hundred considerations that he has not before him. To call a man in one rank of life a liar or a thief is a very serious thing; but if he is in another rank of life, it is not thought much about. I think that should be taken into account in fixing the damage, and I think the man's neighbour can tell that much better than I can.

2171. *The Chairman.*—Has your observation the same weight when the parties are in a different rank of life from the jury?—Yes; it has this importance, that the persons cited as jurymen, though not of the same rank, would have a knowledge of the failings, habits, and modes of thought of the persons whose case they were trying.

2172. Such as the Sheriff has not?—Such as the Sheriff has not; because, in a jury of seven men, the chances are that three of them may be of the same rank.

2173. *Mr. Webster.*—Would you wish the jury to decide on their local knowledge and impressions, or on the evidence brought before them?—Upon the evidence, in the question of whether it is to be a verdict for the pursuer or for the defender; but they are to bring their local knowledge to bear on the question whether £10 or £100 is the proper sum to award as damages.

2174. *The Chairman.*—You mean where it is damage for injury to feeling or person?—Yes; I am confining all I say to that. Damage for breach of contract is a totally different question. I am not prepared to go that length with respect to damage for breach of contract.

2175. If an action is brought for injury to person, or for injury to character, and the fact is admitted by the defender, the whole question being the assessment of damages, would you summon a jury to assess the damage?—I think so. At all events, I think it should be competent to the Sheriff, of consent of the parties, to summon a small jury to determine such a question as that.

2176. With consent of both parties?—Yes.

2177. Have you any further observation to make on the writs, pleadings, and the investigation of facts in civil matters?—In regard to pleadings, I may say, that although there is no great outcry, so far as I know, about delay in the Sheriff Courts, yet the procedure

would be very much facilitated, and made much more rapid, if there were an enactment making it peremptory to lodge papers within a certain time, and if the system of consents were abolished in the Sheriff Courts, as it has been in the Court of Session. I find that out of fifty cases which I caused the Sheriff-clerk to look at—the cases which came first to his hand—upwards of one-fourth of the papers were lodged with consents not within the specified time, or upon cause shown.

2178. Did it appear to you that in any of these cases repeated orders had been disregarded?—Yes; in the majority of them it was so. In fact, what generally happens is this: there is an order pronounced for condescendence and defence in ten days and six days, and no more is heard about it for perhaps two months; one of the parties then comes up with his condescendence, and asks leave to lodge it. The other party consents; that is inscribed on the back of it, and it is received. The same process is gone through with the defence, though perhaps to an exaggerated extent, and it happens also with the revised papers.

2179. *The Chairman.*—Have you any reason to suppose that that is done without communication with the client, or without his concurrence?—That is a question which I have no opportunity of judging of; but I know that agents in the largest practice have said to me, that they wished there were peremptory diets fixed for lodging their papers, because they would then not be in the position of constantly granting favours or asking favours; but so long as the present system existed of lodging papers at any time was competent, so long would it continue to be done.

2180. They could always avoid asking favours, I suppose?—Well, they are tempted to ask favours, by the facility of getting them.

2181. If an agent followed the practice of not asking, he would have less delicacy in refusing; but if he asks, he cannot very well refuse?—No.

2182. And that is really the evil?—Yes.

2183. The accommodation given?—Yes; but it is mutual accommodation.

2184. Is it mutual accommodation to the parties litigants?—I am not prepared to say that in each instance the client is communicated with. I don't think it likely.

2185. *Mr. Webster.*—Do you find that in some cases the delay has really taken place with the view, and often successfully, of settling the case?—I am quite certain that delay is a very proper thing in many cases; but let it be in the discretion of the Sheriff, and before the time has expired. When the day has come on which the paper should be lodged, let it be lodged, or the Sheriff told why it is not lodged. Don't allow papers to be taken of consent.

2186. What interest has the Sheriff in driving on parties faster than it is their interest to go?—He has the interest of the litigants and the public to attend to. No sensible litigant interferes with his agent in a matter of that kind; he leaves it to his agent's discretion. But there is certainly a grievous abuse in the way papers are admitted, and that is the main source of delay, as the interlocutor sheets show. The provision for reviving a cause of consent is also abused. I believe there are counties in which the Sheriff declines to revive more than once of consent. I think there is ground for holding that that is not quite a correct construction of the statute; and in many counties, Aberdeenshire among others, we have pages of interlocutor sheets covered with 'revives of consent' before the six months expire. So long as there is no check to that, I must say I think it is an abuse.

2187. *Mr. Campbell.*—In those cases where for years a case has been kept alive by consents, that can scarcely occur owing to any consideration of convenience of the agents, but must arise from the disposition of the litigants themselves?—Not always. If you put it for years, that may be so.

2188. *The Chairman.*—The remedy you suggest is, that before the period expires, cause should be stated to the Sheriff for extending the period?—Quite so; that it should not be a matter of course that if an agent secures his opponent's consent, he shall get in his paper whenever he chooses.

2189. If he asks for delay, and his opponent says he has no objection to the delay, would the Sheriff insist on knowing the reason, and decide whether it was a sufficient reason?—Probably the Sheriff in such a case would very rarely refuse to receive the paper; but at all events, the mere statement of reasons in court would be a better system than the present.

2190. *Mr. Baxter.*—Do you think any good has resulted from the enactment that if a process lies over for three months, it should fall?—Certainly not, with the mode in which it is generally worked—constantly consenting to get it revived.

2191. Is there any reason why that should exist?—I think our forms of process have been very much decried, from cases being allowed to go on for such a length of time. They point to the first and last interlocutor in the cause, and that arises very much from the way in which it is worked by the agents.

2192. *Mr. Webster.*—Is that more than a wrong opinion formed by the public?—I don't know. I think they have some reason to complain of it.

2193. What is your opinion as to reclaiming petitions and answers on appeal?—In stating my reasons for preferring a perambulatory court of two judges who should hear appeals, I said that I think it would be better to abolish written pleadings altogether, and to have all the appeals conducted by oral hearings. I have had no opportunity of judging whether reclaiming petitions and answers are good things or not. I don't require to read them, and they are not tempting to read otherwise. Then, in regard to the power of amending the record, I think it is not at present in a very satisfactory position. The Sheriff-substitute cannot amend the record; the Sheriff-principal, as I read the statute, can, upon the Sheriff-substitute pronouncing a judgment which brings the record before him. I don't know why the Sheriff-substitute should not be allowed to amend the record before he pronounces his judgment. There is a clumsy way of doing it, which is resorted to without objection—and I don't know that it is clearly competent—of making avizandum to the Sheriff with a view of his doing so. That is plainly not a good thing. I believe it is for the interest of all concerned that the Sheriff-substitute should have the power of amending a closed record.

2194. *The Chairman.*—Under the sanction of costs?—Always, either full or partial costs, as he might think fit.

2195. But always some award of costs?—Unless it happened that both parties were to blame.

2196. Have you anything more to say as to criminal cases?—I don't think I have more to say, except that I think in every case the Sheriff-substitute should keep notes of evidence, however trifling the charge may be.

2197. *Mr. Adam.*—Do you think the present mode of investigating the facts in cases of sudden death, or deaths from accident, is satisfactory?—I don't know what the general practice is. My own practice, whenever there is the slightest suspicion in regard to a sudden death, is to accompany the Procurator-fiscal to the place, and to be present on the ground if there is a *post mortem* examination, or an exhumation. I have to pay my own travelling and other expenses for all that, and that is not very satisfactory. But in all these cases I think the Sheriff should let his presence be felt as the coroner of the district; and that is my practice.

2198. Have you ever seen, in your experience, cases in which it would have been desirable to have had a public investigation?—No; I think a public investigation is not nearly so good as the present form of private investigation, provided it has proper solemnity given it by the Sheriff superintending it, letting the people of the district where it happens feel that it is being looked after, and that there is something more than the mere perfunctory sending of two policemen to gather what information they can get. If the Sheriff and the Procurator-fiscal go down and attend the inquiry, and that

J. Comrie Thomson.

is known in the district, and the result of their inquiry is reported to the Crown office, it is much more likely to produce good effect.

2199. *Mr. Baxter.*—Don't you think that it would injure the feelings of relatives to have a public examination?—Yes; and it often leads to miscarriage of justice when the trial comes.

2200. *Mr. Campbell.*—Are you yourself invariably present when the declaration of a prisoner is being taken?—Certainly.

2201. Do you, in the ordinary case, interrogate the prisoner on the charge, or is that done by the Procurator-fiscal?—Generally I begin with the first few questions, and then the Procurator-fiscal, who is at my side, puts the questions; but I would always be ready to check the form of the question, though I have never occasion to do it. I make suggestions, and sometimes I wind up the examination with a few questions. It is virtually my conducting the examination, though the Procurator-fiscal puts the questions.

2202. Do you dictate the answers to be taken down?—Not always. I cannot say that I do it right through an examination. Generally the Procurator-fiscal does it.

2203. *Mr. Adam.*—If it came to be a matter of delicacy, you would do it?—Yes; and in charges of a capital sort I take it very much into my own hands, with the Fiscal's assistance.

2204. *Mr. Baxter.*—You see that it is fairly put down?—Yes; but I never have to check an attempt at unfairness on the part of the Fiscal.

2205. *Mr. Adam.*—You never saw him endeavouring to entrap a prisoner?—Never the least approach to it. As to the precognition of witnesses, I have always understood that, theoretically at all events, it is the duty of the Sheriff to be present and conduct these precognitions. It is simply impossible that he can be present during the precognition of witnesses; and the practice is, that in cases of murder the Sheriff is present at the precognition, but in no other cases; and I don't see how it is possible for him to be present but in these exceptional cases. I always have the feeling, I must say—and I know it is shared by others—that I am not doing all that the law expects me to do. It is better that it should be declared to be the Sheriff's duty, and he should do it, or that it should be declared to be unnecessary.

2206. *The Chairman.*—But in grave cases you attend?—Always.

2207. And assist with your advice?—Quite so.

2208. It is part of your duty to have the offence investigated?—Yes; and now and then, in the case of a very unwilling witness, if the Procurator-fiscal suggest to me that he would like me to be present, I always go; but these are exceptions.

2209. *Mr. Baxter.*—I suppose that would take up your whole time?—It would be quite impossible to do it.

2210. *Mr. Adam.*—And not necessary?—Quite unnecessary; because the Procurator-fiscal does the work rather better, perhaps, than the Sheriff would do it.

2211. *Mr. Webster.*—And with perfect fairness?—With perfect fairness.

2212. *The Chairman.*—The case is transmitted to Crown counsel; and if they consider any further investigation necessary, they order it?—They do.

2213. And if they don't consider any further investigation necessary, but think it a case in which the party ought to be indicted, they indict the party?—Yes.

2214. And if upon the trial it turns out that the evidence is very different from the precognition which the Fiscal has taken, then the Fiscal is made responsible for that, or has to explain how it has come about?—Yes.

2215. So that all these are checks?—Yes.

2216. *Mr. Webster.*—Would you allow the prisoner, as matter of right, to demand that his declaration should be read to the jury?—I would be disposed to print the declaration at the end of every indictment.

2217. Whatever it contained?—Whatever it contained. I don't see why it should not be used as a matter of necessity in every case.

2218. Do you not find prisoners sometimes implicating innocent parties?—That may be; but I think it is very hard that it should be in the power of the Advocate-depute to keep it from the use of the prisoner; and it is so hard that, in point of fact, it is a very rare thing indeed for an Advocate-depute to refuse it when asked.

2219. *Mr Adam.*—Would you print it before it had been proved?—That might raise some difficulty, but I think it should be furnished to the jury in every case, after it has been proved. It is undoubtedly the most powerful weapon for conviction that is generally in the hands of the public prosecutor; but if it is fairly taken, the object of the trial being to punish the guilty person, I don't see why it should not be laid before the jury.

2220. *The Chairman.*—Would you put it with the indictment into the hands of the jury?—Yes; upon its being proved.

2221. But not till then?—Not till it was proved.

2222. *Mr. Baxter.*—But you would give the power to the prisoner in all cases to require it to be used if he thought it for his advantage?—Yes.

2223. *The Chairman.*—Have you anything to say about review beyond what you have stated?—I think I have nothing further to say than I have already said on that subject.

2224. In regard to review by the Court of Session in civil matters, do you think that the form which now exists is that which you would retain?—Your Lordship means the simple appeal under the Act of last session?

2225. Yes?—Yes, I think it is better than the former note of advocation. I see no objection to that.

2226. Do you approve of dispensing with caution?—That is a matter on which I think we have yet to get experience. I confess I was a little doubtful about it; but I have not had sufficient experience to make my opinion of the slightest value.

2227. You have already spoken as to the costs under the Debts Recovery Act; have you anything to say as to the costs of litigation in other procedure?—I have no suggestion to make, unless it be this, that I think if it fell to the court to review the rate of charges, they would be disposed rather to increase the charges which agents are entitled to make, than to diminish them. It seems to me that they are paid at a less rate than other professional men; but as to the mode of awarding costs, I have no suggestion to make.

2228. *Mr. Webster.*—Would you alter the scale of costs in any respect if you had the perambulatory appeal court, keeping in view where procurators might have to go to plead their case?—But I would propose that they should hold an appeal court in those towns in which for the most part there is a body of procurators, so that their expense would not be greater than at present.

2229. The local agent conducting the case, say in Peterhead, would entrust the pleading of it to an Aberdeen advocate?—He might do so, or he might come to Aberdeen and get the charge for a day's attendance; but I think that, as a matter of detail, it would not make any difficulty. I certainly think the procurator should be entitled to conduct the case at Perth, for example, though he happened to be a Dunblane writer, if Perth was the seat of the perambulatory appeal court.

2230. *The Chairman.*—Supposing there was not to be such a change as you have suggested in regard to the procurators, do you think the procurators in one Sheriffdom should be allowed to practise in any other Sheriffdom?—Certainly, if the arrangements as to practitioners were to be made now for the first time, I should say that they should be entitled to practise all over Scotland; but I think it is a little dangerous to interfere with the rights and interests of old existing corporations and societies of practitioners.

2231. *Mr. Baxter.*—All other exclusive privileges have been done away with?—True, but I am not prepared to say that this is the time to do it. I don't think it is one of those evils calling for change.

2232. Have not the agents in Aberdeen exclusive privileges?—Yes.

2233. Do you know what they are?—No, I don't know exactly what they are.

2234. Supposing a party here had served an apprenticeship of five years to a Solicitor before the Supreme Courts or a Writer to the Signet, would he be admitted as a procurator in Aberdeen?—No, he would not.

2235. Do you think that a right thing?—No, I do not say it is a right thing, but I am not prepared to advocate any sweeping change such as was suggested, that the procurators in any one part of the country should be entitled to practise as matter of right in any other part of the country.

2236. They are not admitted by local examination?—They are in Aberdeen still, and attendance in Arts classes of a university is required for two years at least.

2237. Does that not make a difference?—Certainly.

2238. But they will all pass under it now?—Then probably I might answer the question in a different way, with reference to other parts of the country, when the qualifications are the same as in Aberdeen.

2239. Keeping that in view, don't you think they should be admitted generally?—I think if all the procurators in the inferior courts were examined by the same board, and had the same qualifications, and somewhat the same fees to pay, there could be no objection to their practising generally.

2240. Do you think they should be admitted in Dundee, and not in Aberdeen?—No; but till within the last few years the qualifications necessary to become a procurator in Glasgow, or a solicitor in Dundee, or an advocate in Aberdeen, were very different; and Aberdeen still requires a higher qualification than any other body.

2241. But speaking now of the present system?—I think that has introduced a very important change.

2242. And you think they should not be debarred now from practising in any town in Scotland?—When you have a sufficient number of procurators passed in each court under the new system, I would be disposed to admit them; but I don't know if there is a score of them.

2243. Why not admit the new members?—That may be done.

2244. *The Chairman.*—Are there fees paid on the admission of procurators in Aberdeen?—Yes, to the society.

2245. Do you think that a person going from Dundee to settle in Aberdeen ought to be required to pay those fees for admission before he is allowed to practise?—He has other privileges. When a man becomes a member of the Society of Advocates of Aberdeen, he has other privileges besides that of practising in the Sheriff Court. He has the right to a very valuable library, to widows' funds, and a great many others. I don't see why, if a man duly qualified chooses to come to Aberdeen to settle, he should be forced to pay those fees, unless he were also to get those privileges. I don't see why he should pay the fees necessary for becoming an Aberdeen advocate, merely for the right to practise in the Sheriff Court.

2246. *Mr. Baxter.*—Supposing he does not wish to have these privileges?—Then I would allow him to practise, if he had the general qualification to which you have alluded.

2247. *The Chairman.*—You have very properly used the expression the Society of Advocates. The Solicitors of Aberdeen have, for a particular reason, the privilege of being called advocates?—Yes.

2248. They are not members of the Scotch bar?—No.

2249. Do you think that Procurators-fiscal should be allowed to take other business, or ought they to confine themselves to the duties of Procurator-fiscal?—I think it is certainly in theory desirable that the Procurator-fiscal should not conduct any other business; but it is essential that the public should have a thoroughly good man for the office. You will not get a good man for the office unless there is a good salary attached to it, and it would be an absurd thing to give a large salary to a Procurator-fiscal who had very little work to do as Procurator-fiscal. Therefore, in the smaller places, I do not see how you can debar him from conducting his own business. In large places the business is generally sufficient to occupy a man's whole time; and as you could get a good man for a fair salary, I think he should be debarred from taking other business.

2250. In that case do you think he ought to be entitled to a retiring allowance?—I think he should be put on the same footing as other civil servants. I ought to add that when I say it would be better to debar the Procurators-fiscal from private practice, I am speaking only theoretically, because I know of no instance in which it has been suggested that a Procurator-fiscal with even a large amount of private practice has allowed it to interfere in the slightest degree with his duties. I never heard that whispered. But in theory I say that it is better to have a totally independent public officer.

2251. You never heard any suspicion attached to them?—Never in the least.

2252. *Mr. Adam.*—You have two Fiscals in Aberdeenshire—one for the county and one for the city?—Yes.

2253. Do you find that any inconvenience to the public service arises from that?—No, I am not aware.

2254. *Mr. Baxter.*—Are they not in partnership?—They are, and the Fiscal for the city holds a commission to act as Fiscal for the county in the absence of the other. In fact, I find it a convenience. We never are without a Fiscal for an hour.

2255. *The Chairman.*—Have you any other suggestions to make in regard to Sheriff Courts?—None occur to me.

2256. In Aberdeen there is a Burgh Court; do the magistrates exercise judicial functions?—They hold no regular civil court. Sometimes, but very rarely, civil cases are brought before them. For example, diligence on bills, and particularly summary removings within burgh. I never knew of them sitting to try other civil questions.

2257. Not at all?—Not at all. They don't sit regularly as a Burgh Court.

2258. Is there a Dean of Guild Court in Aberdeen?—Yes. There is sometimes a court to consider applications to repair and remove ruinous tenements, but not often.

2259. Who exercises the jurisdiction generally attached to the Dean of Guild, such as lining, regulating boundaries, and pulling down old buildings?—The Police Commissioners have powers to regulate the lines and boundaries under their special Act. Such questions sometimes come before me in the form of summary applications.

2260. *Mr. Baxter.*—Do the police do anything with reference to that?—Yes, under the Act.

2261. *The Chairman.*—Do the magistrates exercise any jurisdiction *in criminalibus*?—They have a police court, and they take prisoners' declarations.

2262. Is that under a general statute?—They have a local Police Act, and I believe that to be a very satisfactory court. I am not sure whether it is common; but in Aberdeen the Fiscal of that court is a member of the Society of Advocates. He is a partner of the county Fiscal, and the business in the Aberdeen Police Court is, I believe, conducted to the great satisfaction of the public by the magistrates. I cannot but think that that is partly owing to their having a well qualified Fiscal, who exercises his discretion, and does not scruple to stop a case.

2263. Are there any judicial functions exercised in matters of debt by the Justices of the Peace in Aberdeenshire?—There has been one Justice of Peace Small Debt Court held since I went to Aberdeen, but it had not been held for many years before, and has not been held since.

2264. And there are none held in the county that you know of?—None.

2265. I suppose they exercise jurisdiction in revenue cases under statute?—They sit very often in a *quasi* criminal capacity, administering Acts of Parliament.

J. Comrie Thomson.

2266. Do they sit in questions of granting licences?—Yes.

2267. Do the Quarter Sessions review the judgment of the magistrates in the matter of licences?—The Quarter Sessions reviews the decisions of the Magistrates and Petty Sessions in these matters.

2268. Is that found to work satisfactorily in Aberdeen?—Well, there is a considerable amount of outcry; but I can only judge from the public prints, as any other person can judge of it. There are no complaints against the mode in which the court is conducted certainly; but there is the usual feeling on the one hand, that they are perhaps too ready in granting licences, and on the other, that they are not ready enough. There is the sort of divided opinion which one finds in large cities.

2269. The feeling you allude to would exist whatever the tribunal was?—I have no doubt of it, except that the magistrates are attacked on the ground of having personal leanings from their having an interest in public-house property, and so on. Whether these complaints are well founded or not, I have no means of judging; but they are made. And there is, on the other hand, a good deal of public outcry as to taking the jurisdiction from them; but I believe it would be the same whatever tribunal were to exercise it.

2270. Does the review by the Quarter Sessions operate as a removal to any extent of that ground of dissatisfaction?—To some extent.

2271. What is the class of Justices that generally sit in Quarter Sessions at Aberdeen? Are any of them the magistrates?—No; generally they are retired merchants, or gentlemen who have been in the public service in India, and have retired from it. Often Mr. Irvine, the convener of the county, presides, and there are one or two others of his class present.

2272. Do country gentlemen come in and attend?—Not to any large extent. I may mention that it has occurred to me very often that it would be desirable that Justices of the Peace should try petty offences in their own localities. In such a town as Turriff, or in Huntly, they might very well dispose of petty thefts, petty assaults, and petty breaches of the peace. That would save the public the expense of bringing prisoners and witnesses fifty or sixty miles to Aberdeen, and the case might be very well disposed of by them. In Huntly they have the Lindsay Police Act, and they have Commissioners of Police, who try petty offences within the town; but I think it would be a good thing, and it would certainly relieve me of a great deal of work, and would relieve the county of a great deal of expense, if the country gentlemen residing in that district would try petty offenders.

2273. Do you know any reason why they don't?—I am not aware of any reason.

2274. Is there any Procurator-fiscal of the Justice of Peace Court?—There is.

2275. Where does he reside?—There is a Procurator-fiscal of the Justice of Peace Court of Aberdeenshire in Aberdeen; and, if I mistake not, in Huntly, Peterhead, and Fraserburgh, a writer holds the commission of Procurator-fiscal of Justice of Peace Court for each of these districts respectively; and if the Justices were willing to act, I am certain that it could be done without difficulty.

2276. *Mr. Baxter.*—In cases of petty breaches of the peace, where the county constable apprehends a prisoner, is he brought all the way to Aberdeen and tried before you?—Yes; or to Peterhead, if he is within the Buchan district.

2277. *The Chairman.*—That is attended with expense?—Yes; and it seems to me rather to be magnifying the offence to bring a prisoner all that way.

2278. Do you know of any reason why the Justices do not act?—No, I do not.

2279. *Mr. Baxter.*—Is there no County Police Court?—My summary criminal court is the County Police Court, you may say. There is no other.

2280. *The Chairman.*—Are there any burghs of regality or barony in your district?—There are the royal burghs of Kintore, which is the smallest in Scotland, and Inverury. In Inverury the magistrates try petty cases. And within the last few years certain populous places adopted the Police Act; and respectable shopkeepers and others, inhabiting these villages, deal with them in their capacity of Police Commissioners.

2281. In both these burghs?—Not in Kintore, I think; but in Inverury and Huntly they do, and at this time I hear they are endeavouring to arrange the same thing for Turriff. Petty cases are also tried at Fraserburgh by the Baron Bailie.

2282. The magistrates of these burghs do not exercise jurisdiction *in criminalibus*?—No, not except under the Police Acts, where adopted.

2283. Do they do so *in civilibus*?—No; to no extent.

2284. You approve of the Police Commissioners exercising jurisdiction in regard to petty offences?—Certainly, for small offences.

2285. Do you think there is no evil in the magistrates not exercising jurisdiction in civil matters?—I do.

2286. You think there would be no advantage in their doing so?—No advantage.

2287. And no evil would result to the community if they were deprived of the right to do so?—I think not.

2288. *Mr. Adam.*—Does not the expense of trying criminals before Justices of the Peace fall upon the county?—Yes.

2289. And in burghs, when they are tried there before a police magistrate, the burgh pays?—It is upon the assessment.

2290. *Mr. Webster.*—In the cases that go through the Sheriff to Crown counsel, the public pay?—When they are reported to Crown counsel, I don't think they are fit cases to be tried by lay magistrates.

2291. *Mr. Adam.*—Does the prosecutor bear the expense of summary prosecutions before the Sheriff?—The county pays the Procurator-fiscal for cases of Night Poaching and Breach of Trespass Act, and for investigations which don't result in a trial, and are not reported to Crown counsel. All other cases are paid by Exchequer.

2292. *The Chairman.*—Have you any other observations or suggestions to make to the Commissioners?—I think not, unless I may have omitted to state, at the beginning of my examination, that even if the present system of Sheriff-substitute and Sheriff-depute were retained, I would still be of opinion that it would be proper to ameliorate the condition of the Sheriff-substitute as to his status, and to continue the Sheriff-depute as merely an appeal judge in cases from the county.

2293. You would have him no longer an executive officer?—No. I put it in this way, and it is quite right to speak plainly about such things—When a Sheriff-depute comes down to his county, there can be no question that in the eyes of the practitioners in his court, and of the public, the Sheriff-substitute is for the time discredited. He is put on one side: he ceases to exist.

2294. You think he is superseded?—He is superseded, and the superseding of him necessarily involves a certain discrediting of him for the time with the public. I think that is a state of things which is undesirable. I have not experienced anything of the sort myself, because the Sheriff-principal of Aberdeenshire has been all his life a Sheriff-substitute, and knows the feeling. But I know it is not so in other counties. Of course it is not the fault of individual Sheriffs; but it is, I think, the fault of the system. If such important duties are laid on the shoulder of the Sheriff-substitute as now are, he should be recognised, I think, as an independent officer, and not as the mere depute of another judge, who is supposed to be responsible for the judicial affairs of the county.

2295. You think the Sheriff exercising the executive powers ought not to exercise these by a substitute?—Quite so.

2296. In any case?—In any case; in fact, that the theory of substitution should be done away with.

WEDNESDAY, 23D DECEMBER 1868.

Members Present:—

LORD COLONSAY.
LORD BARCAPLE.
THE LORD ADVOCATE.
E. S. GORDON, Esq., Q.C.
DR. BARCLAY.
JAMES CAMPBELL, Esq.
GEORGE HARRISON, Esq.
JAMES ADAM, Esq.
A. B. SHAND, Esq.
T. GRAHAM MURRAY, Esq.
CHARLES MORTON, Esq.
JAMES WEBSTER, Esq.
J. B. BAXTER, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

ROBERT SCONCE, Esq., examined.

Robert Sconce.

2297. *The Chairman.*—You are one of the Sheriff-substitutes of Stirlingshire?—I am.

2298. You are resident at Stirling?—Yes.

2299. How long have you been so?—I have been eight years a Sheriff-substitute, four at Falkirk and four at Stirling.

2300. Falkirk is also in the county of Stirling?—It is.

2301. There is a resident Sheriff-substitute there?—There is.

2302. Who is there at present?—Mr. Robert Bell.

2303. Before you became a Sheriff-substitute, you were a practitioner?—Yes; I was a writer in Stirling for thirty years.

2304. I believe you held the office of Procurator-fiscal for some time?—I did. I was joint Procurator-fiscal for eighteen years, and sole Procurator-fiscal for seven years.

2305. Is there a considerable amount of business done in the civil courts at Stirling?—A good deal.

2306. Does anything occur to you as important to be stated to the Commissioners with reference to the constitution of the Sheriff Court, as consisting of a Sheriff and his substitutes?—I propose to consider together the constitution of the Sheriff Court as consisting of Sheriffs and Sheriff-substitutes, and the review in civil matters within the court itself, and by superior courts, and I would propose to divide the subject into two: 1*st*, the appellate jurisdiction of the Sheriff; and 2*d*, the other duties of the office. My opinion is that the appellate jurisdiction of the Sheriff should not be continued; and that there should only be a direct appeal from the Sheriff-substitute to the Inner House of the Court of Session. My reasons are these:—The recent abolition of the Court of the Lord Ordinary as an appeal court, seems to me to show that the legal and general opinion of the country is, that there should be no intermediate tribunal between the judge of primary jurisdiction or primary instance and the Supreme Court. I think that if the reason was sufficient for abolishing the Court of the Lord Ordinary, who is a superior judge, it is still more strong for abolishing the Sheriff as an inferior judge.

2307. You mean the abolishing of the right to bring an appeal before the Lord Ordinary?—Yes. The duty of the Sheriff-substitute is not merely roughly to indicate his opinion; he has to digest the case, and arrange and fully prepare his judgment,—not only to show his reasons for it, but keeping in view that the case may be taken for the consideration of a proper and full appeal court, to facilitate its disposal there; and I think that the interposition of another single judge of the Inferior Court, as his opinion cannot be held conclusive, is, at least, unnecessary. I think, further, that the constitution of the English County Courts, where there is no intermediate appeal between the judge and the courts at Westminster, affords a precedent for the view which I have been suggesting. I am of opinion that if the Sheriff Courts were now to be established, it would not likely occur that two officers in the relative position of Sheriff and Sheriff-substitute would be appointed. Further, I have the opinion that the conception of the office of Sheriff, as established by statute in 1748, contemplated a resident judge and magistrate, and that there was no idea, as there is no provision, in the statute for the Sheriff being an appeal judge, which, it seems to me, arose from the Sheriff becoming non-resident, and appointing originally as substitutes persons who were not qualified for the judicial office. I further have the opinion that the recent abolition of the process of advocation, and the taking of the case by appeal directly to the Inner House, without caution, as a step in the cause, and the appointment of a special court for hearing certain kinds of cases under appeal from the Sheriffs, the improvements of the form of process, and if there is anything defective, certain to be amended by the report of this Commission,—all these things satisfy me that cases in the Court of Session will be speedily and cheaply determined, and that the object of keeping up the Sheriffs as an intermediate appeal tribunal is thereby removed. My belief is, that the reports of the decisions in the Court of Session do not show that, when the Sheriff and the Sheriff-substitute have differed, the Sheriff-substitute has been found more often wrong, although, from the Sheriff being an appeal judge sitting upon the Sheriff-substitute's judgment, with new and sometimes better argument, a sounder judgment might be expected from him, in the same way as a better judgment is expected from the Inner House than from the Lord Ordinary. My observation further is, that when the Sheriff and Sheriff-substitute happen to differ, just because of that difference, small cases which might well have ended in the Sheriff Court, are carried to the Court of Session. I have further to say, that in estimating the relative chance of accuracy of the views of the Sheriff or the Sheriff-substitute, it has to be kept in view that the Sheriff-substitute superintended the preparation of the record, took the proof, and had opportunities, from time to time, of considering the case, not all at once, but the pleas and facts as they were gradually developed. Having taken the proof himself, I think he had a better opportunity of coming to a just conclusion than a single judge sitting by himself upon the case as finally adjusted and completed. I cannot but think also that the delay which arises from the appeals is prejudicial. I have before me a parliamentary return made on the motion of Mr. Baxter, M.P., for the year 1863, giving the average number of days between the last interlocutor appealed from and the last interlocutor deciding the appeal; and I find that one district gives 102 days, another 115, others 60, 118, 31, 50, 97, 111, 76, 103, 106, 38, 26, 39, 104, 22, 31; and there are others, but I have just selected a few at random. Some of these appeals, I have no doubt, were in the same case, though I have no means of checking how many there were in that position.

2308. *Mr. Shand.*—You use the expression 'from the last interlocutor?'—I quoted from the words of the return.

2309. *Mr. Baxter.*—Whether these appeals were from the final judgment is not stated?—I can give the numbers of these.

Robert Sconce.

2310. What you read had reference to that and also preliminary appeals?—It was between the date of the interlocutor appealed from, and the date of finally disposing of that appeal; and it included both preliminary and other appeals. That brings me to this point, that if the Sheriffs are retained as appeal judges, at least these preliminary appeals should be abolished.

2311. *Mr. Baxter.*—And that there should be only one appeal from the final judgment?—No appeal till the final judgment, or at the same stage at which the case may be carried to the Court of Session.

2312. *Mr. Webster.*—Even though leave were granted?—Except with the leave of the Sheriff-substitute.

2313. *Mr. Adam.*—Would you allow an appeal where there was an interim decree for payment of a sum of money?—I would, certainly.

2314. *Mr. Webster.*—You would anticipate that the Sheriff-substitute would give his consent to appeal where the plea disposed of was one that might, if decided otherwise, exhaust the case?—I have no doubt he would. The same parliamentary return shows, that in 1863 there were in one county 21 preliminary appeals, and 25 on the merits; and in others the numbers were 29 preliminary to 31 on the merits, 17 to 26, 23 to 31, 44 to 55, 168 to 202, 36 to 33, 7 to 11, 16 to 13; and in another the number is said to be 38 to 6, though I do not understand how that should be.

2315. *Lord Barcaple.*—According to the present rule, does a preliminary appeal necessarily stay the progress of the cause?—It does; and not only so, but the statute fixes five different stages of the cause when appeals can be taken. The *first* is disposing of a dilatory plea; *second*, allowing proof; *third*, as to the admissibility of evidence; *fourth*, on the merits; *fifth*, as to expenses; and *sixth*, in many causes there are incidental questions arising as to granting diligence for the recovery of writings before the record is closed, and other matters in which appeals are sometimes taken, perhaps not rightly; but whether rightly taken or not, it is held that the Sheriff is the only judge of the competency, and the case is stayed simply by the appeal.

2316. *Mr. Shand.*—Are you aware that in these returns, in some instances, single appeals have been enumerated as several, according to the number of points which they happen to involve?—Personally I am not aware of that.

2317. Have you observed that that is stated in the abstract of the returns made up by the Sheriffs-substitute?—Yes.

2318. That if five or six preliminary points are involved in one appeal, they will count as five or six appeals?—It is said to be so in one county. I think it may explain the 38 and 6; but I don't think that would run through many counties. My opinion further is, that supposing it should be determined that there is to be an intermediate tribunal between the Sheriff-substitute and the Court of Session, that tribunal should consist of a court of two Sheriffs, presiding over large districts—districts perhaps equivalent to the divisions of the kingdom for Justiciary purposes. These districts might be four in number,—viz. Edinburgh, and the three circuits; but there would probably be some variation of the districts. I don't say more than two judges for each, because if there were more than two, printing would be necessary; if there were only two, they could hand the process from one to the other, and it would not be necessary to print. I think that two judges sitting together, as is done in the Courts of the Lords Justices in England, might consider and discuss the cases in order to endeavour to arrive at the same conclusion, and perhaps more likely at a satisfactory conclusion than they would do if there were three, in which case a vote might be taken, and the matter carried suddenly.

2319. *Mr. Murray.*—Where the two differed, would the judgment of the Sheriff stand?—Yes. I would further say, that if such a court is established, the judges should have no other business or duty; their whole time should be devoted to the public service.

2320. *Mr. Webster.*—And only appeals?—They should have no other duty but that of appeal judges.

2321. *Lord Barcaple.*—Where would you propose that they should administer their jurisdiction?—I think they ought to go round their districts periodically.

2322. Into each county?—I do not say each county, but to each circuit town at all events; and arrangements might further be made, if it were more suitable for the parties, to have hearings in Edinburgh as well. I would not dispense with sittings in the country; but cases might be heard in Edinburgh or Glasgow.

2323. *Mr. Shand.*—Where do you propose that they should reside?—I think they should mainly reside in Edinburgh.

2324. For what purpose?—As being the place where they mostly reside now.

2325. Then you think it is an advantage for an appeal judge to reside in Edinburgh. Is that in order that they may come in contact with their brethren of the bar?—I did not say that; but the natural result would be that they should be resident in Edinburgh.

2326. *Mr. Murray.*—Would you object to their living in the country?—Not in the least, if the two were together. If you got the two to select some other place than Edinburgh, it would be quite satisfactory.

2327. *The Chairman.*—When you say each circuit town, do you mean each town that would be fixed as the place for their circuit, or do you mean each circuit town as it is now fixed by the Court of Justiciary?—I mean each circuit town as it now stands; but that might be varied.

2328. Then they would never go into Fife?—I don't say it might not be varied. There would be some variation as to the districts. For instance, Lanarkshire would require to be a district by itself.

2329. You mean such places as should be fixed on for their sittings?—Yes.

2330. *Mr. Murray.*—And you would have these sittings once a month?—I think once in six weeks should be quite sufficient.

2331. *Mr. Shand.*—Except for the benefit of having the two judges sitting on the appeals, is there any other advantage which that system has over the present?—None.

2332. That is the sole advantage?—Certainly.

2333. Do you think that there is not a great guarantee of attention being given to a case when you leave the responsibility with one man?—No, not more than two. I think that if one man sits with another, he will attend to the case as conscientiously as if the whole responsibility was on himself.

2334. Are you aware that in England one of the most important appeal jurisdictions consists of the Lord Chancellor sitting on appeal from the Vice-Chancellors and the Master of the Rolls?—I am.

2335. Are you aware that that works most satisfactorily?—Yes; but I am aware that the court of the two Lords Justices of Appeal works equally satisfactorily.

2336. But not more satisfactorily?—I cannot give an opinion upon that.

2337. You cannot say it works better?—No, I am bound to suppose that the Court of the Lord Chancellor, as the Supreme Civil Tribunal of the kingdom, is the best tribunal in the kingdom.

2338. How would you propose that summary cases should be disposed of by a court which is only to sit once in six weeks?—If it was necessary to hear them sooner, they might be heard in Edinburgh.

2339. Do you contemplate their sitting oftener than once in six weeks?—Not in the country.

2340. But you contemplate regular sittings in Edinburgh?—They might have hearings in Edinburgh if necessary.

2341. What would be the result, in point of expense, of bringing appeals to Edinburgh to be heard?—It would only be in rare cases that that would be done.

2342. Are there not many summary cases occurring in which it is important to have an immediate appeal?—Not so immediate as that. I don't think they would take much harm from waiting till the end of the six weeks; but it does not follow that every case is to be delayed for six weeks. The decision of the resident

Sheriff might be pronounced only a few days before the sitting of the appeal court. The extreme time is six weeks. But I would permit the appeal Sheriffs to order a hearing in Edinburgh in any summary case requiring great despatch.

2343. Suppose that the appeal judges resided in different counties, you would propose that a communication should be made to them to hear these summary cases in Edinburgh?—I don't propose that they should reside in different counties. I would propose that they should reside near one another.

2344. Would not hearings in Edinburgh add very much to the expense?—I have no doubt it would be expensive coming to Edinburgh; but we are to compare the relative advantages of one Sheriff sitting as an appeal judge, and two Sheriffs sitting as appeal judges; and besides it makes no increase in the expense, because the Sheriffs, as now established, don't require to come to their counties upon every craving for an oral hearing on appeal; for if despatch is wanted, it has to be heard in Edinburgh just in the same way as I propose by the two appeal judges.

2345. The Sheriff at present has the power of ordering argument in writing?—Yes.

2346. That could not be done under the system you propose?—I don't approve of written pleadings before appeal judges. I think it should be done by oral hearings. I don't know that reclaiming petitions should not be permitted by the appeal judges; but I don't approve of them.

2347. In reference to the time it would take to obtain a decision from such a tribunal, I think you contemplate that the papers should not be printed?—Not before two appeal judges.

2348. Do you contemplate that each judge should have the process home, and read the proof before disposing of it?—Yes.

2349. Would the fact that the process had to be laid before two separate judges not be a cause of delay in disposing of a case?—Of course it would. Two men would take longer to consider the case than one.

2350. That is a disadvantage of the system which you propose, as compared with the present?—It requires more time, of course.

2351. That would be productive of greater delay?—I should think there would not be much more delay.

2352. *Mr. Baxter.*—You think the two judges would come round oftener than the one judge does at present?—Yes.

2353. So that there would be no additional delay or expense?—No.

2354. *Mr. Shand.*—Is there any reason why the appeal judge now should not go to his county once in six weeks?—None in the world.

2355. If it were provided that the Sheriff should go to his county once in six weeks, or oftener, as business required it, to dispose of his cases, would that not be a more rapid mode of disposing of them than the mode you have suggested, by which two judges have to read the papers?—No, I don't think it would. The mere reading of the papers would not imply much delay.

2356. I thought you said that system would create more delay?—Of course it takes more time for two persons to read papers than one; but that would not create such delay as should in the least be regarded as deciding the relative advantage of one judge or two judges.

2357. Practically, would there not be less delay if you had one judge hearing the cases as often as the two judges whom you suggest?—The delay would be small, and I don't think that delay is the only matter to be considered in the question of appeals.

2358. *Mr. Baxter.*—Do you contemplate that these appeal judges should give their whole time to their duties?—Yes. The office of Sheriff at present is most anomalous in that respect. It is the only judicial office that I know of in the kingdom where the judges are not bound to give their whole time to the public service, but may practise and discharge other duties. While also other courts have their sittings, the Sheriff at his own discretion may dispose of the cases brought before him. I have already given my opinion that there should only be an appeal direct from the resident Sheriff to the Court of Session, but I have referred to the possibility of establishing another court between the two. With reference to the district courts which have been suggested, there is a question how far their judgment should be final. I am against finality and against excluding the jurisdiction of the ordinary superior courts, and preventing the public from having the benefit of their judgments; but if these district courts are not final, there would, of course, be the just objection of the expense and delay as at present.

2359. *Lord Barcaple.*—Have you at present many appeals to the Court of Session from your court?—Very few.

2360. Can you roughly state the number?—I thought that might be asked, and I can give the number of appeals during the eight years I have been Sheriff.

2361. That is, appeals to the Court of Session?—Yes. Of my judgments there have been six altogether taken to the Court of Session in the eight years.

2362. *Mr. Gordon.*—That is, in your own district?—Partly Stirling and partly Falkirk.

2363. The half of the county?—Yes.

2364. *Mr. Adam.*—Do you know whether the Sheriff differed or agreed with you in these cases?—One was a case under the Poor Law; the Sheriff and I agreed, as did also the Lord Ordinary, but one of the Divisions of the court held that we were wrong. In another the Sheriff reversed my judgment, and the Court of Session adopted his view. Then there was a case of *cessio*, in which the Sheriff agreed with me, and the Court of Session confirmed our view. The next was a process of sequestration, in which there was an appeal to me from a trustee's deliverance; this case did not go to the Sheriff, but went direct to the Inner House, and the Inner House confirmed my view. Then there were two summary cases, in which the Sheriff agreed with me, and which went together to the Court of Session, and the court confirmed our view in both. Recently appeals have been intimated in two cases, in which the Sheriff agreed with me, but there has not been time to obtain the judgment of the court on them.

2365. *Lord Barcaple.*—Do you know what proportion of your final judgments during the same period were appealed to the Sheriff?—I am enabled from the parliamentary returns to give the numbers for 1861, 1862, and 1863. In 1861, while I was at Falkirk, there were 11 appeals taken, and the Sheriff adhered in them all. In 1862, I was temporarily acting in Stirling during the absence of the then Sheriff-substitute there, when 29 appeals were taken from my judgments; and of these, 2 were reversed by the Sheriff, and 27 adhered to. In 1863 I was again at Falkirk, and there were 19 appeals taken; in 16 of these my judgment was adhered to, in 1 there was a reversal, and the others are unaccounted for,—perhaps they may have been cross appeals.

2366. *The Chairman.*—Or they may have been withdrawn?—Yes.

2367. *Lord Barcaple.*—Have you any opinion as to whether the abolition of all intermediate appeal between the Sheriff-substitute's judgment and the Court of Session would lead to a large number of cases being brought to the Court of Session which are now finally disposed of in the Sheriff Court?—I cannot with any accuracy give an opinion upon that.

2368. *Mr. Shand.*—Is it the fact that in almost every case there is an appeal taken from your final judgment?—No.

2369. Can you give us an idea of the proportion?—I cannot.

2370. Seven-eighths?—I don't think so much.

2371. Thereabouts?—I cannot give an idea of it.

2372. You cannot give any idea of the number of final judgments pronounced by yourself in these years?—No, I cannot.

2373. Do you think that the parties acquiesce in your judgments, without taking the benefit of an appeal, in more than a fourth of the cases?—I should think so,—about that, perhaps, but I cannot exactly

Robert Sconce.

say. I am sure that there are more than that of appealable interlocutors, preliminary and others together. I am further of opinion, that if the Sheriffs are retained, either as single appeal judges or two sitting together as district appeal judges, the Sheriff-substitutes or resident Sheriffs should, without control by the others, wholly discharge all the duties pertaining to the office of Sheriff—other, of course, than those of an appeal judge. This leads to the inquiry what these other duties are. There are the Registration Courts; and it must be remembered how much the process of registration has been altered from the provisions of the Reform Bill of 1832. There was first a Registration Court by the Sheriff, and an appeal to another Court of Sheriffs, judging upon claims by the parties. Now a public officer—an assessor—has the duty of collecting the names, and in that he is aided by the valuation roll. The assessor also attends the Sheriff at the Registration Court, and aids him in revising the register. There is not much difficulty upon the facts, therefore. The appeal is now taken not to a court of Sheriffs, but on a stated case on points of law to the Court of Session. The facts are really not difficult, and prior to 1868 the law had been pretty well settled by a series of decisions of the Court of Session. New points unquestionably did arise under the statute of 1868, but these are pretty well settled also. Still, if a mistake in law is made, it can be easily and cheaply put right by the judges. I imagine that the whole business is simple, although responsible, and I think it may well be discharged by a Sheriff-substitute. As to criminal jury trials, the returns of 1861 show that not more than 10 per cent. of these trials were taken by the non-resident Sheriffs, and that in twenty-one jurisdictions in which there were trials of this kind they were all disposed of by the Sheriff-substitute. Then there are the parliamentary elections. This duty, though responsible, is simple, and is frequently performed now by the resident Sheriff, who, besides, necessarily from his constant residence and local knowledge, and regular discharge of duties of the same kind, has to make all necessary arrangements for the preservation of the peace on these occasions. I have heard it said that it was necessary to have Sheriffs resident in Edinburgh, so as to be able personally to communicate with the Lord Advocate on matters connected with the peace of the country. Of course this suggestion is not applicable to the kingdom in its normal or usual condition. But I don't see the advantage of the Sheriff resident in Edinburgh being able personally to communicate with the Lord Advocate. His knowledge can only be derived from the resident Sheriff, who could communicate his information as well to the Lord Advocate direct as through the Sheriff. And in the same way, if the Lord Advocate had any communication to make for purposes in the country, he could as easily do so direct to the resident authorities as through the Sheriff. The Sheriff of the great county of Lanark does not reside in Edinburgh. Moreover, the understanding is, that if troubles arise, the Sheriff should proceed to his county. He must depend very much upon the more generally better local knowledge of the resident Sheriff for information and assistance. Then there does arise against the Sheriff interfering at all in the county the objection of divided responsibility—two persons with the same duties; and with the suggestion of that objection there is the attendant financial remark, Why provide two persons to perform duties which properly fall on one only, and which that one can, and does when requisite, properly discharge? I am of opinion that the districts of some of the Sheriff-substitutes may be enlarged, and their number reduced, providing, so far as geographical position will permit, fair and full occupation for all, even though it should have to be provided that they statedly hold courts at different places for the disposal of all causes, civil and criminal, and all kinds of public business. That is all I have to say on the constitution of the court.

2374. *Lord Barcaple.*—Do you include your own district in that last observation?—There are several districts round about me.

2375. But do you mean that you could overtake with convenience a larger district than you at present have?—I think I could.

2376. *The Chairman.*—Have you formed any idea in your own mind of the localities from which you would take away the Sheriffs-substitute?—Not beyond my own neighbourhood.

2377. What are those in your own neighbourhood?—I think that three, at all events, might be taken away. There are Dunblane and Alloa, both of which are small districts. There are also Dunfermline and Kinross.

2378. Would you take them away from these four places?—No. I would combine Dunblane and Alloa.

2379. *Mr. Murray.*—You would make districts irrespective of counties?—That might be done.

2380. Would you combine Dunfermline and Kinross?—Yes.

2381. Would you combine Falkirk and Stirling?—That could be done.

2382. Would it be an expedient arrangement?—There are a great many summary criminal cases at Falkirk, and that would imply the judge going from Stirling to Falkirk twice a week. That is the difficulty.

2383. The criminal business there makes the difficulty?—Yes; the civil business is no real difficulty There is another division which might be made. I am not sure that Linlithgow and Falkirk might not be thrown together, Stirling and Dunblane, Alloa and Kinross, throwing Dunfermline into the rest of Fife. I think three or four might be saved in my neighbourhood.

2384. In reference to the ambulatory court which you have spoken of, how many days do you think they would require to sit each time they went to Stirling?—I think one day should be quite sufficient. I think they could take both the Stirling and Falkirk cases quite well.

2385. Would you propose that they should have the whole district which is now combined in the Stirling circuit?—Yes.

2386. That is Stirlingshire, Kinross-shire, and Clackmannanshire?—Yes.

2387. *Mr. Webster.*—And would you add part of Perthshire?—If the Sheriff-substitute's districts are changed, it would make a difference in the circuits.

2388. *The Chairman.*—Do you think that one day would be sufficient at Stirling even under the enlarged arrangement which you have spoken of?—Yes.

2389. How many days do you think would be required at Perth?—They would have Perth and Fife cases, if Fife is to be thrown in with Perth. I should not imagine that they could have less than three days for Fife and Perth.

2390. How many days do you think they would take for Dundee? Dundee would be taken separately?—I think a couple of days.

2391. That is, holding the courts once in six weeks?—Yes.

2392. Would it be an inconvenience, do you think, for the people in Fife to have their causes considered in Perth?—Necessarily there would. It would not be so convenient as to have them heard in their own court-house; but nowadays there are railways which afford facilities for travelling which did not exist before.

2393. That would add somewhat to the expense of the appeal?—It would.

2394. Would you have that appeal confined to matters of law, or would you give the judges power to go into matter of evidence?—I would let them go into matters of fact as well as of law, with the limits at present existing in reference to the Debts Recovery Act.

2395. These judges would not have the benefit of hearing the witnesses examined if they proceeded to deal with the matter on the proof taken?—No.

2396. They would proceed on the notes of the resident Sheriff?—Yes.

2397. Would you allow the resident Sheriff to have any power of reconsidering his own judgments?—I would, if, as I have suggested, there should be a direct appeal from him to the Court of Session. My view is,

that there should be a simple note put in by way of exception to his findings, specifying without argument the points of fact or law which the parties wish him to reconsider. He should have power to call them before him, and hear an argument upon these points if necessary; and if not, then to adhere to his former judgment.

2398. You would give a party the option of going direct to the Court of Session or to the ambulatory court?—I would.

2399. And in the event of their intending to go to the Court of Session direct, you would allow a sort of reclaiming note to the resident Sheriff against his own judgment?—Yes.

2400. Would you dispose of that by oral argument?—Yes; if the resident Sheriff thought that necessary.

2401. *Lord Barcaple.*—He might refuse it without argument?—Yes.

2402. *The Chairman.*—Would you allow an appeal from the ambulatory court to the Court of Session?—I would. I think that the public are entitled to the benefit of the superior courts of the country.

2403. Have you considered whether there should be any further limit than there is at present to the power of appeal from the local court; I mean in point of amount?—I have an idea that the small debt jurisdiction should be extended to £25, but that as part of the arrangement there should be an appeal to the Court of Session in point of law, and that the Sheriff's judgment should only be final, even in small debt cases, as to the matter of fact.

2404. Would you let the power of appeal in point of law descend below the present limit of the Small Debt Court?—I would. There are cases where important principles of law are discussed and decided in the Small Debt Court; and I am opposed to excluding the public from the benefits of the superior courts.

2405. Is there a power at present of sending such questions as involve important principles to be more deliberately discussed than in the small debt roll?—Yes; they may be remitted to the ordinary roll.

2406. Is that not a remedy against hurried decisions?—It is.

2407. Is it not important to have a rapid decision in these small debt cases? Is that not the principle of the jurisdiction?—Yes.

2408. And final decision?—Quite so. I would accompany the power of appeal with a check by insisting on the parties taking it depositing the small sum of four or five guineas to meet the subsequent expenses.

2409. Would you do that in other cases of appeal to the ambulatory court, where larger sums were involved?—No, I would not.

2410. Would it not be a hardship on the persons engaged in the litigation in the Small Debt Court, who are frequently poor people, to be obliged to make such a deposit, while in cases of larger amount you would not require it?—I propose to give them a benefit which at present they have not. They have no power of appeal in point of law; and if they get this benefit, it is perhaps not unfair to impose that condition. It is matter of discretion. At present there is no appeal to the Court of Session in cases not exceeding £25, however tried.

2411. In regard to your view of there being a resident Sheriff, who should exercise, as I understand, all the executive functions which are now exercised by the Sheriff, how would you deal with such a place as Glasgow?—Of course Glasgow and Edinburgh are different from any other part of the kingdom. There you have several substitutes in the same district. You cannot divide Glasgow according to streets, and each Sheriff-substitute must retain his jurisdiction over the whole. In order, therefore, to provide for the proper discharge of the duty, you must have a chief, call him what you may, whether Primus or Sheriff, and the others assistant-Sheriffs. There must be one to regulate the business between himself and the others, and who would be the immediately responsible person, having all correspondence addressed to him, and bound for the discharge of the whole duties with the assistance of the others.

2412. That is the condition now as regards the executive duties?—Yes, and it would be very much the same as it is now in that respect.

2413. Your objection to the present system is, that the Sheriff exercises judicial functions as a judge of appeal?—Yes, and likewise the executive,—that is my objection.

2414. That objection would be removed, as I understand, if a person were sent to act along with him as judge of appeal?—He would then become judge of appeal, but he should cease to have the other functions.

2415. Why should he cease to have executive functions any more than the Sheriff-substitute?—I think his whole time should be given to his appeal duties.

2416. But he disposes of all the appeals now, and of the executive duties too?—Yes.

2417. You think an appeal to a single judge is not a good thing. If there was another judge combined with him, would that not remove your objection?—I would increase his district, so as to occupy his time fully with his appeal duties.

2418. I thought you said Lanarkshire was itself a sufficient district?—Perhaps I was wrong in saying that. If it is not enough, I would add to it so as fully and fairly to occupy his time.

2419. But if his executive duties did not fully occupy his time, how would you dispose of his spare time? At present he does both?—Yes. If the five substitutes, who would then be the executive officers, had spare time, I would take away one of them.

2420. I am not talking of their having spare time; I am talking of his having spare time?—What I mean is, that if the Sheriff of Lanarkshire were made an appeal judge, he should cease to be an executive officer; and then we should look to his substitutes as the executive officers. There should be one of them, I think, made the primus or head, in order to regulate and dispose of the executive and other duties of the resident Sheriff, but leaving the present Sheriff solely and entirely as an appeal judge.

2421. But what is the objection to the resident Sheriff now exercising executive functions and appellate jurisdiction, except that he is a single judge in appeal?—I can quite see that Lanarkshire is in a different position, perhaps, from other counties. The Sheriff of Lanarkshire is resident in his district; in the other counties the Sheriffs are non-resident.

2422. Is Edinburgh an exceptional case?—Yes, it is the same.

2423. You spoke of the anomalous character of the office of Sheriff. Is it not anomalous that a judge exercising functions in civil and criminal matters of a judicial character, should also be the executive officer of the district?—I don't know that it is so.

2424. Does it occur to you that there are instances of that?—The Sheriff, of course, is both the executive officer and the judge.

2425. Is that not a peculiarity in our system?—It is.

2426. Do you think it works well?—I have never seen any difficulty arising from it.

2427. Then the anomalous character of the thing is not an objection to it?—No, not by itself.

2428. Would you give an appeal to the appellate court in regard to criminal matters?—No, I would not.

2429. Anything of that kind you would give to the Circuit Court or to the High Court?—Yes.

2430. In the investigation of matters of fact in civil causes in the Sheriff Court, would you desire to try cases by jury?—It is very difficult to say that jury trial could with propriety be extended to the Sheriff Courts yet.

2431. You rather think not?—I rather think not; certainly not without the consent of both parties.

2432. Would you give any right of appeal in criminal matters which does not exist at present on reserved points, or anything of that kind?—I have not found any inconvenience from the present system, or any complaint as to the present system; and I am not for changing it.

Robert Sconce.

2433. Do you take down the evidence in civil causes?—I do. I take it all myself; but I think we ought to have the power to dictate to a shorthand writer. I think that ought to be extended to the Sheriff Court.

2434. And these notes, whether taken by yourself, or dictated to a shorthand writer, would be the materials which would go before the ambulatory appellate court?—Yes.

2435. *Lord Barcaple.*—You say you think you should have power to dictate to a shorthand writer. What benefit do you anticipate from that?—We would get on more rapidly.

2436. Do you know that in your own experience? Have you tried it?—No; I have dictated to others, but not to a shorthand writer.

2437. Do you think it would be a more rapid proceeding than dictating to a good clerk?—I have no experience of it. I merely theoretically suppose that it would.

2438. Does it occur to you that it would cause considerable additional expense?—No doubt it would.

2439. Does it occur to you that if the services of the non-resident Sheriff be dispensed with in counties which are divided into districts, each having at present a Sheriff-substitute, it would be necessary to make arrangements for one of the resident Sheriffs of the county performing certain duties that are of a more general kind, but are applicable to the whole county; as, for instance, making arrangements for polling?—Yes, the writ would be addressed to the Sheriff at one particular place of the county, as the returning officer.

2440. It would be necessary, if a change of that sort took place, to make some arrangement for one of the resident Sheriffs in the county performing duties that are of a general kind?—Of such a kind as that.

2441. *The Chairman.*—Who should appoint the resident Sheriff on your plan?—The appointment would fall to the Crown.

2442. If the present system continued, do you think there should be any alteration?—None.

2443. Do you think there should be any difference in the qualification of the person to hold the office?—That is a delicate question for me to answer. My opinion is, that it should remain as it is.

2444. If the present holders of the office who are members of the bar, and are appointed by the Crown, were to be required to go and reside in their counties, and the Sheriff-substitutes were dispensed with, would that accomplish your object?—Perfectly. I by no means say, that if there was an abolition of what is called the double office of Sheriff, it necessarily falls to the resident Sheriff to be the new officer. I think that very likely it might be arranged satisfactorily for the public interest, and agreeably to the parties.

2445. Suppose the office to remain as it is, and that the Sheriffs of Stirlingshire and Linlithgow were to hold a court at Stirling once in six weeks, would that remove your objection as to the constitution of the appellate jurisdiction?—Yes, so far; but I still think it would be better to have the appeal direct from the resident Sheriff to the Court of Session.

2446. But apart from that?—Your Lordship's question proceeds, I suppose, on the assumption that the number of Sheriffs over all Scotland is to be retained as it is now.

2447. Or nearly so?—I did not intend to advert to the subject, but I presume it is my duty to answer the question as it has been put. My opinion, rightly or wrongly—and I give it with diffidence and delicacy—is, that if you exclude the Lord Advocate, the ex-Lord Advocate, the Solicitor-General, and the ex-Solicitor-General, and the Dean of Faculty, it will be difficult to find twenty-three persons from the bar whose opinion would have that weight as appeal Sheriffs which one would expect appeal Sheriffs to have. There are many who are ornaments to the bar, and will be ornaments to the bench some day; but I have the feeling that, excluding those I have spoken of, it would be very difficult to find twenty-three gentlemen at the bar whose opinions as appeal judges would have the confidence of the public.

2448. If the number was considerably reduced, do you think they might be found?—I do.

2449. Have you considered what ought to be the remuneration of the resident Sheriffs, supposing your system were adopted, of leaving the entire responsibility to them?—I think it would not be well to pay any of them less than £900 to £1000 a year. The districts would be enlarged as well.

2450. *Mr. Baxter.*—And the number diminished?—Yes.

2451. *The Chairman.*—Have you considered what remuneration should be given to the appeal judges who are to sit in the ambulatory appeal court? I presume you would take them from the bar?—Yes; I should think that they ought to get the same salaries that are now given to the Sheriffs of Lanarkshire and Edinburgh—about £1600 or £1800 a-year.

2452. *Lord Barcaple.*—How many of them do you propose?—Four districts; that is, eight appeal judges.

2453. *Mr. Webster.*—With or without retiring allowances?—Certainly with retiring allowances.

2454. *The Chairman.*—Do you apply that both to the resident and the non-resident Sheriffs?—Yes.

2455. *Mr. Shand.*—Do you anticipate that men in leading practice at the bar would accept these appeal judgeships, excluding the four law officers whom you have mentioned?—I think you would get gentlemen to take them, in whom the public would have confidence.

2456. Would you expect men in leading practice to accept these offices at £1600 a year?—£1600 or £1800 I said. I should think you would get persons whose judgment would be held as of weight.

2457. You don't think members of the bar in leading practice would accept these offices?—No, not the leaders of the bar, nor those at the head of the bar.

2458. *The Chairman.*—I think you said you considered that the power of appointment which now rests with the Sheriff has been well exercised?—I do think that it has been well and judiciously exercised.

2459. The Sheriff has an important interest in having an efficient substitute?—He has.

2460. More interest than any other individual?—He has.

2461. And therefore he looks out for the person that he thinks is, on the whole, the best qualified to discharge the duties?—Yes.

2462. Do you think there is the same security for the appointment if the right was transferred to the Crown?—I don't know that the Crown abuses its patronage.

2463. But is there the same security that the most efficient person will be looked out for?—I don't see why the Crown should not exercise its patronage quite as well. The Crown appoints the Sheriffs and the judges.

2464. But you think that two of the present Sheriffs appointed by the Crown would not be a satisfactory court of appeal from the judgment of a Sheriff-substitute who is appointed now by the Sheriff?—No; I presume to say not every two.

2465. Do you think that the appointments of the Sheriffs are as satisfactory as those of the Sheriff-substitutes?—Not quite.

2466. Have you any reason to expect that the appointment of the resident Sheriffs will be better afterwards than the appointment of the Sheriffs?—It is difficult to say.

2467. You have no opinion on that subject?—No.

2468. What is the next point?—I think the civil jurisdiction of the Sheriff should be extended over all parties in every action where the defenders, or one of them, resides or carries on business within the county, or in the county where the cause of action, whether contract or damage, wholly or in part arose. Sometimes it is vexatious to have to go to the Court of Session to pursue defenders for a small matter, because they don't all reside in the same county; and I propose to remedy that by giving to the Sheriff of one county jurisdiction over all the defenders, if any one of them resides in his county. That is the case in England under the County Courts Act.

2469. Do you mean that the action might be brought

either where the party resides and carries on business, or where the cause of action arose?—Yes.

2470. Where the cause of action arose, although the party did not reside there?—Yes.

2471. That is, if a man went into a jurisdiction and made a purchase there, and returned to his own place, you would let the action lie in the forum of the pursuer?—Yes; or if he committed an assault. I mean even actions of damages for assault or for any other tort.

2472. *Mr. Baxter.*—More especially if he had a place of business there?—Yes.

2473. *Mr. Webster.*—Do you know that it was proposed, in the Bill as to English Common Law Procedure, to give the courts at Westminster Hall jurisdiction over all the world, including Scotland and Ireland, if the cause of action arose within England?—I was not aware of that.

2474. *The Chairman.*—Would it be satisfactory to you that the courts in Westminster Hall should have that jurisdiction?—No; that would be taking the parties out of the kingdom.

2475. You think it makes a difference that the same law would be administered in the one jurisdiction and in the other?—Yes.

2476. Does that not interfere somewhat with the principle that the forum of the defender is the proper forum for the action?—Yes; but my own experience has shown that it leads to great expense and confusion.

2477. The pursuer would bring his action always in his own forum?—Yes; if the defenders or one of them resided there, or if the cause of action arise there.

2478. Where the defender may not be able conveniently to attend, where he may not have the materials for his defence, and where he has not his agent; why should the action not be brought where the defender is?—Sometimes it is desirable to have the action decided where the cause of action arose, from the witnesses being there, and from the contract having been made at that place; and if a man makes a bargain or does an act in a certain county, giving rise to an action, I think it not unjust to make him responsible in that county to the party with whom he contracts or whom he has injured.

2479. *Mr. Webster.*—Does the party with whom he contracts not know that he is not resident within the county?—Generally speaking, he may be so.

2480. And he has it in his option to decline entering into the contract, if he does not like to follow it to his own court?—Yes.

2481. *The Chairman.*—Have you any further suggestion?—I propose that the Sheriff's jurisdiction should be extended in all cases for aliment or maintenance, as between husband and wife, or parent and child, and as to the custody of children, legitimate or illegitimate. The Sheriffs have power to regulate these matters *ad interim* at present, in the usual case at least; and that gives rise to this anomaly, that there may be a process in the Sheriff Court on that point, and a second process in the Court of Session, to regulate it finally. I propose, therefore, that the Sheriff should have power to judge not merely *ad interim*, but absolutely in the matter, subject always to the usual appeal. These cases very frequently occur with people who are ill able to bear such expense. I should also imagine that it would not be inexpedient to extend the power of the Sheriff to the appointment of judicial factors or *curators bonis* in cases where the value of the estate does not exceed £500 in moveables and £50 a year in heritage, and to give them a limited jurisdiction in cases involving the right to heritable property where the value does not exceed £50 a year, and the property is situated in the county. At present the Sheriff has jurisdiction in cases of servitude depending upon use and enjoyment for forty years; but there is frequently a doubt how far the use or enjoyment arises from a servitude or a public right; and I would propose that in rights of way, whether depending on a public right or a servitude right, the Sheriff's jurisdiction should be extended. In the same way, in questions of marches or boundaries, where there may be only a few feet or inches in dispute, all depends on the question of possession, and I think the Sheriff should have power to decide such questions.

2482. *Lord Barcaple.*—Do you restrict the last part of your answer to cases in which the judgment will merely settle the possession; or do you include cases which depend upon possession, but where the judgment will determine the right, as in the case of marches?—To determine the right.

2483. You would allow the Sheriff to determine the right in cases which, being cases of marches, or something of that sort, depend upon the possession?—Just so, and where the title is not in dispute.

2484. Where the title to the two separate subjects is not in dispute?—Quite so. Then there is a class of removings which are excluded from the Sheriff's jurisdiction at present. I would extend that jurisdiction to them.

2485. *Mr. Baxter.*—In all cases of removing?—Yes. And I should say, that where in any action the validity of any writing is impugned, its validity should be competently tried before the Sheriff, by way of exception, for the purposes of that action. The same powers now exist in Sheriffs, under the Bankrupt Acts, as to deeds thereby made void, and all alienations of property by a party insolvent or notour bankrupt, which are voidable by statute or at common law.

2486. *The Chairman.*—Have you anything to state as to criminal jurisdiction?—As to that, I have really no suggestions to make. The present practice seems to me to be quite satisfactory. No complaint has been made in my county. It has been suggested that the Sheriff's powers with a jury should be extended to inflicting penal servitude. The Court of Justiciary, apparently without difficulty, overtakes all cases deserving of that punishment, and I do not see any necessity for extending the powers of the Sheriff Court in this respect. There would be no risk, however, in the extension, particularly as Crown counsel, in the exercise of their discretion, would necessarily keep for the higher tribunal the truly serious cases, and send only to the Sheriff Court those which would justify penal servitude because of the number of previous convictions. Perhaps the Sheriff Court might have power to try cases of robbery, from its occasional close approximation to theft, and the prudence, in the less obvious cases, of alternately charging robbery or theft. I do not think it necessary or desirable to extend the summary jurisdiction at present existing in the Sheriff Court. A jury is easily available; and as jurors are not summoned unless the panel pleads not guilty at the first diet, and so many plead guilty—about four-fifths in my county—few juries are summoned.

2487. *Dr. Barclay.*—Have you formed any opinion as to the propriety of retaining the verdict of not proven in Scotland? Have you found, in practice, that it has given juries an opportunity of coming to a conclusion which is not very satisfactory?—No. I have considered that matter, and I think it a wise thing to leave it as it is. I would not interfere with the verdict of not proven.

2488. *Mr. Shand.*—Would you still retain the verdict of not guilty?—Yes.

2489. You think matters should remain as they are?—Yes.

2490. *Dr. Barclay.*—Don't you think it a bad thing that a man may be put on his trial, and go out to the world with his character blemished by a verdict of not proven, leading to the suspicion that he is guilty, but that there is not enough of proof to convict, keeping in view that the practice in England is different, and that unanimity is necessary there?—I think the verdict of not proven is attended with advantage. It lets the public and the man himself know that, although he has got off, the jury was not quite certain that he was not guilty notwithstanding.

2491. *The Chairman.*—Do you think it would be advisable that, where a verdict by a majority is not proven, it should be stated whether the minority were for a verdict of guilty or not guilty?—Yes; I think that should be stated.

Robert Sconce.

2492. *Dr. Barclay.*—Have you not sometimes heard the judge ask whether the minority is the one way or the other?—Yes; I have heard that done.

2493. *The Chairman.*—Have you any other suggestion to make?—With reference to forms of process, I may state that I have found great benefit from the form adopted under the Debts Recovery Act, of closing the record upon a note of parties' pleas, prepared with the Sheriff's aid. Not only do you get a minute of defence containing the defender's statements, but you have the reply, and you bring out very summarily and well the whole case in a very simple and easy way. I would extend the power of closing upon pleas of parties to all causes. I am quite sure that that would stop condescendences and defences, and revisals, to a large extent, and greatly shorten the proceedings.

2494. *Mr. Baxter.*—Then you would abolish the condescendence and answers?—Not in all cases. In particular cases I would permit that course to be followed.

2495. *Mr. Shand.*—As a power?—As a power. Then I think the court should have power at any time before final judgment, subject to expenses it may be, to allow amendments, or to add new facts or pleas. I am of opinion that the Debts Recovery Act should be extended to all claims under £50, and should not be confined to book debts as at present. I am not quite sure but that I would make more stringent provision as to closing proofs. Do what Sheriffs may, there is delay. I like very much the term used in the Debts Recovery Act, that a day should be fixed for the 'trial.' I would not preclude the case from being adjourned, if necessary; but I think the word 'trial' makes the parties feel that they are limited as to the length of time that they may carry over their proofs.

2496. *Mr. Baxter.*—Are there great delays just now by adjournments?—Sometimes there are, fight as we may against it.

2497. *Mr. Shand.*—Why should not the Sheriff-substitute, as matters now stand, treat all his proofs as trials?—He should, and he has the power; but if you use the word 'trial,' you let it be well understood that there is to be no delay.

2498. *Mr. Adam.*—You want your hands strengthened?—Yes.

2499. *Mr. Shand.*—Does not the Act of Parliament expressly provide for that?—Yes, it provides that the case shall not be adjourned without cause shown.

2500. Has not the Court of Session, in one or other of its Divisions, expressed a strong opinion that that should be done?—Yes; and I try it as much as I can, but I want our hands strengthened.

2501. *Dr. Barclay.*—Don't you find statements made that witnesses cannot attend?—Yes.

2502. *Mr. Shand.*—Are you aware that in some counties the Act is worked in the way I speak of, and that such cases are treated as a trial?—I am not. I have managed repeatedly, in an ordinary case, to get the pursuer to finish, and I have even managed to get both sides to finish at one diet, but that cannot always be done.

2503. Are you not aware that in some counties it is the rule that both pursuer and defender finish their case at the same diet?—I am not aware of that.

2504. Do you see any reason why fifteen days should elapse between an appeal taken from the Sheriff-substitute and the process being sent to the Sheriff?—I think that might be limited very well to seven days.

2505. Or even less, if there is to be no written pleading?—Yes, if you get the parties to declare within seven days that they wish an oral hearing or written argument, I would force them to declare that within the seven days.

2506. And to send in the written pleading if that was desired?—Yes.

2507. *Dr. Barclay.*—Is that not too short a time if the petition is drawn by counsel, which it frequently is?—It may be, but I think seven days enough.

2508. To declare whether they wish oral or written pleading?—Yes.

2509. But would you compel them to give in the reclaiming petition within seven days?—I think so.

2510. *Mr. Adam.*—Do you think it quite fair to a pursuer that the defender's proof should be adjourned to a distant date, thus allowing the defender to consider the pursuer's proof, and to overbear it?—If there are many adjournments, it gives one party or the other, and sometimes both, an opportunity of scouring the country for witnesses to contradict the evidence already taken. That is one of the evils which attend such adjournments.

2511. And it tells against the pursuer, and in favour of the defender?—I don't know. Sometimes a defender has a conjunct probation with the pursuer, and he looks out for witnesses in replication; and sometimes a defender has to prove his separate statement of facts, and then the pursuer follows him.

2512. *Mr. Baxter.*—That is in cases where the defender is pursuer of the issue?—Yes.

2513. *Dr. Barclay.*—Is there in your court a practice of asking proofs in replication?—Not much.

2514. You don't encourage them?—Certainly not.

2515. *The Chairman.*—Is there much evil arising from parties accommodating each other with prorogations of the time for putting in papers?—There is.

2516. Do you think there should be some more peremptory rule about that?—I do think so.

2517. What have you to say as to costs?—I have not much to suggest upon that point. The costs allowed in the Sheriff Court do not seem to be unfair either way. I do not quite approve of the principle of paying agents for precognitions by a certain fee for each witness actually examined, and rather think that they should be paid for the precognition by its length, subject of course to check by the auditor or the court.

2518. *Mr. Webster.*—Would you pay the agent by the length of the precognition, wherever he might have to go to see the witness?—I think some addition might be made in regard to that.

2519. *The Chairman.*—You think the present system induces agents to precognosce too many witnesses?—And to produce too many.

2520. Is the payment for the witnesses produced or for the witnesses precognosced?—For those produced.

2521. And they get a fee for the witnesses examined?—Yes.

2522. You say it ought to be according to the length of the precognitions, irrespective of the number of witnesses examined?—There ought always to be a check. I believe that the Court of Session do not allow for any witnesses except such as have been examined, except in rare cases. I should like the same rule to be applied to the Sheriff Court—viz., to allow for no precognition except of witnesses examined, unless in particular cases.

2523. *Lord Barcaple.*—Might such a rule not have the effect of inducing parties to examine too many witnesses?—It might.

2524. *Mr. Webster.*—Would it diminish the expense of a precognition according to its length?—I think it would.

2525. Would it not greatly increase it?—I would only have it subject to a check; and there is none now.

2526. *Dr. Barclay.*—What is your opinion as to the mode of paying agents under the Debts Recovery Act by a fixed sum, and not *pro rata*, as in the ordinary court?—I think the method of paying agents in cases under the Debts Recovery Act is objectionable, but it could easily be improved.

2527. How?—A certain fee is allowed for the whole trouble in the cause; but I would split it, and allow so much for taking out the summons, so much for stating the note of pleas, and so much for the trial per hour. I would allow nothing except for these three things; but the fee for the trial would be larger or smaller, as the case occupied the agent's time.

2528. *Mr. Webster.*—Would you allow nothing for precognitions?—No. You might give an additional fee for the first hour to cover that.

2529. Suppose a case requiring half a dozen or a dozen witnesses to be collected from different parts of the country, do you think the agent should do all that

for nothing?—That would be generally covered by his larger fee for attendance at the proof. The next point is the privileges of agents. I do not think that country agents, even though they had power to practise in the Court of Session, could satisfactorily conduct their cases there, and that they would require the assistance of an Edinburgh agent. Possibly if they had the power to practise, they might be able to make a better arrangement with the Edinburgh agent as to a division of the fees. I have heard that such arrangements are not uncommon even now, whether enforceable or not. Perhaps, if not enforceable, they might be declared legal by statute, and thus remove any existing feeling of hardship on the part of the country agent. I am informed that in England such arrangements are quite common, and held to be legal.

2530. Can you make any comparison between the scale of fees in the two countries—divisible and indivisible?—No. As to the Commissary Court, I have no suggestion to make. Its business is of a simple kind, and it seems to be satisfactorily performed in my county.

2531. Would you keep it up as a separate court from the Sheriff Court, with a separate staff?—Well, that may or may not be. It would be some saving to the country if it was incorporated with the Sheriff Court.

2532. *The Chairman.*—Do you see any propriety or any impropriety in agents being entitled to practise in any Sheriff Court, if they choose?—None.

2533. Do you approve of that?—I do.

2534. You would give them a general power to practise?—Yes, in any Sheriff Court.

2535. Would you require that they should be admitted to the Faculty of Procurators in the place where they were going to practise?—No; I would admit them simply to practise in the courts.

2536. The faculty have privileges which may be more or less of a pecuniary or patrimonial character?—Quite so.

2537. *Mr. Baxter.*—You don't think, considering the manner in which agents are admitted, that they should be excluded from any Sheriff Court?—Certainly not from any local court.

2538. *Dr. Barclay.*—Would you require them to make a separate application for admission to a court? Or should their general appointment extend over the whole country?—I would admit them.

2539. *The Chairman.*—You would require them to put themselves on the roll—the court would admit them?—Yes.

2540. Would you confine the privilege to those who have been admitted under the new regulations as to education, and so forth?—I think that would be invidious. I don't think I would. I would allow all who are practitioners in one court to practise in every other.

2541. *Mr. Webster.*—If you would permit practitioners before the Sheriff to practise in the Court of Session, would you permit agents in the Court of Session to practise in all Sheriff Courts?—I would not admit country agents to practise in the Court of Session.

2542. I understood you to express the view that they would not avail themselves of the right, but that if they had it, they would use it for the purpose of making arrangements with the Edinburgh agent?—That is the only advantage to them.

2543. You have given your opinion on the assumption that they are to have the right of practising here; now, if you admit the Sheriff Court agents to practise in the Court of Session, would you give Court of Session agents the right to practise in the Sheriff Courts?—Certainly I would. Sheriff Court agents talk about being permitted to practise in the Court of Session as removing a grievance which they feel; and what I meant was, that in place of giving them the remedy they ask, it might be enough to say that any bargain made between them and the Edinburgh agents should be legal and enforceable, without giving them the power to practise there.

2544. *Dr. Barclay.*—As to the Commissary Courts, do you find any advantage in having two separate staffs of clerks?—No advantage, but no harm. It is a mere question of expense.

2545. *The Chairman.*—Would there not be this advantage in combining the offices of Sheriff-clerk and Commissary-clerk, that the same person would have the custody of the records in all cases?—Yes, there would, no doubt, be an advantage. It would make one office for all the judicial business of the county.

2546. *Mr. Baxter.*—Does your Sheriff-clerk do the duty in person?—Yes.

2547. *Mr. Shand.*—Have you any procurators who are procurators in the Commissary Court and not in the Sheriff Court, or *vice versa*?—No.

2548. Do you know that that is the case in some counties?—No.

2549. *The Chairman.*—Have you anything to state as to Burgh Courts?—There is little law business in the Burgh Court of Stirling, beyond issuing peace-warnings forty days before Whitsunday, and an occasional process of ejection arising out of them. There are also applications for aliment at the instance of debtors in prison, under the Act of Grace. If the Burgh Courts do no good, they do no harm.

2550. *Lord Barcaple.*—Is there any benefit in present times from keeping up the civil jurisdiction of the Burgh Courts?—No benefit.

2551. *Mr. Baxter.*—Is it ever exercised?—Not beyond what I have stated.

2552. *Mr. Shand.*—I presume you would transfer the power to the Sheriff?—Yes; and there is another reason for doing so—because the form of process adopted in that court is the old-fashioned form. There is no separate Dean of Guild Court in Stirling, and no Dean of Guild business. If there was any, it would be done in the Burgh Court.

2553. *The Chairman.*—Is there any objection to its being done by the Sheriff?—None; it should be done by the Sheriff, in my opinion.

2554. *Dr. Barclay.*—You say there is no Dean of Guild Court in Stirling; are you aware that the ruling decision as to guildry jurisdiction is *The Dean of Guild of Stirling* v. *The Sheriff of Stirling* in 1775, finding that the Sheriff had no power to exercise guildry jurisdiction in the town of Stirling?—Yes.

2555. *The Chairman.*—Has the Dean of Guild jurisdiction ceased to be exercised?—There is a Dean of Guild, but he holds no court. As to Baron and Regality Courts, I may state that in Stirlingshire there is a Baron Court at Kilsyth, with a magistrate chosen annually. Very little business is done in it. Occasionally, however, parties are taken before it for assaults and breaches of the peace, and there has been collision between the Baron Court and the Sheriff Court in some matters of that kind. In particular, after the rural police constable had made inquiries and reported, with a view to its being considered whether there should be a prosecution in the Sheriff Court, the matter was taken up by the burgh authorities; and there was an instance where, after certain parties had been prosecuted in the Sheriff Court at the instance of the Fiscal, the Burgh authorities took in the complaint of those who had been punished, and raised a prosecution for the same act against those who had complained to the police, and whose information had been acted upon in the Sheriff Court. I think the Baron Court useless, and a source of evil. There is also a Bailie of Regality at Denny, but no business is done before him.

2556. *Mr. Webster.*—By whom is the Baron Bailie elected?—By the burgesses.

2557. *Dr. Barclay.*—Have you never had *res judicata* pleaded upon a Baron conviction?—I think that occurred a good many years ago.

2558. *Mr. Baxter.*—Then you can conceive a case being brought in his court in order to prevent it from being brought before the Sheriff?—I can.

2559. *Dr. Barclay.*—You say they don't do much business?—Not much.

2560. Is there not a leading case of a bailie having convicted a man, and driven him to jail in his own

Robert Sconce.

cart?—Yes. The cases in the Baron Court at Kilsyth average six criminal cases every fortnight.

2561. *The Chairman.*—These are police cases?—Yes.

2562. *Dr. Barclay.*—Have they availed themselves of the General Police Act?—No.

2563. Have they any civil jurisdiction? have they the 40s. jurisdiction?—They might exercise it, but they don't.

2564. *Mr. Webster.*—Do you think their power to do so should be abolished?—Decidedly. There is a Police Court in the Royal Burgh of Stirling, presided over by the magistrates of the burgh. The business seems to be satisfactorily performed.

2565. *The Chairman.*—Is that under a special statute or under the General Act?—The General Act. As to Justices of Peace, I may state that in Stirlingshire the Justices only act in cases of day poaching, breach of licence, and road offences, with the usual prosecutions at the instance of the Inland Revenue. They have a Small Debt Court at Stirling once in every month, but few cases are brought in it. There are no district courts held by the Justices, except at Falkirk; but they do not have a Small Debt Court, nor do they try criminal cases.

2566. *Dr. Barclay.*—Do they never take up night poaching cases?—No, that is done in the Sheriff Court.

2567. Have they the jurisdiction?—Yes, but it is not done.

2568. *Mr. Shand.*—Do you think there should be any change in the jurisdiction of the Justice of Peace Court?—I think that it is unnecessary to maintain the Justices' civil jurisdiction, but I think it is useful to preserve their criminal jurisdiction.

2569. Would you limit that criminal jurisdiction to any extent? I refer particularly to game cases?—That is a matter I think for the Legislature alone. It is a large public question.

2570. *The Chairman.*—The magistrates in Stirling grant licences for public-houses?—The magistrates of the burgh license the public-houses within the burgh.

2571. Are their deliverances in that matter subject to review by the Quarter Sessions?—Yes.

2572. Is that jurisdiction exercised in Stirling by the Justices?—Yes.

2573. Is it advantageous to have a control of that kind?—I do think so. There was an instance this year where I think it was judiciously and rightly exercised by the Justices.

2574. Do you think, on the whole, that the Justices exercise that jurisdiction properly?—I do think so.

2575. Do they exercise jurisdiction in Inland Revenue cases?—Yes.

2576. *Dr. Barclay.*—Have you a separate Fiscal, or the same Fiscal?—The same gentleman happens to be Fiscal in both courts.

2577. Therefore there is no collision?—No.

2578. *The Chairman.*—Have you any collision with the county police authorities?—None whatever.

2579. That works smoothly?—Perfectly smoothly. It is very satisfactory indeed.

2580. Do you find the police authorities always willing to carry out whatever you think expedient, and direct to be done?—In every instance they have done so.

2581. Whether you direct it in person or through your Fiscal?—Yes.

2582. *Mr. Webster.*—Do you attend at the taking of prisoners' declarations, and dictate what is to be taken down?—The Procurator-fiscal asks the questions, and I dictate the whole declaration.

2583. *Lord Barcaple.*—Do you attend at the taking of precognitions?—I do not.

2584. I suppose in extraordinary cases you do so?—Yes.

2585. But in ordinary cases the Sheriffs in Scotland do not attend the taking of precognitions?—They do not.

2586. *Mr. Baxter.*—I suppose you would find it impossible to do so?—I could not do so and attend to my other duties.

2587. Do you think the present mode of investigating sudden deaths, and deaths by accident, is satisfactory to the public?—I do. In looking back over my experience, I don't know any instance in which either the accused or the public suffered from the investigation being in private.

2588. And as to sudden deaths?—Either sudden deaths or otherwise.

2589. *The Chairman.*—Do you attend to the precognition yourself in the case of very grave crimes, such as murder?—I do; in all grave cases.

2590. *Lord Barcaple.*—Do you attend the precognition throughout in these cases?—I attend the precognition of all the leading witnesses.

2591. *Dr. Barclay.*—Do you think that the introduction of coroners' inquests into Scotland would be of any advantage?—I don't think so.

2592. *Mr. Adam.*—Have you seen exceptional cases where it might have been desirable to have them publicly investigated, without putting the party on his trial?—I cannot say that I have. The public seem to be satisfied with the knowledge of the fact that the case was carefully investigated by the local authorities, and reported by them to the Crown for their opinion. I have heard no complaint in our county.

2593. *Dr. Barclay.*—Have you ever known a person put on his trial for murder, when you were quite aware that there could be no conviction, simply for the purpose of satisfying the public?—No; not in our county. We have not had a murder case for a great many years. I have heard of its being done in larger places, and I know that it has been done, but it has not been done with us.

J. Guthrie Smith, Esq., examined.

2594. *The Chairman.*—You are a member of the bar of Scotland?—I am.

2595. How many years have you been so?—Since 1855.

2596. You are Sheriff-substitute at Dundee?—I am Sheriff-substitute at Dundee, having previously for two years, from October 1860, acted as Sheriff-substitute at Forfar.

2597. How long have you been at Dundee?—Since December 1866.

2598. Dundee is a place with a large population?—The estimated population is about 120,000. The town has a large export and import trade, and is the chief seat of the linen manufacture in Scotland. Besides that, I have jurisdiction over the neighbouring portion of the county, containing a population of about 30,000 or 40,000.

2599. There are two substitutes in the county?—Yes; there is a Sheriff-substitute at Forfar, and one at Dundee.

2600. What is your opinion as to the present constitution of the Sheriff Court with reference to Sheriffs and Sheriff-substitutes?—It appears to me that the present constitution of the Sheriff Court is objectionable. Were it proposed to establish the County Courts in Scotland for the first time, I don't believe that the judge of the Sheriff Court would be allowed to continue his practice at the bar, and appoint a brother barrister to do his work for him on the spot as his depute, the depute's acts being sent up to the principal in Edinburgh for his approval and confirmation. That is practically the state of things which now exists, and that seems to me to be objectionable in many particulars. In the first place, it gives rise to great delay; the delay involved in a system which keeps the case oscillating between the resident and the non-resident judge. There are five different stages at which it is competent to appeal against the interlocutors of the Sheriff-substitute; namely, the interlocutor repelling preliminary pleas, the interlocutor allowing a proof, rulings on points of evidence during the trial after proof is ordered, the interlocutor on the merits, and the interlocutor on the expenses. One can easily imagine the facilities for

staving off a just demand which a system of this kind gives to a debtor, whose only true defence is that he has no money wherewith to pay the debt. He puts on record a preliminary plea; that is repelled. He then appeals against the Sheriff-substitute's judgment; that removes the case to the Sheriff for a time. The same thing takes place when the case is ordered for trial. At the close of the trial further delay may be gained by bringing under review all the rulings on points of evidence at the trial, and so on till the opponent's patience is exhausted, and he is disposed to settle upon very easy terms. The mode in which this state of things has arisen is instructive: when in the year 1746 the Sheriff of the shire was permitted to appoint a substitute or substitutes, he was taken bound to reside in the county for at least four months every year. It was not then intended apparently that the substitutes should be lawyers,—at least I have been told they were not in point of fact lawyers, many of them being half-pay officers and landed gentlemen; and in some counties the cases, without being decided by the Sheriff-substitute at all, were merely sent up by him to the Sheriff in Edinburgh, and the opinion of the Sheriff was signed by the substitute upon the spot. Since then, by the 6 Geo. IV. c. 23, the substitute now requires to be a member of the Faculty of Advocates, or a member of the legal profession, and in 1838 he was declared to be irremoveable. Thus it has happened that two courts and two judges have been created out of what, in theory at least, is only one court. I would also say, that I think the present system is objectionable, in so far as the power of appointing any person to a judicial office should not be vested in a private individual. I think that that power should only be vested in a Minister of State, who can answer for his conduct in Parliament. At the same time, I am bound to say that, so far as I am aware, the appointments which have been made by the Sheriffs have given general satisfaction to the country. But it seems to me that the public would have a better guarantee that the best person was appointed to fill the office were the power of selection vested in a Minister of State, who is thinking only of the public interest, and who would be responsible for his proceedings to Parliament. I may also take leave to say that I think the present system, by circumscribing the position and keeping down the salary of the Sheriff-substitute, makes the office less attractive to men of talent and learning than it should be. The money given to the office by Parliament having to be divided between two men—the resident and the non-resident judges—the salaries of the resident judges are much too small. Any one who compares the quantity and kind of the work done by the Sheriff-substitutes, with the work done by the County Court judges in England, and the salaries received by them respectively, must admit that the salaries paid to the Scotch Sheriff-substitutes are too small. In such cases I think the salary should be fixed on the principle, not simply of its being a payment for the work actually done, but of being large enough to attract the best talent from a profession in which a successful practitioner makes much money. The remedy seems to me either to abolish the Sheriff-principal or the Sheriff-substitutes, and appoint in their room one efficient resident judge with a competent salary. I would only further point out to the Commissioners that the duties of the Sheriffs at present are either judicial or ministerial, either as appeal judges, or as connected with the administration of the law and of the police in the county. Now, looking at the matter in these two aspects, first as regards the duties which devolve upon them other than as appeal judges, it seems to me that the office of Sheriff is unnecessary. The Sheriff may conduct inquiries for the Secretary of State as to the propriety of proposed provisional orders, and hear applications for the closing of burial-grounds under the Burial Grounds Act, hear appeals from the decisions of the Police Commissioners under various Police Statutes, and he may take the general supervision of the police; but in all such and the like matters the Sheriff-substitute is entitled to act, and frequently does act, and I presume to say is just as well qualified to act as the Sheriff-principal. When the Sheriff-principal is so occupied, the Sheriff-substitute may be going about doing nothing. Then the Sheriff is entrusted with the revision of the register of electors, and acts as returning officer at the election of members of Parliament. It seems to me an unseemly thing, that a person who may be acting as a political partisan in one county is entrusted with duties of that kind in another county. I rather think that the person who should act in these matters is one who, like the Sheriff-substitute, does not meddle with politics at all. Then I think that, looking at the Sheriff as an appeal judge, the present system of review is objectionable. I think that the system rests upon a wrong principle; in fact, it is contrary to all the principles by which an appeal is, or at least ought to be, regulated. An appeal means an appeal from a judge ill informed to a judge better informed. Now in matters of law this may be the case in some counties, but at best the appeal is but an appeal from one judge to another judge, and that judge of the same rank. As regards facts, the case is worse. Here the Sheriff-substitute sees the witnesses, the Sheriff-principal does not. He has nothing before him but the Sheriff-substitute's notes of evidence; and in estimating the weight of evidence, attention must be given to the terms of the question as well as the answer, and above all to the witness' demeanour, and consequently in this case the appeal is from a judge well informed to a judge worse informed. The more numerous and the more dense the *media* through which testimony has to pass before it reaches the judge's mind, the greater is the liability to mistake. The only further observation I have to make as to the constitution of the court is as to the office of the Sheriff-clerk. At present there is one Sheriff-clerk for each county, who appoints a depute to each court in the county. These deputes are most efficient public servants, but they are very poorly paid. The more efficient they are, the less necessary it is to have a Sheriff-clerk. I think one clerk should be appointed for each court, with a competent salary. The Sheriff-clerk may himself do the work, by giving personal attendance at his office where there is only one court; but where, as in Forfarshire, there are two, it is obvious that he cannot be in two places at the same time. At Dundee the depute-clerk has a salary of only £155, while the salary of the depute at Forfar is only £110. The entire expense of both the offices at Forfar and at Dundee must be under £600, and yet the principal clerk gets a salary of £1000 a year as Sheriff-clerk, and draws from £600 to £700 a year as Commissary-clerk. The country thus gives this gentleman close on £1200 a year for doing literally nothing, but dividing among those who do the work £600 of the public money.

J. Guthrie Smith.

2601. *Mr. Baxter.*—Does he not do the duty in person?—He does not, but he is resident, and occasionally comes to the office.

2602. *The Chairman.*—Are these all the observations you have to make on the constitution of the court?—Yes.

2603. What are your suggestions with a view of remedying the evils which you think exist?—The suggestion I would make is, that the office of Sheriff-substitute should be abolished, or perhaps both the offices of Sheriff-principal and Sheriff-substitute should be abolished; and the Crown should be empowered to select from the two one efficient resident judge at a greatly increased salary, and that an official resembling the registrar of the County Courts should be appointed by the Crown to each Sheriff Court to perform the duties of clerk.

2604. Would you make the judgments of that resident Sheriff final?—I think there should be an appeal in all cases, because it acts as a most efficient check on the manner in which the local judge performs his duties. I think that there should be an appeal upon a case stated, on questions of law only, in all cases under £50 or thereby, and that there should be an appeal upon fact as well as law upon cases above that amount. That appeal, in my opinion, should if possible lie to the Supreme Court, or at all events to judges of the rank of supreme judges, provided that can be done at such an expense as a Sheriff Court case can reasonably bear. It seems to me, that by some alteration of the present

J. Guthrie Smith.

system, and also some change in the usages at the bar, it would be possible to get a case argued before the Supreme Court at an expense of ten guineas a side or so. In the first place, I think only one counsel should be employed upon each side, and I would put an end to all such fees as for moving the case to the roll, approving of the auditor's report, and so on. My opinion is, that if the case be once in the hands of the clerk, it should find its way to the roll itself, and in that way the cost would simply be the cost of the argument. But if the people of Scotland cannot have a case argued before the Supreme Court for less than ten guineas a side, it will be necessary to establish some new court of appeal; and the next best thing to the review which I have indicated is an ambulatory court of appeal composed of two judges of a greatly more elevated rank than that held by the Sheriff-substitute.

2605. *Dr. Barclay.*—Supposing these two judges differed?—If they differed, then the judgment of the resident Sheriff would stand.

2606. Would three not be a better number?—No, I think two is sufficient.

2607. *The Chairman.*—How many districts would you assign to these judges?—I think if two judges were resident in Glasgow, they might overtake the counties of Lanark, Dumbarton, Ayr, Renfrew, Galloway, and the West Highlands, which contain a population of about 1,250,000; and I think the two other judges might move between Edinburgh, Perth, and Aberdeen, for the rest of Scotland.

2608. Then you would have four such judges?—Yes.

2609. How often should they hold their courts?—I think they might reasonably be expected to be in each place about once a month, except, of course, during the vacation.

2610. In what places would they hold their courts?—For example, to take my own district, with which I am most familiar,—Perth might be the place of meeting of the court of review for the counties of Perth, Fife, and Forfar. It is easily accessible by rail, and the procurators would feel no inconvenience in attending it. Then the court at Aberdeen might hear cases from the counties running along the shores of the Moray Firth. In dealing with matters of this kind, it is to be remembered that the bulk of the population of Scotland is resident in some seven towns.

2611. You have mentioned two places on one side of the country: on the other side, Glasgow would be one place of meeting; and where would be the other?—I would propose that of the four judges, two should sit at Glasgow continuously, and the other two at Edinburgh, Perth, and Aberdeen.

2612. *Dr. Barclay.*—Have you thought what salary you would give, in order to get men of the eminence you want?—I am not prepared to express an opinion on that subject. The salary should be such as to command the best talent which the bar of Scotland can afford for such duties.

2613. *The Chairman.*—You say that the salary of the resident Sheriffs should be greatly increased. What amount of salary do you think would command the services of persons suitable for that office?—Jurisdictions of course vary in importance; but where the duties are moderately extensive, I should think that the Sheriff-substitute should at least have £1200 a year.

2614. You think that would command the services of such persons as you allude to?—Yes.

2615. *Dr. Barclay.*—That is your maximum?—The range might be from £1000 to £1500 a year.

2616. *The Chairman.*—Would you confine it to members of the bar?—I think persons appointed to a judicial office should be taken from members of the bar. At the same time, I am bound to say that those Sheriff-substitutes who have not been members of the bar have proved to be very excellent appointments.

2617. What is the reason you would assign for not taking them from a source that has provided excellent appointments?—My reason is, that I think members of the bar have a special training in the science of jurisprudence, which adapts them better for the performance of judicial functions than a training in the practical details of the law.

2618. What kind of salary do you think would command the services of the persons whom you talk of for the ambulatory court of appeal? You say they ought to be superior in position and qualification to those from whom the appeal is taken. What sort of salary would you propose for them?—They could not be allowed to practise at the bar; and that being so, I think the salary should be at least £1800 or £2000 a year.

2619. *Dr. Barclay.*—Would you give them their travelling expenses besides?—That is a matter of detail to which I have not turned my attention.

2620. *The Chairman.*—Do you think that would command the services of persons of the highest qualifications?—I think it would.

2621. *Mr. Webster.*—With or without retiring allowances?—I think all public servants should have retiring allowances, after a certain number of years' service, when they give up everything for the sake of the public service.

2622. *The Chairman.*—Do you take into consideration the surrender of prospects that exist, and that persons in high position at the bar are avowedly entertaining, of promotion?—Of course, a person who expects to be a supreme judge in time, would not surrender his position for an inferior one.

2623. *Dr. Barclay.*—Would he not be in a better position for another step? Would he not get more judicial experience than he could get from practising at the bar?—It is probable that would be the case. Moreover, if the jurisdiction of the Sheriff Court is to be extended, and if the ambulatory court of appeal is to be established, one can easily see that that would involve important changes in the Court of Session. The number of judges would probably require to be reduced, and the chances of promotion at the bar would be proportionately lessened.

2624. *The Chairman.*—Would you allow an appeal from the judgment of the perambulatory judges to the Court of Session?—No; I think their decision should be final.

2625. In all cases?—In all cases that originate in the Sheriff Court. I think that a case which was so heard and disposed of, would probably be decided in a manner satisfactory to the country.

2626. *Mr. Adam.*—Would you allow an appeal from them to the House of Lords?—No; I say it should be final; but the proposal admits of this qualification, that cases above a certain value should all go to the Supreme Court, so as to keep the path open to the House of Lords.

2627. *The Chairman.*—The jurisdiction of the Sheriff extends to any amount in personal matters?—Yes.

2628. Do you think it ought to be extended in other respects?—Of course I am keeping in view the fact, that although the jurisdiction of the Sheriff Court at present extends to any amount in petitory claims, it is competent to either party to remove the case to the Supreme Court, when a proof is ordered, if it be above £40. I think that right should be reserved, the sum being perhaps raised. If the party chooses to have his case tried in the Supreme Court, and it is of importance and value sufficient to justify its being taken there, I think he should have that right. But as to the question of the extension of jurisdiction, I think, in the first place, that the mere form of the action is no reason for excluding the jurisdiction of the local court. At present we have no power to deal with actions of declarator or reduction, or the process of suspension, except in limited cases. I think that, as regards form, every kind of action should be competent before the judge ordinary, the form I venture to suggest being in the shape of a petition or bill setting forth the relief prayed for in the manner proposed in the Court of Session Bill of 1862. It would be of great importance, for instance, were trustees able to obtain the opinion of a court of law in this manner, on a doubtful or obscure clause in a will; and I think that if Sheriff-substitutes may be entrusted with the decision

of a question whether a person is indebted in the sum of £5000, he may surely be entrusted with the power of making a declaration that such and such is the measure of a party's legal rights in certain circumstances, or that a particular deed is null on the ground of fraud, or insanity, or intoxication, or anything of that kind. What is required is not to exclude the jurisdiction of the local court, but to afford a ready means of review from its decision; so that, if the inferior judge goes wrong, he would be easily set right.

2629. Would you extend the jurisdiction further in other matters?—I think that cases involving questions as to the title to land should also be competent in the Sheriff Court, either absolutely, or where the subject is of the worth of £20 a year, as is provided in the last English County Courts Amendment Act, 30 and 31 Vict. cap. 142. It seems to me unreasonable that the Sheriff may try the right to thousands of pounds, and yet be incapable of dealing with cases relating to a yard of land. This, I believe, simply operates in many cases as a denial of justice, because cases occur where the parties will not go to the Court of Session on account of the expense.

2630. Are there any other matters to which you would extend the jurisdiction?—The only other matter which I have considered, and I confess I have had some difficulty in forming an opinion upon it, is as to whether the action of divorce should be competent in the Sheriff Court. Some people think that decrees of divorce should not be granted at all; others that, if this remedy is allowed, it should at least not be too easy of attainment. Now I daily see abundance of evidence of the grievous hardship which is caused to the working classes from its being incompetent to bring an action of divorce save in the Court of Session. A woman takes to drink; she strips the poor man's home of all its furniture, in order to procure the means of ministering to her depraved appetite. He is obliged to turn her out of doors; then she gets from bad to worse, and after leading a life of open infamy, she hangs like a millstone round his neck; she contracts debt in his name. He cannot marry again; his home is desolate, and there is no one to act the part of a mother to his unfortunate children. If he does form another connection, it usually takes the odious and debasing form of concubinage. Stories of that kind are constantly cropping out in the course of criminal investigations, and in the Small Debt Court. I am sure that, if I have seen one instance of this, I have seen a dozen since I went to Dundee. The remedy is to allow cases of divorce to be entertained by the Sheriff, the Procurator-fiscal being bound to sist himself as a party in every case for the protection of the public interest, and an appeal being competent at his instance or at the instance of either of the parties to the Supreme Court. I also think the Sheriff might be safely entrusted with the power of appointing a judicial factor where the legal title to a property was in abeyance either from the person being absent or being a lunatic, or the lapse of a trust. I see occasionally instances of the inconvenience which results from the present system. I suggest to the parties that they should get a factor appointed. The answer is, the expense is too great, and the estate is too poor to afford it. I think, therefore, the Sheriff should have power to appoint judicial factors. I can give an instance from my own practice of the mischief which results from confining these appointments to the Supreme Court. William M'Laren, a cattle-dealer in the village of Comrie, became imbecile. He was an old man, about seventy years of age. He had no relatives nearer than second or third cousins. A natural daughter kept his house. His funds consisted of £170, which was lodged in the Central Bank at Crieff. The girl, taking advantage of the imbecility of the old man, induced him to indorse the deposit-receipts; she uplifted the money from the bank, and lodged £140 in her own name in the Commercial Bank at Comrie, and the remaining £30 in the name of her father and herself. This was in July 1860. The facts having oozed out, M'Laren was indignant at the trick which had been played upon him; and a distant relative, Mrs. M'Call, on 5th September 1860, presented an application to the Lord Ordinary for the appointment of a *curator bonis*, the application being accompanied by two medical certificates, and the object being that the factor should recover the money for the old man's use from his natural daughter. The Lord Ordinary ordered service on M'Laren and his daughter, and answers were given in in the name of the daughter on two grounds: first, that Mrs. M'Call was no relative, and had no title to make the application; and second, that M'Laren was not imbecile. The case gave rise to a great variety of procedure, which ended in the whole objections to the petition being declared unfounded, and on 12th February 1861 the factor was at length appointed. The daughter was found liable in costs, but she had nothing to pay them with. The accounts were taxed at a large sum, and the £170 which constituted the poor man's all went to pay the expenses, and he himself was thrown on the parish. Very soon after, the factor, having no estate to attend to, obtained the recall of his appointment, and his discharge.

J. Guthrie Smith.

2631. *Mr. Baxter.*—Would you extend the Sheriff's jurisdiction to cases under the Conjugal Rights Act?—Yes; I think it would be expedient that the Sheriff should have power under that statute.

2632. Would you extend it to suspensions of charges?—Yes.

2633. *Dr. Barclay.*—Above £25?—Yes. We have it up to that point at present.

2634. *Mr. Baxter.*—Do you see any occasion for limiting it?—No, provided there is an efficient mode of appeal.

2635. *The Chairman.*—Is there any class of cases in which you think the judgment of the resident Sheriff should be final?—The judgment of the resident Sheriff is final now in cases up to £12 in the Small Debt Court. I don't think it expedient to extend the jurisdiction of the Small Debt Court; but I think that even in cases below £12, a party should be entitled to demand a case for the opinion of the appeal court on questions of law, probably with the leave of the judge. In the Small Debt Court, questions involving an important principle are frequently brought for the purpose of having that question determined: for example, the right to a toll, or a right to levy a particular rate, and matters of that kind.

2636. In those cases in which the judgment of the local court was not final, would you allow an appeal to the ambulatory court?—In all cases. I would say that, between £12 and £50, I think the judgment of the Sheriff-substitute, or, as I would rather call him, the resident Sheriff, should be final in matters of fact; but there should be an appeal upon matters of law. As to cases above that sum, I think that the powers of the court of review should be similar to those which are embodied in the Debts Recovery Act; that is to say, the court of review should have the entire control of the case, the judgment of the Sheriff as to fact being treated as the verdict of a jury: *in dubio*, to stand; but if in their opinion against evidence, to be recalled, and a new trial ordered, or the case to be remitted, with instructions to take further evidence on a particular point. But every case involves a mixed question of law and fact; and if the court of review saw their way to reversing the decision of the local judge without further inquiry, they should have the power to do so.

2637. Would you have an appeal to the ambulatory court in all the cases to which you would extend the jurisdiction of the Sheriffs?—Yes, in all these cases. But I repeat that I think the best mode of review is review by the Supreme Court; and I think that the ambulatory court should only be established as a court of review in the event of its being found impossible to obtain review in the Supreme Court without very great expense.

2638. Supposing the ambulatory court to exist, would you give a party the option of appealing to it or to the Court of Session?—Probably it might be expedient that he should have that option.

2639. Do you think that the expense of the appeal to

J. Guthrie Smith.

the ambulatory court would be greater or less than the expense of appealing to the Sheriff at present?—I don't think it would be any less than the expense of the present appeal to the Sheriff. The appeal to the Sheriff is a very inexpensive proceeding, but I don't think it is satisfactory.

2640. Do you think the expense would be greater?—I think that the procurators should be allowed much larger fees for the work they do than they now receive; and it may be that counsel would be employed in these courts, in which case the expense would be greater; but I don't think any person would object if the expenses were limited to £5, 5s. or £6, 6s., as I think they might be.

2641. Your main objection to the appeal at present is, that it is from one judge well informed to another judge not so well informed, and that there is great delay?—Yes.

2642. You propose to remedy that by sending two judges to deal with the appeal?—Yes.

2643. They would be in the same condition as to information that the one judge at present is in?—They would be so; but I propose that they should be persons of a higher position than the existing Sheriffs are as a class, and should deal with cases in a different way. I don't propose that they should be required to find out the truth of a case from the judge's notes of evidence, without seeing the witnesses. They should consider the decision which he has come to with his notes before them, treating his judgment very much as the verdict of a jury, and the judgment standing *in dubio*. But if they think he has come to a wrong result, the proper procedure would be to enter a new trial, or to remit the case with instructions.

2644. That is as to course of procedure; but their information, when the case came before them, would be of the same character with that which the present Sheriff in appeal has?—Yes.

2645. But there is the benefit of two judges?—Yes.

2646. Suppose that two Sheriffs, as now constituted, went to hear appeals once a month, or once in six weeks, would that meet your view?—That would be the ambulatory court which I propose; but of the twenty-four Sheriffs, you would be able to dispense with twenty.

2647. That would be equally effective with the per-ambulatory court?—I entirely hold to the opinion that a review by two judges is greatly superior to a review by one.

2648. And that would remove that objection?—No doubt it would.

2649. If that were compatible with the avocations of the Sheriffs practising at the bar, what would be the objection?—I would see no objection to that at all, except, of course, that I think the Sheriffs should be relieved of all duties unconnected with those devolving upon them as appeal judges.

2650. All executive duties?—Yes. The Sheriff-substitute is on the spot to perform them, and there is no use of appointing two men to do what one of them can well enough do.

2651. You think that the judges on appeal ought to be persons of high qualifications at the bar?—Most certainly.

2652. You said higher than those who are resident Sheriffs?—Yes.

2653. Would it be an advantage to have a person of that sort to see to the proper performance of the executive duties, or to perform them themselves in cases of difficulty?—I think the resident Sheriff should be capable of doing all the duties which the Sheriff now does; otherwise he should not be appointed.

2654. You say that the appointments of Sheriff-substitutes are good?—Yes. I am not prepared to say anything to the contrary.

2655. What is the objection you have to a person not resident, assisting or superintending and seeing that the duties are properly done?—The only objection I have is, that his superintendence is unnecessary. There is a curious provision in the Act 16 and 17 Vict. c. 80, § 46, in which the Sheriff is directed to go once in the year the Small Debt Circuit in use to be held by the Sheriff-substitute. Now in Dundee there are 1600 small debt summonses issued every year, and on an average from 40 to 60 small debt cases are tried every week. What is the use of appointing the Sheriff to hold one of the 40 courts that I hold in the course of the year, and to try some 50 or 60 of the more than 1000 cases that I have to try in the course of the year? There would be no use for him in that case, and there is no use for his going circuit. In the office, as at present held, there are many anomalies of that kind. I think, if one official judge is resident on the spot to do all duties in the Sheriff Court, that should be enough, and it is unnecessary to appoint two.

2656. *Mr. Baxter.*—Do you ever feel yourself discredited, as resident judge, by the Sheriff coming and suspending you?—No. I feel no discredit in the matter.

2657. You don't feel that it lowers your status?—I don't think that the presence of the Sheriff in the county lowers my status in the least.

2658. *Dr. Barclay.*—Does it not dislocate the cases left by you to him, and by him to you?—In the Small Debt Court it does; because, if a case is continued when the Sheriff comes, not having heard the beginning of it, all he can do is to let it stand over for six weeks or three months, till the ordinary substitute comes his rounds.

2659. *The Chairman.*—Do you think it an advantage or a disadvantage, that a person not resident, and not under the suspicion of being subjected to local influences, should go into the county occasionally?—I don't think there is any advantage in it. I believe it is the case generally; but I can at all events speak for my own county, that the Sheriff-substitutes make it a point to keep themselves clear of all local influences; and I think the public regard them as being just as free from local influences as the Sheriff-principal.

2660. *The Lord Advocate.*—What is the precise benefit that you expect to accrue to the litigants from a change in the appellate jurisdiction? Is it economy, or despatch, or the quality of the judgment to be obtained?—One great object of a court of appeal should be to give coherence and uniformity to the law. That cannot be said to be the case when there are twenty-four Sheriffs over the country, assuming their decisions to be final. If it is desired that uniformity and coherence should be given to the law, then an appeal should be to one central court; and therefore I say that the appeal should be straight from the Sheriff-substitute to the Court of Session; and if that cannot be got save at a great expense, then I suggest the ambulatory court as the next best thing that I can think of, and which would just come to be a branch of the Supreme Court, two judges being in Glasgow and two for the rest of Scotland.

2661. Then it is uniformity of the law that is the main object of this change?—That is one benefit.

2662. What is the present expense of an appeal in your court?—I have no means of stating that.

2663. What is the average?—I don't know.

2664. Is it not a matter of some consequence, with reference to the arrangement which you propose?—I don't know the expense of an appeal.

2665. Do you imagine it to be anything like £10 a side?—I am aware that it is much less than that.

2666. Is it £2 a side?—I really don't know.

2667. Supposing you can get an appeal decided by the Sheriff-principal at present for £2 a side, the proposal of a system which would make it £10 a side would be just five times the amount of the present appeal?—Yes, of course it would.

2668. So that the litigant would have his remedy abridged to that extent?—But the litigants will have greater cause to be satisfied with the result.

2669. Do you think that the litigants are at present dissatisfied with the result of the judgments on appeal?—The opinion among the mercantile community is decidedly against the double Sheriffship.

2670. Are the litigants dissatisfied with the judgments on appeal, in your opinion?—I have not heard

any open expression of dissatisfaction, but I am not prepared to say that grounds for dissatisfaction do not exist; and I am certain that the course I have suggested would give greater satisfaction. So far as I know, the feeling among the mercantile community is against the number of courts which they have to go through in Scotland before a case comes to an end. Mercantile men have told me over and over again that they never think of appealing to the courts of law in regard to any of those numerous questions that are constantly arising: for example, as to a short shipment, or deficiency of quality, or a question on a bill of lading, they refer such a question, and it is settled by arbitration at once; the reason given for that being, that when they enter a Scotch court, there is no saying when the case may come to an end. They have first to go before the Sheriff-substitute, then before the Sheriff, and then to the Court of Session. The remedy I suggest is the one appeal straight to the Supreme Court.

2671. As far as can be seen from the course adopted by the litigants, have you every reason to suppose that they are more dissatisfied with the judgment of the Sheriff-principal than they are with the judgment of the Sheriff-substitute?—I don't know whether they are satisfied or not with the judgment of the Sheriff-principal, but they have to rest content with it, because the expense of bringing it under review is now so great.

2672. Do you know what the percentage of appeals to the Sheriff in your court is?—No, I do not. I never make any inquiry about a case after it has left my hands.

2673. Do you know what the percentage of advocations from final judgments is?—No, I have no information on that point either.

2674. It is competent to advocate the Sheriff-substitute's judgment?—I believe it is competent; but when it was once tried, the party was sent back to the Sheriff, on the ground that he had not exhausted his remedy.

2675. You think it is not now competent?—I am merely stating that as my impression. That was the impression I had when at the bar.

2676. If it were competent, do you think it would be frequently resorted to?—I think it would be resorted to in many cases.

2677. You propose to enlarge the jurisdiction of the Sheriff, and to give jurisdiction to the ambulatory court, if you cannot reduce the expense in the Court of Session to £10 a side. Do you think there might not be a good deal of expense and delay from double instruction, from an agent in Aberdeen, or Inverness, or Perth, being instructed to plead the cases?—I don't think there should be double instruction. I think a person once admitted to practise the law in Scotland should be entitled to practise in any court.

2678. But he must travel to Perth, or Aberdeen, or Edinburgh to plead the case, if there is to be no double instruction?—Yes.

2679. And that expense, and the expense of his living while the case was being conducted, would have to be added to the litigant's expenses?—Of course that would add to the expense; but if any one looks at a railway map of Scotland, he will be astonished at the facilities which exist for carrying out a scheme of that kind. In most cases a party could go to the court and be home again in the evening.

2680. Provided his case were sure to come on?—Yes.

2681. Do you think the present Sheriff-substitutes fit to undertake the duties which you propose to impose upon them?—That is a question which I am not in a position to answer. I would have no hesitation in undertaking them myself.

2682. You had the advantage of having a considerable practice at the bar before you became a Sheriff-substitute?—I had.

2683. That is an advantage which a good many of your brethren had not?—I am not in a position to answer that question; but their practice must have been small indeed, if it was not more than that of some Sheriffs.

2684. *Mr. Shand.*—You spoke of the delay that is at present caused by cases oscillating between the Sheriff and Sheriff-substitute. Have you any remedy to propose to prevent that?—Yes, I think there should be no appeals at all, except at the end of the cause. The experience of my court is, that no practical injustice would result from the appeal being reserved till the end of the cause.

2685. Would you give no power of any kind to appeal during the progress of a case?—Not except with the leave of the court.

2686. Would you give it with the leave of the court?—Probably; if things are to remain as they are.

2687. If that remedy were adopted in any new legislation, it would remove your objection on the ground of delay on appeals?—To a certain extent.

2688. Entirely as far as delay is concerned?—Not altogether.

2689. Would it not put the system exactly on the same footing in reference to delay in obtaining review as an appeal either to the ambulatory court or to the Court of Session?—There would still be delay.

2690. But no greater delay than in the case of the ambulatory court or the Court of Session?—There would be no greater delay in going to the Sheriff.

2691. Therefore that remedy would remove the cause of the delay?—Yes, so far as it abridged the existing right of review.

2692. And the only advantage to be gained by the other system would be getting a decision of higher authority?—Yes.

2693. But which could only be obtained at considerably greater expense?—No doubt.

2694. You approve of the appointments of the Sheriff-substitutes that have been made throughout the country?—I think I may say so, though I am not exactly in a position to give an opinion; but that is the general impression.

2695. Are you aware that, on the occasion of every vacancy of that kind which occurs, a number of competitors come forward for the office?—I believe that generally the Sheriff has an ample choice.

2696. And an ample choice amongst men well qualified for the office as it at present exists?—Yes.

2697. *Lord Barcaple.*—Have you known cases in each of which appeals have been taken at all the five stages you have mentioned?—These cases don't very often occur. In truth, in my court the great bulk of the business is confined to merely petitory actions.

2698. Would these five stages not occur in a petitory action?—They might; but many a case in my court is decided upon proof, and an appeal is taken against my judgment on the merits, but not till then.

2699. That is to say, usually there is no appeal till you come to the final judgment?—Often there is none; but incidental appeals are very numerous.

2700. You mentioned that mercantile men have frequently told you that they don't take cases into the Sheriff Court in consequence of the number of courts they have to go through. Do you speak of mercantile men resident in Scotland?—I speak of mercantile men in Dundee; but I should also say that there are other reasons which deter a mercantile man from litigation. In the first place, there is a great advantage in having the matter settled at once, in five minutes; secondly, a mercantile man does not like to have his difficulties paraded before the public,—he objects to the publicity; thirdly, there is a great objection to acquire the character of being a litigious person, because many foreign houses send to their correspondents here instructions not to deal with A. B. or C. D. because he is such a litigious person. I believe in great establishments the practice now is either to propose arbitration, or, if that is not agreed to, just to write off the claim as loss.

2701. *Dr. Barclay.*—Is it not a fifth reason that a number of these cases are technical?—They are usually referred to a person in the trade who knows about them. The cases disposed of in that way may involve £20 or £30, or even £300, and the arbiter gets a fee of three guineas from each party, and there is no record kept.

2702. *Mr. Webster.*—Many of these disputes also have reference to goods which very rapidly change in value?—That is so.

J. Guthrie Smith.

2703. And the custody of which would be attended with very great expense?—That is also true.

2704. And they necessitate that short mode of settling disputes which could never be carried through in a court?—That is so. I have looked over the litigated cases that were finally decided in the ordinary court at Dundee last year. They amount altogether to 234; of these only 78 have been extracted, and I can give the particulars of these 78 cases, as showing the character of the business I have to do. Of the 78 cases, 5 were actions on bills of exchange, involving the following amounts—£2673, £368, £105, £96, and £50; 16 were actions of damages; 15 were actions of affiliation and aliment; 28 were petitory, involving these amounts—namely, 2 under £100, 1 under £62, 1 under £52, 1 under £50, 5 under £40, 8 under £30, 9 under £20, and 1 under £10. These are the sums which were decerned for. There were 14 miscellaneous cases, involving questions of right of access to a close, delivery of moveables, diversion of a stream, and matters of that kind.

2705. *Dr Barclay.*—What damages were awarded?—The damages awarded were all £50 and under; so that the business before the ordinary Sheriff Court is of comparatively unimportant character.

2706. *The Chairman.*—Would you desire to have the assistance of a jury in disposing of cases before you?—I think a small jury might be had recourse to in actions of damages. I think it is peculiarly the province of a jury to estimate the amount of damages; and probably the objection of expense and time, which is the great objection against jury trial in the Court of Session, would not apply to the Sheriff Court, because at present I have sometimes three or four proofs in the day.

2707. *Dr. Barclay.*—What number do you suggest for the jury?—A jury of five, I think, would be sufficient.

2708. Would you require that they should be unanimous?—If they were of that number, I think they should be unanimous. In fact, I think the practice of the Scotch courts should be assimilated to the practice of the English County Courts in that matter.

2709. *The Chairman.*—How do you account for the cases before you on proof being so much shorter than the trials by jury in the Supreme Court?—There is not the elaborate cross-examination that there is in jury trials, as I have seen them, and the procurators have no disposition to spin out the proceedings. I myself frequently make suggestions that a certain point has been, in my opinion, sufficiently established, and that further evidence upon it is unnecessary.

2710. You are, in fact, the jury in that case?—Yes.

2711. *Mr. Webster.*—Would that advantage not be lost by having a jury?—That would depend very much on how the judge was allowed to put the case to the jury. I have seen an English judge, after a single witness was examined, asking if there was to be any further question as to a particular point, or putting it to the jury if they had any doubt of the witness' testimony.

2712. Have you seen a recent jury case in Ireland which occupied 38 days, and where the jury were not able to give a verdict?—I don't propose to reason from anything Irish in Scotch matters.

2713. Have you anything further to say as to the forms of pleading and the investigation of fact?—I think it is very unfortunate that we should have at present no fewer than three different forms of process in the Sheriff Court. The Debts Recovery Act has certainly given great satisfaction in Dundee. The issue is easily adjusted, and there is no delay whatever; and I think the cases that have been tried under that statute have been tried in a way to give general satisfaction. But it is faulty in two particulars: First, a difficulty arises in knowing whether the case brought under it really is under the statute or not; and then, supposing it be under the statute on one branch of it, there may be another item in the account which is clearly out of the statute, and in that case the only course open is to send the case to the ordinary court. Second, I think the fees allowed to the procurators need revision. I think 10s. is probably a sufficient sum for a decree in absence; because where no appearance has been entered for a defender, the Sheriff-clerk should have power to give decree at once, and I don't think there is any necessity for its being moved in court at all. But where appearance is entered and issue is joined, I think it is unjust that the defender should be permitted to litigate upon such favourable terms as are presented to him in the statute. I think if he litigates wrongously he should pay for it, and that the procurator should get a suitable fee for his trouble. Just now it seems to me that the fees are wholly inadequate for the services rendered; therefore I would suggest that that statute should be repealed, but, at the same time, that the practice which it has introduced, of throwing upon the Sheriff the duty of noting the pleas of parties, should be continued. I think that is a most useful course. Indeed, I am not sure that that is not the meaning of the Act of Parliament that is now in force. The statute of 1853 says that the Sheriff is to hear parties, and to cause a minute of the defence to be written. Nothing is allowed to the procurator for drawing that minute; and it rather appears to me that the meaning was, that the Sheriff should dictate the minute, or write it himself; but the practice is the other way, and I did not choose to interfere with it.

2714. *The Chairman.*—Do you think that the principle on which the fee to procurators is arranged is erroneous or not?—I think the principle is erroneous. I think the procurator's fee should be proportioned to his services.

2715. There is a power in the statute to the Court of Session from time to time to revise and alter the fees?—There is.

2716. It might be remedied under that?—It might; but the Court of Session has not given the Sheriff Court much assistance in the way of Acts of Sederunt. I think, also, if I had the power of allowing a pursuer to put in a minute of replication or answer to the matters stated in defence, it would be a great advantage. Just now the only course open in a case of that kind is to order condescendence and defences; that is a very serious proceeding, and is the cause of great delay. For instance, the course of procedure, where the record has to be made up by condescendence and defences, is this in my court: The first interlocutor is, 'The Sheriff-substitute appoints the record to be made up by condescendence and defences in terms of the statute.' The time is usually allowed to run down without anything being done; the order is renewed to consent, and the papers being at length in, this interlocutor is pronounced: 'The Sheriff-substitute appoints parties' procurators to meet with him next court-day, to adjust and close the record.' At this meeting it is discovered that the defender has added a separate statement of his own, which the other procurator insists on answering. Hence the next order is: 'The Sheriff-substitute appoints one revisal of the condescendence and defences to be made on the original papers within eight days each.' When this order has been complied with, the next interlocutor is: 'The Sheriff-substitute appoints parties' procurators to meet with him to adjust and close the record.' At this meeting it is discovered that a preliminary plea has been put on record, which under statute must be disposed of before the record is closed; and another interlocutor is pronounced: 'Appoints parties' procurators to be heard on the preliminary plea.' The case goes to the debate roll for that purpose, and I dispose of it. Then an appeal is taken to the Sheriff, and the case goes before him. It then comes back, and the record is closed; and after all the record is practically thrown aside, because very likely the case is decided on the proof. In 1867, of the 234 cases disposed of, 54 lasted a month; 26 two months; 15 three months; 29 four months and under; 31 six months and under; 18 eight months and under; 13 ten months and under; 14 twelve months and under; 15 fifteen months and under; 3 eighteen months; 8 two years; 4 several years; and 7 unaccounted for.

2717. *Mr. Baxter.*—If the pursuer had the power of

replication, would many of these condescendences and answers be useless?—That is my impression.

2718. *The Lord Advocate.*—Have you found, on the whole, that the short form of minute and defence has been preferable to condescendence and answers?—Certainly. At the same time, it is not so artificially prepared as a person accustomed to the rules of good pleading would make it.

2719. You think the form might be better manipulated; but on the whole, you think it has worked satisfactorily?—I think so.

2720. You have suggested that it might be extended to the Sheriff minuting a replication?—Or allowing the pursuer to put in a minute in replication.

2721. Might it not be done by the Sheriff himself noting that on the paper?—I think the Sheriff has that power under the Debts Recovery Act. He is required to take a note of the pleas, which means the pleas of both parties. Hence the issue, under the Debts Recovery Act, is generally brought out in a very clear form. I think the judge might have these three courses open to him in making up the record: he might either in a simple case minute the pleas of parties, as he does in the Debts Recovery Act; or if the defence is longer than he can conveniently take a note of, he should order it to be made up by minute of defence and replication; or if it is a purely equity suit, involving long statements, he might order condescendence and answers.

2722. Don't you think the minute in that shape would be very apt to run into a condescendence?—Anything may be abused.

2723. But your experience would not suggest that?—I think not.

2724. Do you think it better to put it in that shape, or to let the Sheriff minute the reply in larger cases?—The effect of my suggestion would be, that practically, in the great majority of cases, the pleas of parties would be minuted by the court, and only in very special cases would the Sheriff order the minute of replication.

2725. Do you think there would be any harm in abolishing the condescendence and answers?—I don't see how you could frame the pleadings in equity suits without condescendence and answers; but I think some order should be issued by the court as to the form in which a paper like a condescendence should be framed. It seems almost impossible to get a country practitioner to content himself in answering a paper with simply admitting or denying. Occasionally the answer is as long as the statement which he undertakes to answer; and when one comes to the end of the paper, it is impossible to tell the issue between the parties. If the court were to order that they should be framed in such a way as was required by the bill of 1862, that would be a great advantage. I question, also, whether there should be any record at all. I think there should be unlimited power of amendment to the very last entrusted to the discretion of the judge, so as to prevent justice being defeated by technicalities.

2726. You mean any closed record?—Yes.

2727. *Mr. Harrison.*—Have there been many cases, under the Debts Recovery Act, brought before the courts in Dundee?—A great number.

2728. Have the cases in the ordinary Sheriff Court diminished to the same extent?—I think the cases in the ordinary court are less in number since the Debts Recovery Act came into operation.

2729. Have they diminished to the same extent in point of number?—I think many cases are brought under the Debts Recovery Act, of which we heard nothing before.

2730. Then you think it has had the effect of bringing justice home to people's doors who did not ask for it before?—I think it has been a most useful statute, though it contains many blemishes.

2731. But you think that it has made justice cheaper and more speedy than it was to be had previously?—I think that has been the effect of it.

2732. Do you think it is an advantage to the public to have the maximum expense known, as is provided by that Act?—I don't know that there is any great advantage to the public in that. If you confine the maximum to a decree in absence, you do all that the public are entitled to require. The great advantage of the Debts Recovery Act has been the facility it has given to a tradesman to get a decree in absence.

2733. *The Lord Advocate.*—Is the large proportion of cases which you have had decrees in absence?—A large number of them; but very important questions have been raised and tried under the Debts Recovery Act: for instance, whether a man has ceased to be a partner, questions of warranty, and so on.

2734. *Mr. Campbell.*—As a general rule, do you find that the practitioners usually require the Sheriff-substitute to make a note of the evidence in writing?—In almost every case they require him to do so.

2735. *Dr. Barclay.*—Have you adopted shorthand?—No; I make my notes in such a form that they can be read by the Sheriff-principal.

2736. You seem to think that the form of making up the record in the Debts Recovery Act should be adopted?—I think so; it should be extended to all cases.

2737. Your procurators prepare the minutes?—Yes.

2738. Have you not been obliged to purge them and correct them when they ran into argument?—I don't like to meddle with them; I confess I don't purge them. The great objection to the minute of defence is, that it is a mere repetition of the pursuer's story under a different colour, whereas it should raise a distinct plea.

2739. *The Chairman.*—You point at an assimilation of the form of proceeding in the different classes of cases that come before the Sheriff under the Debts Recovery Act and the ordinary Act?—Yes.

2740. And also the Small Debt Act?—Yes; I think that it would be an improvement, in ordinary petitory suits, if the action were to originate by writ with an endorsement. I think that would be an improvement on the present form of summons. It would be suitable for the Small Debt Court as well as the ordinary court. The form of the Court of Session Bill of 1862, *mutatis mutandis*, would, I think, supply what is wanted in the Debts Recovery Act.

2741. *Dr. Barclay.*—Have you had any experience of the practice, where imprisonment follows on a decree for £8, 6s. 8d., that there shall be a suspension, and the case tried over again in the ordinary court?—I have never seen any instance of that.

2742. You seem inclined to give the Sheriff jurisdiction in cases of divorce: do you refer to divorce *a vinculo* or to divorce *a mensa et thoro*?—I think both remedies should be competent to the Sheriff. I don't see any harm in that, provided the Fiscal is there to prevent collusion, and provided the parties have an appeal.

2743. *Mr. Shand.*—Taking the whole of Scotland, are you satisfied that there must be a very great number of cases in which poor persons have grounds for divorce, but cannot obtain it at present on account of the expense?—I think there is no doubt about that.

2744. Would you think that the figure 6 would at all cover such cases in Scotland? Do you think that an erroneous estimate?—I think so; I am sure I have seen a dozen cases myself in Dundee since I went there.

2745. Would you say that there are hundreds over the country?—I think so; at least a much larger number than that estimate.

2746. *Dr. Barclay.*—Have you a Commissary Court in Dundee?—Yes; I act as Commissary-depute.

2747. *The Chairman.*—If there was only one local Sheriff, would you give him power to review his own judgment?—Probably advantage would result from a re-hearing before the same judge. We have that power just now in *cessios*. Where a party is refused *cessio*, he may present a reclaiming petition to the same judge who refuses it; and if the Sheriff-substitute is disposed to adhere to his judgment, then the statute requires him to send it on to the Sheriff. I may state that I have altered my opinion under these circumstances, and saved the party the trouble of going further; and I think there would be no harm in allowing the Sheriff-substitute to reconsider his opinion. Perhaps the effect

J. Guthrie Smith.

of the decision would be to bring out more clearly to the parties the points on which the case hinges.

2748. Then you think that he should have the power to review his own judgments?—Yes, I think so.

2749. In what form would you have that done?—Either by reclaiming petition or by a motion for re-hearing.

2750. Which of them? or would you give him his choice?—I think he might have his choice.

2751. *Mr. Webster.*—Would not that add greatly to the cost of each case?—The expense of it would not be very much.

2752. *Mr. Shand.*—Would it be the same expense as an appeal to the Sheriff?—What I am pointing at is having one efficient local judge instead of the present divided system.

2753. But would it not be the same expense as an appeal to the Sheriff?—Yes, if the case did not go off on the motion.

2754. *Mr. Webster.*—Do you know that in the Court of Session the Lords Ordinary have not the power of reviewing their own decisions, as they at one time had?—I am aware of that.

2755. Do you approve of that?—I am only speaking of the Sheriff Court. I say nothing about the Court of Session. I speak from my own experience in *cessio* cases.

2756. *The Chairman.*—Have you any observation to make on the matter of costs beyond what you have already said?—I think that just now there is no doubt that the right administration of justice greatly depends on the character and the attainments of the men whose business it is to act as pleaders in court, and I think that the fees now allowed to the procurator are too small. In truth, few procurators care for court business at all. They confine themselves to conveyancing and general business, and they rather avoid taking up court business. Now, I think the fees should be such as would be a fair return for the services that these persons render. I would increase the fees, but probably make the steps of process fewer. There are too many sixpences and eighteenpences and items of that kind in the present table.

2757. You would make the steps fewer at which they would be entitled to fees?—I would say the steps for which they should be entitled to fees should be made fewer, but the fees much increased in amount.

2758. Have you anything to say as to the privileges of agents?—I think an agent, when once he has passed and got his certificate of competency from the examining board, should be entitled to practise anywhere, in any court.

2759. In the Court of Session?—I see no distinction between the Court of Session and the local courts. I think the practice of the two kingdoms, England and Scotland, should be assimilated in that particular.

2760. What would be the qualifications you would require?—The qualification which is now required,—namely, a certain amount of literary attainment, a knowledge of the law, and of the practice of both the superior and inferior courts.

2761. *Mr. Baxter.*—You don't think that any faculty should have exclusive privileges?—Just so; I think no faculty should have any exclusive privilege, or should be, in fact, a professional trades' union.

2762. *The Chairman.*—Would you carry that into the Faculty of Advocates?—I am not prepared to abolish the distinction which now exists between the bar and the agents. I think we have experience to guide us in that matter—the experience of America, where it was attempted; and the result was, that it gave rise to partnerships, the one partner acting as a barrister and the other as a solicitor.

2763. Are you aware that that was the system in Scotland at one time, when the same person conducted the cases and pleaded them?—Yes.

2764. And that was departed from, and what was considered a better system introduced?—Yes.

2765. The counsel's clerks were generally made agents, and that system of the clerks having the privilege of practising as agents continued till a comparatively late period?—Yes.

2766. You have the experience of America, you say, and you have the experience of this country in the matter?—Yes.

2767. Are there any other points on which you wish to make any observations?—In regard to the criminal jurisdiction, I think the Fiscal should be appointed by the Crown. Perhaps there is no more important functionary in Scotland than the Procurator-fiscal. The theory is, that he is the deputy of the Sheriff in making investigations; but that theory has long ceased to be consistent with the fact. The Fiscal is truly an independent officer, and is responsible for his proceedings to the Crown counsel in Edinburgh. Therefore I think he should be appointed by the Crown. I also think that he should not be allowed to practise.

2768. *Mr. Baxter.*—Would you give him a retiring allowance?—I think every public servant should have a retiring allowance after some years' service.

2769. *Mr. Shand.*—You say he is directly responsible to the Crown officials. Is he not directly responsible to the Sheriff?—That is a supervision which is never exercised in Dundee; but theoretically, no doubt, he is responsible to the Sheriff.

2770. *Mr. Webster.*—And he is removeable by the Sheriff?—Yes.

2771. *Mr. Shand.*—And the Sheriff may call upon him at any time to undertake investigations, and may take any charge of these investigations he deems proper. In short, the Procurator-fiscal is responsible to the Sheriff?—Yes.

2772. *Dr. Barclay.*—The Lord Advocate may do the same?—Yes; but I say the working of the system is, that he is responsible to the Crown Office only, and therefore he should be appointed by the Crown.

2773. Would the object not be gained by the Sheriff appointing the Fiscal with the approbation of the Lord Advocate, and the Lord Advocate's consent being necessary to his removal also?—I think it would be better that he should be appointed directly by the Crown.

2774. You thereby make him very independent of the Sheriff?—So much the better, in my view.

2775. *The Chairman.*—Is not the Fiscal an important officer to assist the Sheriff in the performance of his duties?—Yes.

2776. Has not the Sheriff an important interest in having an efficient Fiscal?—No doubt he has.

2777. Are they not persons who ought to be on very confidential terms with each other?—I don't think they should. I hope the Sheriff and the Fiscal will always be on good terms with each other; but my view is, that the Fiscal should assume the sole responsibility for criminal investigations. For instance, I don't think it right that, first of all, I should assist at a precognition, as I am entitled to do, and then perhaps have to try the man afterwards. I think that the duties of the Sheriff and the duties of the Fiscal should be separated in that matter, making the Fiscal a Crown officer, and relieving the Sheriff of all responsibility.

2778. You think the Sheriff should be deprived of these executive powers?—Yes.

2779. And of the responsibility for the investigation of crime?—I think it would be better if these powers were entrusted to the Fiscal absolutely.

2780. That would be a radical change in the constitution of the office of Sheriff?—No doubt of it.

2781. He would then be a mere judicial officer?—Yes.

2782. And no longer an executive officer. That you think would be an improvement?—I think it would be an improvement. In point of fact, in Dundee the Fiscal is never interfered with.

2783. *Mr. Shand.*—Is the office of Procurator-fiscal throughout Scotland, as a rule, held by efficient men?—To the best of my belief, it is.

2784. *Mr. Baxter.*—If you deprive the Fiscal of his private business, would you get good men as Fiscals in such small places as Dunblane?—I think these are the very places where the Fiscal should have no private practice, because there is not a strong expression of opinion in these places. There is no daily press to

exercise a supervision over the proceedings of the local officials; and these are the very places where, if a client is found tripping, the Fiscal—I don't say is, but may—become blind to the circumstance.

2785. How would you remunerate him in these small places?—I assume that the State would find money sufficient for the performance of the duties.

2786. *Mr. Morton.*—How would prisoners' declarations be taken if the Sheriff were relieved from any share in the investigation?—The Sheriff, in taking the declaration, acts as committing magistrate.

2787. And he would still take the declaration?—I assume he would still act as committing magistrate.

2788. *Mr. Baxter.*—Who dictates the declarations?—The declaration is generally dictated by myself, and I take care that no undue pressure is put upon the accused. The question is always put in the most general terms. He is invited to make any statement, and what he does say is taken down, but there is no application of the screw to him.

2789. Did you ever see any question put with a view of entrapping a prisoner?—Never in my experience.

2790. Have you seen questions pressed on him when he shows disinclination to speak?—Quite the contrary. When he shows such disinclination, I ask, 'Do you wish to make any statement on the subject?' and if he says No, the proceeding is brought to an end.

2791. *The Chairman.*—What do you do if he says No?—He is committed for further examination.

2792. But if a question is put, and he shows hesitation and unwillingness to answer, what do you do?—Perhaps it will be minuted that the prisoner has no further statement to make.

2793. But he may have further statements to make in reply to future questions. A question is put which he shows a disinclination to answer; what do you do?—Of course, if a question is put, we generally get an answer.

2794. But the case Mr. Baxter put was where he indicates a disinclination to answer?—In that case I don't put any more questions.

2795. If he hesitates, and shows a disinclination to answer, what do you do?—I never met with a case in which an answer of some kind was not given; but I am explaining that there is no undue pressure, and that he is generally asked whether he wishes to make any further statement.

2796. Would you not tell him, if he is indisposed to answer, that he need not answer unless he likes? Would you not renew that statement to him?—Yes; that is explained to him.

2797. When you see his disinclination, would you help him out in that way?—Yes.

2798. Then you put down that he declines to answer?—That would be minuted, of course.

2799. *Mr. Baxter.*—Would you extend the Sheriff's power of pronouncing sentence in criminal cases tried with a jury?—I think the bulk of the crime in towns like Dundee consists of simple cases of theft, committed by persons who are convicted thieves; and these cases are the simplest of all to try. They merely involve a police charge—theft of a pair of boots, or of a shirt from a washing-green; and the only thing that makes them aggravated is, that there are so many convictions standing against the accused party. I think the Sheriff's power to deal with that class of offenders should be enlarged, so that he could sentence them to penal servitude; and in that way there would be a great saving of judicial time, by the abolition of the Circuit Courts, because the other cases remaining for trial of a graver kind might be brought to Edinburgh.

2800. Robbery?—I think the technical distinction between theft and robbery ought to be abolished. Robbery is merely theft with violence; and it is very inconvenient at present that on a charge of theft you cannot receive previous convictions of robbery as an aggravation, and *vice versa;* therefore I think the Sheriff should be empowered to deal with cases of robbery.

2801. In criminal libels, would you be inclined to give power of amendment during the trial in regard to particulars which would not be deemed prejudicial to the prisoner?—I think, wherever the amendment does not substantially interfere with the matter of the charge, the judge should have powers to allow it in his discretion, just as in the Summary Procedure Act.

2802. *Dr. Barclay.*—Have you ever turned your attention to the right of the prisoner to ask his declaration to be read to the jury, if it has been libelled on?—I think the prisoner should have that right.

2803. In your practice in jury trials, which has been very great, have you formed an opinion of the propriety of dropping the verdict of not proven, and adopting the English form of guilty or not guilty?—I don't propose any change in the Scotch practice in that particular.

2804. Don't you think it gives opportunity to jurymen in a difficult case, to let the prisoner off with a verdict of not proven?—In that case, I think the prisoner should get off.

2805. But he gets off with a blemished character?—I think he ought to rest content.

2806. *Mr. Baxter.*—Have you any observation to make on the present law and practice with regard to bail?—I think the present law is in an unfortunate condition. It is very difficult for one to know what bail to take without communicating with the Fiscal. Therefore I think that in all applications for bail the first step should be intimation to the Fiscal, that he might be heard for the public interest in every case.

2807. *Dr. Barclay.*—That is, as to the amount of bail?—And also whether the bail should be taken or not.

2808. *Mr. Adam.*—Do you think it is a proper thing that the prisoner should in certain cases be entitled to get out on bail as a matter of right?—Just now the effect of it is, that you may fix the bail at such an amount that he cannot find it.

2809. Suppose the case of a breach of trust to a large amount: do you think the party should be entitled to the privilege of getting out on bail?—I think that ought to be under the control of the public authorities.

2810. *Mr. Baxter.*—Don't you think it would be better to leave it to the discretion of the bailing judge in all cases?—I mean so, and let there be review if that is thought proper. Practically, no hardship would result from the discretion being left to the bailing magistrate.

2811. *Mr. Adam.*—Is there great evil practically under the present system?—Yes, by persons getting away who should not get away.

2812. *The Chairman.*—Have you any other suggestions to make?—The only other matter I would suggest is, that there should be some restriction on the right to sue certain classes of actions in the Supreme Court. When I was at the bar, I saw great injustice from persons bringing random actions of damages against their employers or others on the ground of negligence. I have been consulted about cases of that kind; and though frequently clearly of opinion that there was really no case against the defenders, I have over and over again advised them to pay £50 or £60 to get rid of the claim, because if they went to trial with a mere man of straw they would be worse off at the end of the day, even with the verdict in their favour, than by making a small payment at once. Therefore I think it is a matter for consideration whether the provisions of the 30 and 31 Vict. c. 142, on that subject, should not be adopted, and particularly the sections which provide that if a party suing in the Supreme Court should not recover more than £20 if the action is founded on contract, or £10 if founded on tort, unless the judge certify on record sufficient reason for bringing the case in the Supreme Court, he shall not be entitled to any costs of suit; and second, in all actions for malicious prosecution, false imprisonment, libel, and slander, the defender should be entitled to make oath that the pursuer has no visible means of paying costs, in which case he must either find security or satisfy the judge that he has a cause of action fit to be tried in the superior court, failing which it should be sent for trial to the Sheriff Court.

2813. *Dr. Barclay.*—Is that last matter in the Eng-

J. Guthrie Smith.

lish statute?—If a party bring a case of the kind I have indicated, and the other party swears that the pursuer has no means of paying costs, he is required to find security, or the judge sends it to be tried in the local court, unless he is satisfied that it is an action which should be tried in the Supreme Court.

2814. Would it not be better to have a report upon the *probabilis causa*?—I would rather take it out of the hands of the reporters on the *probabilis causa*. I think it should be disposed of by a judge at chambers.

2815. Have you had many cases of advocation for jury trial under the 40th section of the Judicature Act?—I am not aware that we have had any from Dundee.

2816. Do you think that should be kept up?—I think so. The party should be entitled to bring his case to the Supreme Court if it is of a certain value.

2817. *Mr. Webster.*—Would you keep it at £40, or would you raise it?—Perhaps it should be raised to £50.

2818. *Dr. Barclay.*—When an issue is prepared and goes to proof, would you still give a power to remove the case to the Court of Session?—I think so.

2819. Would it not be better to have a jury trial in your own court?—That might be regulated by the Court of Session; but I certainly think that, when an action is above a certain value, either party should be entitled to say, 'I insist on my case being tried in the Supreme Court.'

2820. *Mr. Webster.*—Would you apply that to cases where there has been no order for proof?—Where there has been no order for proof, perhaps the right course would be to take the Sheriff's judgment first.

2821. *The Chairman.*—What was the remedy you proposed with reference to parties bringing actions against their masters? One part of it seemed to be applicable to the case of a party not being entitled to recover more than a small amount?—Yes; that is, if he recovers only £20 in an action *ex contractu*, or £10 in an action *ex delicto*, unless the judge certifies on record that the case was fit to be tried in the Supreme Court, he should not be entitled to any costs of suit.

2822. There is a similar provision, is there not, in reference to a certain class of cases in the recent Scotch Act?—Yes.

2823. The other branch of your suggestion was as to remitting to the Sheriff where the defender makes oath that the pursuer is not able to pay costs?—Yes. I intended that to meet the case of what is well enough understood in the profession as speculative actions of damages.

2824. Is the fact of the pursuer not being able to pay the costs of the Court of Session suit a proof that it is a speculative action?—Undoubtedly there is great hardship from what now prevails, and the remedy which occurs to me is the one I have suggested. The party would get his case tried, and doubtless would get justice done, but before a less expensive judicature; or if the judge were of opinion that the case was fit to be tried before the Supreme Court, it would remain there.

2825. Would it depend on the oath of the defender that the pursuer was not able to pay the expenses, or would you make it still a matter of discretion for the judge in the Supreme Court?—I assume that the matter would have to be disposed of on motion in some way.

2826. How would the judge determine whether it was a fit case to be tried in the Supreme Court? What kind of investigation would be necessary to enable him to do that?—I should think he would first look at the question involved; and second, at whether the party would suffer any harm from the case not being tried in the Sheriff Court, if he had no means of paying.

2827. Suppose it is made patent to the judge that a man has sustained an injury in a coal-pit, and the question arises as to the validity of his claim against his master, how would the judge proceed there?—If, for instance, he saw that the injury was caused by a *collaborateur* or fellow-workman, he would have no difficulty with the case. He would say, This matter is pretty clearly against you, and to carry it on in the Court of Session would cost a large sum, and you have no means of paying; if you think there is anything in your case, you can go before the Sheriff.

2828. If it were apparent to the judge that there was an injury sustained through the fault of the *collaborateur*, would it not be better to take the case out of court?—Of course the judge has no power to try the case with nothing before him but a summons and the affidavit of the defender. I have known many cases of that kind where £50 or £60 has been paid whenever the summons was called, as the shortest way of getting rid of it. That is an evil, and the only way that occurs to me of meeting it is that which I have suggested. But God forbid that unnecessary obstacles should be placed in the avenues leading to courts of justice.

2829. The feeling among labourers at present is that the law leans rather hard against them. You are for making it a little harder?—They would practically have no cause to complain.

2830. Suppose the defender should swear that the pursuer is not able to pay the expense of a Sheriff Court proceeding?—I don't propose to interfere with him in that case.

2831. Have you any suggestion to make as to the Commissary Court?—Would you amalgamate it with the Sheriff Court?—Practically the distinction in Dundee is only in name. There is the same judge and the same clerk.

2832. He happens to be the same clerk?—Yes. I don't think there is any ground for any distinction.

2833. Is there a convenience in having the same clerk?—Most certainly there is.

2834. Are there Burgh Courts in Dundee?—So far as I am aware, the magistrates in Dundee don't exercise any civil jurisdiction.

2835. *Dr. Barclay.*—Are you aware that they did so at one time?—Yes.

2836. *The Chairman.*—Do the magistrates in Forfar exercise any civil jurisdiction?—Not that I am aware of. I think the only local courts are the Justice of Peace and the Sheriff Courts.

2837. Is there a Dean of Guild Court in Dundee?—Yes; but there is a controversy going on just now about his powers. I don't know how that matter stands.

2838. Do you think there is any practical advantage in keeping up the Dean of Guild?—I think all the powers exercised by the Dean of Guild might just as well be transferred to the Sheriff.

2839. There are not many cases before the Dean of Guild Court in Dundee?—I am not aware. At all events, the Dean of Guild has interfered with very little effect in Dundee, if one may judge from the structure of the streets.

2840. Are there any Barony or Regality Courts in Forfarshire?—Kirriemuir is a burgh of barony, I think. I think it holds under Lord Airlie.

2841. You don't know whether there is a baron bailie, or whether they have adopted the Police Act?—There is a baron bailie, I think; but all the populous towns in Forfarshire, such as Broughty Ferry, which are of recent creation, have their affairs managed by a magistrate appointed under the Police Act of 1862. They have no civil jurisdiction.

2842. Is there any civil jurisdiction exercised by the magistrates of Montrose, Arbroath, or Brechin?—Not that I am aware of. I think there was a case in the Supreme Court lately from Brechin. I rather think that in Brechin they have always exercised civil jurisdiction. It is an ancient cathedral city.

2843. But Justices of the Peace exercise civil jurisdiction in Forfarshire?—In Dundee the Justice of Peace Court does a large business, I believe.

2844. *Mr. Baxter.*—They have a good assessor?—They have an able assessor—Mr. David Small; and I believe justice there is very satisfactorily administered.

2845. *Dr. Barclay.*—Then the assessor is a judge?—In effect he is.

2846. *Mr. Murray.*—Who appoints him?—I am not aware.

2847. *Mr. Webster.*—Is that a jurisdiction which you would continue over the country?—I think they might as well go to the Sheriff Small Debt Court.

2848. *Mr. Baxter.*—The assessor is the judge?—The Justices have very little to do with it.

2849. *The Chairman.*—Do they exercise any criminal jurisdiction?—No, I think not; but I never sat as a Justice of Peace, except under the Revenue statutes.

2850. There is jurisdiction exercised by Justices in revenue matters?—Yes.

2851. *Mr. Harrison.*—Do you know how the comparative expense stands as between the Justice of Peace Court and the Small Debt Sheriff Court?—I don't know the particulars, but there can only be a shilling or two of difference. The Justice of Peace Court is cheaper, if anything, to the pursuer. *J. Guthrie Smith.*

2852. *Mr. Murray.*—The judge is both judge and clerk?—Yes.

THURSDAY, 24TH DECEMBER 1868.

Members Present:—

LORD COLONSAY.
E. S. GORDON, Esq., Q.C.
A. R. CLARK, Esq.
DR. BARCLAY.
JAMES CAMPBELL, Esq.
GEORGE HARRISON, Esq.
JAMES ADAM, Esq.
A. B. SHAND, Esq.
CHARLES MORTON, Esq.
JAMES WEBSTER, Esq.
J. B. BAXTER, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

PETER MORISON, Esq., examined. *Peter Morison.*

2853. *The Chairman.*—You are secretary to the Scottish Trade Protection Society?—Yes.

2854. How long have you been so?—Between five and six years.

2855. What are your duties as secretary?—I attend to the department for the recovery of debt. That is my principal work.

2856. What do you mean by attending to the department?—There is a large number of claims sent to us for collection every year. For example, in 1867, there were 5850 claims lodged for collection, the amount of which was £36,784, 19s. 3d. My work chiefly is to attend to the collection of these claims.

2857. In doing so, do you employ any practitioner to conduct the cases?—Cases that are in the country we send to solicitors throughout the country; cases above £12 in town we send to a solicitor in town; those below £12 we cannot get a solicitor to take up, and we are obliged to take them ourselves.

2858. How do you take them yourselves?—We take them in the Small Debt Court.

2859. Who conducts them in the Small Debt Court?—I do.

2860. *Dr. Barclay.*—In the country too?—No.

2861. *The Chairman.*—You appear in court, make the claim, and act as the pursuer of the action?—Yes.

2862. Have you any special authority from the party to do so?—I have a mandate invariably.

2863. Are these prosecutions conducted at the expense of the parties, or at the expense of the Society?—At the expense of the parties, so far as the outlay is concerned; the cost of the summons, the officer's fees, and the cost of the execution.

2864. And as regards the charges of professional men employed?—They get their fees.

2865. From whom?—From the members.

2866. From the society?—No, from the individual members.

2867. Do you mean the individual who is claiming?—Yes.

2868. Then the individuals pay that the same as the outlay?—That is between the agent and the member. The claim passes entirely out of our hands when it is sent to an agent.

2869. *Mr. Campbell.*—In the Small Debt Court the kind of professional assistance required is furnished gratuitously by the society to its members?—Yes.

2870. *The Chairman.*—It is part of your duty as secretary to appear, and you are remunerated by the society?—Yes, by a salary.

2871. You have stated the number of claims, and the amount of the sums involved in them; can you distinguish those above and under £12?—We make up the numbers every year, and I have here the numbers for 1866 and 1867. In 1867 the claims not exceeding £1 were 980; above £1 and not exceeding £2, 1028; above £2, and not exceeding £5, 1711; above £5, and not exceeding £8, 6s. 8d., 808; above £8, 6s. 8d. and not exceeding £12, 471; above £12 and not exceeding £25, 563; above £25, 289.

2872. *Dr. Barclay.*—You make no division beyond £25?—No.

2873. *Mr. Clark.*—What was the largest sum involved in one claim above £25?—I had one last year of £600. That is the largest I recollect. It was for machinery, and the debtor resided in England.

2874. *Dr. Barclay.*—Do you take in any claim?—Any claim from a member.

2875. *The Chairman.*—In such a claim as that for £600 against a debtor in England, what did you do?—We sent it to a solicitor in London.

2876. Of your own selection?—Yes.

2877. Did you intimate to the party that you had done so?—They knew our solicitors, and granted a mandate in their favour. We print a list of our solicitors.

2878. After that you had no more to do with the matter?—He collected the money, and remitted it to us.

2879. Did the solicitor communicate with you or with the party?—With me.

2880. *Mr. Baxter.*—Do you take in claims from all Scotland?—We take in claims from no one except he be a member of the society, but we have members in England, Scotland, and Ireland.

2881. *Dr. Barclay.*—And you recover claims in any part of the three kingdoms?—If the claimant be a member of the society.

2882. *Mr. Shand.*—Of what class are the members composed?—Merchants.

2883. Shopkeepers?—And shopkeepers.

2884. How many members have you?—About 1300.

2885. *Mr. Harrison.*—Does that include any bankers?—Yes; all the banks in town, I believe, are members.

2886. *Dr. Barclay.*—Any one may become a member, I suppose; you have no qualification?—No, except that he must be passed by the directors.

2887. *Mr. Harrison.*—And must be recommended by members?—Yes; he must be proposed and seconded, and passed by the directors.

2888. *Dr. Barclay.*—What is the annual fee and the entry-money?—There is no entry-money. The annual fee is one guinea.

Peter Morison.

2889. Failing to pay that, a party will be struck off the roll of membership?—Yes.

2890. *Mr. Webster.*—Can you state how many of the actions you have mentioned were defended, and how many undefended?—The whole of these were not prosecuted. The number prosecuted in 1867 was 1679.

2891. *Mr. Clark.*—What do you mean by prosecuted?—Actions raised.

2892. *Dr. Barclay.*—You send a circular first?—Yes.

2893. And that frequently brings payment?—By circular, without anything else, we recovered £8699, 13s. 8d., of the £36,000 odds.

2894. *Mr. Clark.*—By prosecuted do you mean the number of decrees obtained, or the number of summonses issued?—Summonses issued.

2895. How many decrees were obtained?—I cannot tell that. We generally obtain decrees in all the cases.

2896. *Mr. Webster.*—Are they generally defended or undefended?—Generally undefended; most of them undefended.

2897. *Dr. Barclay.*—Do you go to the Justice of Peace Court with the sums below £5?—I do; with some of them.

2898. Do you make it a rule that all below £5 you go to the Justice of Peace Court with?—Yes.

2899. Would you state your opinion of the comparative merits of the Sheriff's and the Justices' jurisdiction in cases below £5?—I would prefer the Sheriff Court if I suspected that the case was to be defended; but as most of our cases are undefended, and the means of recovery provided through the Justice of Peace Court are more summary, we recover the debt much more effectually by going there.

2900. How are you aware whether it is to be defended or not?—We generally know from the case. When we write to the debtor, he makes an excuse, or says he has a defence.

2901. Have you had many defended cases in the Justice of Peace Court?—Probably one or two in each weekly court out of 10 or 11 cases.

2902. In those cases which are defended, are you pleased with the adjudication of them?—I am generally pleased with the decision.

2903. Is the decision generally given by the assessor or by the Justices?—It is nominally of course given by the Justices, but the assessor does the principal part of the work.

2904. *The Chairman.*—Are the decisions generally in your favour?—Generally.

2905. And you are pleased with them?—Yes.

2906. *Dr. Barclay.*—You say the mode of execution is more summary; is the charge shorter?—No; the charge is the same.

2907. Then how is it more summary?—It was not altogether from choice that we went to the Justice of Peace Court; but some time ago the Sheriff issued an order that no one was to be allowed to practise in the Small Debt Court except procurators of court, who are a very small body. We applied to our solicitors, who are procurators before the Sheriff Court, and offered them a fee of five shillings, in addition to a small commission on each case, if they would take these small debt cases; but they would not take them upon any terms. We could not expect parties at a distance—in Aberdeen, Inverness, Glasgow, Dublin, or London—to come and attend personally at the Small Debt Court; and therefore we were forced to go into the Justice of Peace Court. The more summary remedy consists in this: when an officer goes to execute a poinding on a Sheriff small debt decree, he takes an inventory of the effects which he poinds, and leaves a schedule with the person in the house; the Justice of Peace officer seizes and carries off the effects at the time. That is the advantage.

2908. It is somewhat like the English distress?—Yes. There is a great number of what may be called fraudulent debtors, who have the means to pay, but who will not pay, and resort to all sorts of subterfuges to avoid paying. They are taken unawares by the Justice of Peace officer carrying off at once. But my opinion is that this summary power ought to be abolished. It is frequently used most oppressively. I know that it is abused, and I think it should be taken away. But I would not have it taken away unless some remedy was provided to meet the case of the class of debtors to whom I allude,—a remedy something like what exists in the English County Courts. If a judgment be granted against a debtor in England, and he does not pay, a judgment summons is issued requiring the debtor to appear before the judge; he is then examined as to the circumstances under which the debt was contracted, and his means of payment. The judge, if satisfied that he has the means of paying, but from some cause or other does not pay, makes a peremptory order on him to pay by instalments, or commits him to prison if he is satisfied that he has behaved in a fraudulent manner. I think we ought to have something like that in Scotland; if we had, I think the Justice of Peace method ought to be abolished.

2909. Are you aware that that system has been very much complained of in England, as being tyrannically used?—I would say that is the fault of the judge; as a general rule, I should say the judge ought to see what is right.

2910. You mentioned that the Justices allow you to appear, and the Sheriff does not?—I believe that the order of the Sheriff was practically found not to work.

2911. Is the Justice of Peace Act not more stringent in that respect than the Sheriff Court Act, the former being that a party may appear by himself, his wife, or one of his family, or by a clerk, while the latter says by a procurator or by any one the Sheriff may authorize to appear?—Yes.

2912. *Mr. Campbell.*—The terms of the order issued by Sheriff Davidson are, that a person might appear himself, or by any member of his family, or by any person employed by him ordinarily in the course of his usual business, but that no law-agent or person practising as a law agent should appear, unless he were a procurator of the court. Is not that so?—Yes.

2913. And gradually the older practice has begun to prevail again, and there is no obstruction placed in the way of competent and respectable persons appearing, though they be not procurators of court?—I believe that is the practice of one of the Sheriff-substitutes, but I am told that one of them is inclined rigidly to adhere to the order.

2914. *The Chairman.*—You have stated your reasons for going to the Justice of Peace Court in preference?—Yes.

2915. *Mr. Harrison.*—You stated that the decision in the Justice of Peace Court is to a great extent influenced by the clerk of court; do you think there is any beneficial influence exercised by the presence of the Justices?—Oh yes.

2916. Of what nature?—The Justices are generally gentlemen of position and humanity; and certainly they have much reason for the exercise of their humanity in that court, because many of the cases that come before them are most distressing, from the wretched squalor of the poor people who are prosecuted; and the Justices very often mitigate the rigour of the law to a very great extent.

2917. *Dr. Barclay.*—Have you ever seen any diversity of opinion between the bench and the assessor?—I have.

2918. *Mr. Morton.*—When the Justice of Peace officer carries off the goods, as you have mentioned, when and how are they sold?—He sells them at the market cross next day; and the expense of carrying through a sale on a Justice of Peace decree much exceeds the expense of carrying through a sale on a Sheriff Court decree. It nearly amounts to the expense of a sale under the Debts Recovery Act.

2919. *Mr. Shand.*—Would you not characterize that as a harsh proceeding?—I do.

2920. But yet you resort to it?—I am forced into it.

2921. *Dr. Barclay.*—But for that, you would prefer the Sheriff Court?—Yes.

2922. *Mr. Shand.*—You are forced into it by the necessity of having a procurator in the court?—That does not now exist.

2923. *The Chairman.*—In the case of fraudulent debtors, they can more easily put away their goods before you get at them?—Yes.

2924. That is the objection you have to going before the Sheriff?—Yes.

2925. If there was any mode devised by which that could be prevented, and that mode substituted for this very summary seizing of the goods, you would prefer it?—Yes. There is another respect in which that summary mode is used, and it is this: The Justice of Peace officer goes to these poor people; they have nothing to satisfy the debt, but he says, 'Give me 5s. or 10s. to cover expenses, and I will give you delay.' And he goes back perhaps in a week and repeats the thing, and the money he gets is not attributed to the debt, but goes into the officer's pocket.

2926. The Justices have a power of directing the debt to be paid by instalments, or interposing to produce an arrangement to that effect?—Yes.

2927. That is a matter of discretion very much with them?—Yes.

2928. You think that the bench of Justices is beneficial as regards the exercise of that discretion?—I do.

2929. And other humane views?—Yes; but the Sheriff has the same power.

2930. *Mr. Clark.*—I suppose the practice of the officer giving delay for 5s. or 10s. is a clandestine practice?—It is.

2931. Does it prevail to any extent?—It does not so much prevail here as in Glasgow, I understand; and it does not now prevail so largely as it did about six years ago. It prevailed to a great extent then; but I understand that the clerk of the Justice of Peace Court is doing as much as he can to put it down. Still it cannot be wholly put down, from the nature of the case.

2932. *The Chairman.*—Does it consist with your knowledge whether in the recovery of debts in other towns, such as Glasgow, Dundee, and Aberdeen, your cases are brought before the Justices or before the Sheriff?—Generally before the Sheriff.

2933. *Mr. Campbell.*—Does the existence of the lock-hole execution add materially to the hardship of the summary mode of levy you have spoken of?—Very much.

2934. A respectable working man against whom there is a lock-hole execution, being absent from home in the ordinary hours of business, may never know that any proceeding has been taken against him till his goods are seized for the debt?—I knew a gentleman to whom that happened. He was in a respectable position, but his wife drank, and she contracted a debt. The first notice he got of it was when he came home from his work one day, he found his effects had been sold.

2935. *Dr. Barclay.*—If it had been in the Sheriff Court, above £8, 6s. 8d., his first notice of it might have been putting him in prison?—Yes.

2936. Is it not the case that in the Justice of Peace Court, if a defender appears, he has to table 6d. before he opens his mouth?—Yes.

2937. And for every witness 4d.?—Yes.

2938. And oath of party 1s.?—Yes.

2939. Do you think these are good regulations?—I think they are very bad.

2940. That is not so in the Sheriff Court?—No; and the greatest number of appearances are to crave time; but before the debtor can say, 'I am very poor—I am not able to pay the debt,' he must lay down 6d.

2941. *Mr. Gordon.*—Who gets the 6d.?—The clerk.

2942. *Dr. Barclay.*—Is it not another hardship in the Justice of Peace Court, that if a defender has not appeared, and a lock-hole citation has been left for him, he must consign the whole debt before he can be reponed?—Yes, and expenses.

2943. And when he comes he pleads poverty?—Yes.

2944. In the Sheriff Court he has only to pay a small sum?—Yes. He consigns the expenses, and 10s. to meet expenses.

2945. Do you consider it a hardship that he should have to consign the whole debt?—I do.

2946. *Mr. Webster.*—You have said that you invariably send a circular claiming payment of a debt before raising a summons?—Yes; we send two circulars.

2947. In these do you demand any sum for costs of the application?—No.

2948. *The Chairman.*—Do you give a time for payment?—Four days in the first circular, and four days in the second.

2949. *Mr. Baxter.*—Do you ever send circulars after you get a decree in the Justice of Peace Court?—Yes, we invariably do that.

2950. *The Chairman.*—Before proceeding to execution?—Yes.

2951. *Mr. Webster.*—Could you give us the cost of a sale of effects under a Justice of Peace Court decree?—The average cost of a sale after judgment under a Justice of Peace warrant is from 16s. to £1.

2952. *The Chairman.*—Is that affected by the amount?—No.

2953. *Dr. Barclay.*—What is the expense of a sale under a Sheriff's warrant?—9s. 6d.; but the other is often above £1. There is a charge for storage, porterage, and other extras.

2954. *Mr. Baxter.*—In the Sheriff Court do you give a charge on the decree?—That depends on the warrant. If the warrant says there is to be a charge, we do so. We must follow the warrant.

2955. *Dr. Barclay.*—It depends on whether the person has been personally present?—Yes; I think a charge ought to be given in all cases.

2956. *Mr. Baxter.*—If he is not present, you give a charge?—Yes.

2957. *Mr. Shand.*—But you think that even where the party is present a charge ought not to be given?—Yes. It is often necessary for cutting down a preference. I have known a small debt decree for the same sum, and the one creditor could cut down the preference of the other, who could not retaliate, because a charge was necessary on the one decree and not on the other. In fact, in the former the debtor sent an agent to defend the action, while in the latter he appeared and admitted the debt.

2958. *Dr. Barclay.*—Are you aware that in some courts it is considered that if a person is present a charge is not required; but if he appears by proxy a charge is necessary, because the proxy may have simulated authority that he had not?—In the principal counties in Scotland the practice is, that unless the defender appears personally, a charge is necessary.

2959. Do you think that the proper mode?—I think that is the carrying out of the Act; but I know that in some of the smaller counties they act on a different principle.

2960. *Mr. Campbell.*—In regard to the original expense of taking out the claim and serving it, are the charges in the two courts identical?—They are not. In the Justice of Peace Court there is about 1s. less to begin with, but it increases very much before the conclusion by the additional expenses.

2961. *Dr. Barclay.*—In the Sheriff Court the fees are all at the beginning and the end?—Yes.

2962. *The Chairman.*—There has been an Act passed lately for the recovery of certain debts. Have you availed yourself much of that Act?—Yes, very much. We find it very useful.

2963. You have now had a year's experience of it?—Yes.

2964. Can you tell us how many actions you have had under that Act?—No.

2965. *Mr. Harrison.*—Can you supply us with the information?—Next month I will make up the return for 1868, and I shall then have the numbers for the whole year.

2966. *Dr. Barclay.*—You did not make up a return for the three months in which the Act was in operation in 1867?—No.

2967. *Mr. Campbell.*—Will you hand in that return to the Commission?—I will hand it in when it is ready.

2968. *Dr. Barclay.*—Can you give us also the three months of 1867?—I believe I can.

2969. *Mr. Shand.*—By whom are these cases con-

Peter Morison.

ducted?—If they are in the country, they are conducted by solicitors in the country; if in town, they are conducted by our solicitors in town.

2970. *Dr. Barclay.*—Do they hold a mandate from the individual creditors?—They do.

2971. When you appear in these cases, is the mandate in your favour or in favour of the society?—It is in my favour.

2972. *Nominatim*?—Yes.

2973. *Mr. Baxter.*—Do you appoint the solicitors in the country?—We do.

2974. *The Chairman.*—In making the return which you are to make, can you distinguish between defended and undefended causes?—No, not without a great amount of correspondence.

2975. Can you give the average amount of the claims, and the greatest and smallest claims?—We can.

2976. Can you give the average amount, and the greatest and smallest amount of the sums decerned for?—No.

2977. Can you tell how many cases have been decided in favour of the defenders?—Yes; but I am not aware of one. I think there have been none.

2978. Have there been many defended cases?—Of course, if they came through our Edinburgh solicitors, I would not know about them. I would know the country ones, but I would not know these.

2979. When you say there were no cases decided in favour of the defender that you recollect, does that answer apply to country cases as well as Edinburgh cases?—It does not apply to Edinburgh at all; it only applies to country cases.

2980. You can distinguish the number of Edinburgh cases from the number of cases in the country?—Yes.

2981. *Mr. Harrison.*—Have you any recollection as to the proportion of undefended cases under the Debts Recovery Act?—I cannot tell the defended from the undefended.

2982. *The Chairman.*—Your Edinburgh solicitor can tell us as regards Edinburgh?—I can get it as regards Edinburgh quite easily.

2983. You correspond with one solicitor in Glasgow?—Yes.

2984. One solicitor in Dundee?—Yes.

2985. And one in Aberdeen?—Yes.

2986. And one in Perth?—Yes.

2987. If you were to take four or five of the principal towns, you might be able to obtain that information for us?—I shall do so.

2988. Have any defects in the Debts Recovery Act presented themselves to your mind?—I think it is too limited in its scope.

2989. Do you mean that it ought to embrace a greater variety of classes of cases?—I do; and there are some technical defects in it.

2990. What are the classes of cases which you think it material that it should embrace, which are not embraced in it now?—For example, a bill. If the six months allowed for summary diligence have expired, it is not competent to sue under the Debts Recovery Act for the amount of the bill. I believe it has been so decided. Then there are actions of freight and carriage, which I believe are not competent, although I have not so much experience in that class of actions. But they ought to be embraced under the debts recovery form.

2991. *Mr. Baxter.*—Would you make exceptions of any class of cases?—No, if the Sheriff had power to remit them to the ordinary roll, as he now has.

2992. *The Chairman.*—You would include all cases that resolve themselves into claims of debt from any cause?—Yes. In fact, I would say, let all actions of debt be first brought in the manner provided in the Small Debt Court; if they are undefended, let the mode of execution provided by the Small Debt Court be applied, because there is no difference between recovering a debt whether the amount is £5, £20, or £100, if it is not disputed. If the debt be disputed, then let the judge inquire and see if it is capable of being disposed of in the summary manner provided either by the Small Debt Act or the Debts Recovery Act; and if he is satisfied that it is not so, let him remit it to the ordinary roll.

2993. *Dr. Barclay.*—Then you would not even limit the amount in that respect?—I would not, unless there was appearance entered to defend the action, and then I would remit it to the ordinary roll.

2994. Originally you would make no distinction of class of cases?—No; but there would require to be one provision made as to that—viz., when a poinding is ordered, the summary mode of carrying through a sale under a small debt poinding is perhaps not just if the amount of the inventory be large. In this case I would say there would require to be more publication, so as to ensure competition at a sale; but with that proviso I would say, let all actions of debt commence in the manner of small debt actions. If they are undefended, let them pass into the Small Debt Court; and if they are defended, remit them to the ordinary roll where the sum exceeds £50.

2995. *The Chairman.*—No matter what the amount of the claims?—No.

2996. *Dr. Barclay.*—Or the kind of debt?—Or the kind of debt.

2997. Is it not a defect in that Act, that there is no power to use inhibition, but merely arrestment?—It is.

2998. Would you give that power?—Certainly.

2999. *Mr. Clark.*—Do you mean by debt any claim which resolved itself into money?—Not exactly.

3000. Or are you using debt in the strict sense of the word?—I am.

3001. *Dr. Barclay.*—Would you exclude damages?—I would, in talking of the actions of debt; but I would not exclude the raising of actions of damages.

3002. *Mr. Clark.*—Then, whenever there is a money claim, of whatever amount, and from whatever consideration arising, you would begin with a summons in the form of a small debt summons?—Yes.

3003. Do you think that would be a convenient course?—I do.

3004. Whatever the character of the claim, if it was a money claim?—Yes.

3005. A claim for aliment?—Yes.

3006. In short, every money claim?—Yes.

3007. *Dr. Barclay.*—Arising from any cause?—Yes.

3008. Damages and *solatium*?—Yes; but the mode of citation would require to be amended. It would not do to have lock-hole citations.

3009. Have you any suggestion to make as to what could be put in the place of lock-hole citations?—In England it is required that the claims be served personally or by notice. A person goes to the house of the defendant; and if he is not to be found, he gives notice that he will call on a certain day, at a certain hour, in order to serve the summons.

3010. Suppose there is nobody in, to whom does he give the notice?—Well, there could be no action.

3011. *Mr. Baxter.*—In the case of the lock-hole citation, there is nobody in?—I would say there should no decree pass against the person.

3012. *The Chairman.*—You would abolish lock-hole citations?—Yes.

3013. How would you proceed in order to entitle yourself to obtain a decree against a party who kept out of the way and locked up his house?—There is a hardship in all cases, but of two evils I would choose the least; and I think there would be less hardship in preventing a person from getting a decree than in retaining these citations.

3014. *Mr. Gordon.*—Could it not be effected in this way, that the pursuer, not being able to make personal service, should apply to the court for leave to serve the summons in such a way as the court might appoint?—Yes.

3015. By a substituted service, which could be made according to the circumstances of each case?—That would get over the difficulty, and I think the judge might be entrusted with that power.

3016. *Dr. Barclay.*—Would not advertisement in a local paper be a very good mode?—That might be invidious.

3017. *The Chairman.*—You think it would be safe to leave it in the discretion of the judge in each case?—I do.

3018. Advertisement in a local paper might be a good mode in some cases; it might not be proper or it might not produce any result in other cases?—It might not.

3019. I might not come to the knowledge of the party?—And it might unnecessarily expose him.

3020. *Mr. Clark.*—Your view is to commence all money actions in the form given in the Debts Recovery Act?—Yes, or the Small Debt Act.

3021. With a power to the Sheriff to remit all cases to the ordinary roll. At what stage of the case is the Sheriff to exercise that power?—At the calling.

3022. Is there to be any record made up, if he remits to the ordinary roll?—When he remits the cause to the ordinary roll, it is proceeded with in the same manner as ordinary court causes are proceeded with.

3023. If he remits under the Debts Recovery Act a case to the ordinary roll, you don't make up a record in the manner prescribed by that Act?—No.

3024. But you make up a record in the manner prescribed by the Sheriff Court Act?—It depends very much on the stage at which the Sheriff remits.

3025. *Dr. Barclay.*—Have you ever had in your experience a remit under the Debts Recovery Act to the ordinary roll?—I do not know.

3026. Would it be incumbent on the Sheriff in that case to make up a record by condescendence and answers?—If the parties ask it, he would be bound to do so.

3027. If it is by the short defence, the mode of making up the record under the Debts Recovery Act is preferable to that under the Act of 1853?—I would prefer it.

3028. *Mr. Clark.*—You would like the Sheriff to make up the record for you?—Yes.

3029. You think it would be convenient that in all money claims the Sheriff should make up the record between the parties?—Yes.

3030. *Mr. Gordon.*—But there might be cases so complicated as to require to be prepared in the ordinary way?—Yes.

3031. And therefore this provision is a sort of safety-valve to admit of these cases being sent to the ordinary roll?—Yes.

3032. It also allows a plea in compensation to be stated, which could not be done probably under the limited scope of the Debts Recovery Act?—Yes. I understand that the first duty of the Sheriff just now in debts recovery cases, is to inquire whether the action is one that should be treated in the summary way provided by the Debts Recovery Act. If it be clear to him that it is so, he disposes of it in that manner; if it is not clear to him, he is bound to remit it to the ordinary roll.

3033. *Mr. Baxter.*—You think that all actions should be brought in the form of a summons under the Small Debt Act?—Yes.

3034. Suppose appearance is made, and that the claim is between £12 and £50, do you think that the case should be proceeded with under the Debts Recovery Act?—No, under the form provided by the Small Debt Act.

3035. Would you supersede the Debts Recovery Act altogether?—No.

3036. What cases would you proceed with under it?—The mode of trying a cause under the Debts Recovery Act is virtually the same as under the Small Debt Act, except that there is a written record where the parties require it.

3037. Then you would proceed under that Act in cases between £12 and £50?—Yes.

3038. *Mr. Clark.*—To any amount?—Yes.

3039. *Mr. Baxter.*—Cases above £50 would go to the ordinary roll?—No.

3040. *Mr. Clark.*—Unless the Sheriff thought proper to remit them to the ordinary roll?—Yes, unless the parties consented.

3041. Would you leave it exclusively to the Sheriff to determine whether the case, however large the sum was, should or should not go to the ordinary roll?—Yes.

3042. So that the pursuer might select that court for a claim of any amount, contrary to the wish of the defender, if the Sheriff thought proper to transfer it?—Yes.

3043. Does that not seem to you to give rather too much power to the Sheriff?—I don't think so. I think we might trust the Sheriff with that power.

3044. Would there be no hardship in being bound to submit in such a matter to the decision of the Sheriff?—The party has an appeal against the decision of the Sheriff, under the Debts Recovery Act.

3045. Would you allow him to remove the case to the Court of Session if he thought proper, or must he submit in the first instance to the judgment of the Sheriff?—I would say he should submit to the judgment of the Sheriff.

3046. So that you give the pursuer the right of carrying on his case before the Sheriff Court, however great the amount involved, and you force the defender to submit to that selection of a court by the pursuer?—The pursuer has that power already. He can do it in the ordinary Sheriff Court.

3047. Are you aware that a defender can remove the case from the Sheriff Court to the Court of Session at his own option, whenever an order for proof is made?—Yes; but it is never done in practice.

3048. Are you not aware of such a thing as an advocation with a view to jury trial?—I never knew of it.

3049. *Mr. Campbell.*—You think that actions of any amount ought to be brought in the small debt form, and that the Sheriff might in his discretion proceed as under the Small Debt Act. Supposing he did so, how could any available appeal be taken from his judgment if there is neither a record of pleas nor of the evidence?—At present, under the Debts Recovery Act, the Sheriff, if parties require it, must make a note of the pleas, and he is bound to take the proof down; and there is an appeal to the Sheriff-principal and to the Court of Session. I would have all that, certainly.

3050. Then I understand it is only in cases under £12 that the summary mode of hearing parties and taking proof, and disposing of the case without record, should be followed?—I would say let that be done up to £50.

3051. *Mr. Clark.*—Suppose an action for a very large sum is brought in the Sheriff Court, you think the Sheriff should have power to dispose of it in the manner provided by the Debts Recovery Act?—If both parties are agreeable.

3052. That was not what you said before?—Well, that is really what I mean. I would allow the pursuer to bring his action in the small debt form: if it is undefended, he would get decree at once; if it is defended, and if the amount exceeds £50, I would allow the parties the option of taking the Sheriff's decision, and let it be final if they stated at the beginning that they agreed to that.

3053. *Mr. Baxter.*—Under the Small Debt Act?—Yes; but if it is beyond £50, I would certainly say the Sheriff must remit it to the ordinary roll.

3054. *Mr. Clark.*—That the Sheriff must do so?—Yes, unless the parties expressly said that they did not want that done.

3055. He must remit it to the ordinary roll on the motion of the defender?—On the motion of either party.

3056. You would exclude the defender from removing the case to the Court of Session?—No.

3057. Suppose the defender desired to have the proof taken and judgment pronounced by the Court of Session, would you give him the right of removing the case from the Sheriff Court to the Court of Session for that purpose?—I would allow that only with the leave of the Sheriff; I mean above £50.

3058. Above £50 the Sheriff should have the power to give leave to have the case removed to the Court of Session?—Yes.

3059. But without leave, would you permit it?—No.

3060. Whatever the amount of the claim, unless the Sheriff gives that leave, the record must be made up,

Peter Morison.

the evidence taken, and the case in the first instance disposed of by the Sheriff?—Yes.

3061. *Dr. Barclay.*—That would involve a repeal of the present law, which gives a right to either party to remove a case above £40 for jury trial to the Court of Session?—I don't think parties are very much pleased with jury trials.

3062. *Mr. Clark.*—But I suppose you are aware that, although a case may be removed for jury trial, it does not follow that it will be disposed of in that way?—I am.

3063. *Mr. Campbell.*—Do you know whether there are many appeals from the Sheriff-substitute to the Sheriff under the Debts Recovery Act?—I am not aware.

3064. *Dr. Barclay.*—On the first calling of a case under the Debts Recovery Act, when the parties are agreed on the facts, and the question is a pure question of law, do you think the Sheriff can adjourn the case to a future day?—Yes.

3065. Is it not only where a proof is allowed?—No.

3066. Why should it be continued to another day, if it is a pure question of law?—It gives the parties more time to consider the case.

3067. Is the claim in a schedule annexed?—Yes, an account.

3068. Is there anything in the Act which implies that it must be on the same paper?—No.

3069. Don't you think that a defect?—No.

3070. Is it not possible that it may be withdrawn, and another one substituted?—That may be prevented by putting markings on it.

3071. *Mr. Gordon.*—Does the Sheriff-clerk not mark productions?—He should do so.

3072. *Mr. Webster.*—Are the accounts not sometimes very long, extending to a great many pages?—Yes.

3073. *Dr. Barclay.*—Have you had any experience of counter claims being set up?—I think counter claims ought to be competently set up under the Debts Recovery form, whatever their nature may be.

3074. In the Small Debt Act they require service the day before?—Yes.

3075. In the Debts Recovery Act they require no service?—No.

3076. Is that not a defect?—Yes, I think there should be service, but the defender should be allowed to plead any sort of compensation as a bar to the action.

3077. Without notice?—No, with notice. At present, unless the counter claim is of the same nature, he cannot plead it.

3078. He cannot compensate by a bill?—No.

3079. Is that not a great defect?—It is.

3080. *Mr. Clark.*—If a person raises an action for a debt, do you think he should be entitled to state a counter claim in respect of damages?—Yes.

3081. Then if a party raises an action for a debt of £50, the defender may say, 'It is not due, because you assaulted me, and you are owing me £50 of damages?'—But the judge might say he was not bound to wait till the defender established his counter claim of damages. That is an illiquid claim.

3082. Suppose neither are liquid,—suppose a man brings an action on a claim for £50, and the defender says, 1*st*, It is not due; and 2*d*, If it is due, you owe me £50; the Sheriff has to inquire whether the debt is due, and then into the counter claim?—Yes, but notice should be given to the pursuer that the counter claim is to be pleaded.

3083. In short, the counter claim may be just whatever the defender could include in a separate summons, and the two cases are to be tried?—Yes.

3084. Do you think that would be convenient?—I do.

3085. And that the public would like it?—Yes.

3086. *Mr. Shand.*—I suppose you don't intend to interfere with the judgment of the Sheriff as to what classes of claims might competently be compensated by other claims?—No; that is a point of law.

3087. *Mr. Clark.*—How is it a point of law? If you admit a defender by statute to state a counter claim, upon whatever ground, he has a right to state it, and the Sheriff must inquire into it?—I don't contemplate a new statute in order to admit counter claims; I would rather contemplate the abolition of the clause which prevents counter claims being stated.

3088. *The Chairman.*—But that is a new statute?—It is not a positive enactment to admit counter claims. It is rather the withdrawal of a prohibition.

3089. *Mr. Clark.*—Then all you mean is this: that under the Debts Recovery Act the defender should be allowed to state such pleas of compensation as may be competently stated at present?—That is all.

3090. *Mr. Webster.*—How would you ascertain whether the counter claim had been rejected as unfounded, or had been rejected as incompetent?—The interlocutor rejecting it would specify that.

3091. *The Chairman.*—Would you allow an appeal against the rejection of a counter claim?—No.

3092. Neither upon law nor fact?—No. The party could easily bring a new action. He need not plead his counter claim unless he chose.

3093. Then you would not hold the judgment final?—If the claim was not admitted, the judgment would not be final. The party bringing forward the counter claim could bring it up in the form of an action.

3094. If it was rejected upon the facts?—If it was rejected upon the merits, it would be final.

3095. *Mr. Clark.*—Is it so, that under the Debts Recovery Act a plea of compensation cannot be stated?—Yes, it is restricted; you could not plead a bill or a bond against an account.

3096. *The Chairman.*—Have you any other objection to the Debts Recovery Act?—In regard to sequestrations for rent under that Act, I believe if the effects have been removed from the premises, it is not competent to sequestrate in the summary manner provided by the Debts Recovery Act.

3097. *Mr. Baxter.*—That is in the Small Debt Act?—Yes, and also in the Debts Recovery Act. The schedules are both the same.

3098. They both apply to goods upon the premises?—Yes. Now, because a tenant has fraudulently removed his effects, I don't think that is any reason why the pursuer should be obliged to go into the ordinary court. I think that is one of the cases that should come under the Debts Recovery Act, and the Small Debt Act, within their respective jurisdictions.

3099. *Dr. Barclay.*—Is that power to bring back the articles to be sequestrated on the premises, or to sequestrate them elsewhere?—To sequestrate them where they are found—to make an inventory of them. The officer merely makes an inventory of the articles found.

3100. *The Chairman.*—Would that be upon an allegation of fraudulent removal, or how would it come out?—It would come out upon an allegation of rent due.

3101. But suppose the goods had been removed by a transaction?—It would give the parties the same power as they have in the ordinary court.

3102. Then you don't limit it to fraudulent removals?—I would not limit it. It should be wherever the goods had been removed, from whatever cause.

3103. *Dr. Barclay.*—Then would you not give intimation to the person into whose custody the goods have come by sale, or to a new landlord?—The officer must leave a schedule with the person in whose custody the goods are.

3104. *Mr. Webster.*—Would you give notice to the proprietor of the house to which the goods had been removed?—He does not get notice at present. You might give him notice; but he would have the same remedies that he now has.

3105. *Mr. Gordon.*—What you want is an extension of the law of hypothec, to make it apply to goods which have been removed from the premises?—I don't wish an extension of the law of hypothec. I only wish an extension of summary process of making hypothecs effectual, so long as hypothec exists; but I would be very glad to see the right of hypothec abolished.

3106. *Mr. Campbell.*—You cannot sequestrate *currente termino* for rents between £12 and £50 in the Debts Recovery Court?—No.

3107. Do you think that has been an accidental omission?—Yes. And I think there has been a mistake in the framing of the clause applicable to multiplepoindings under that Act; because not only must the fund *in medio* be of the same nature, but the claims upon the fund must be of the same nature as what is set forth in the second section of the statute.

3108. *Dr. Barclay.*—You would extend the Act to all claims falling under your general category?—Yes.

3109. *Mr. Clark.*—Your view is, that all cases, whatever the amount, if they are money claims, should begin in the Debts Recovery Act form?—Yes.

3110. And that the exceptions shall be those which the Sheriff thinks, after commencing in that way, ought to be sent to the ordinary roll?—Yes; and below £50 the Sheriff's decision should be final.

3111. *The Chairman.*—If above £50, you would give the party a right to have it sent to the ordinary roll; but if both parties agreed to retain it under the Debts Recovery Act, you would allow it to be retained?—Yes; but they would require to express their intention.

3112. *Mr. Clark.*—Do you think the Sheriff would be a good judge of the question whether the case should remain in the Sheriff Court or should be removed to the Court of Session?—I do.

3113. Of whether he should retain the cause or lose it?—The Sheriff has no interest in retaining the cause.

3114. Do you think he can fully appreciate the motives which might actuate either party in having the case removed?—Let them be stated to him, and I think he could appreciate them.

3115. Some Sheriffs might have a desire to retain all causes?—I don't think so.

3116. And others to get quit of them?—Every man is bound to do his duty, and the Sheriff generally does his duty.

3117. But if a defender has a claim of very large amount made against him, and he desires to have the record made up and the evidence taken in the Court of Session, unless he can satisfy the Sheriff as to that, he must submit to the decision of the Sheriff?—Yes.

3118. And take his chance upon an appeal?—Yes.

3119. The remedies are of a very different character there, are they not?—They are of a different nature, perhaps, but the result might not be different. I don't think the result, as a rule, would be different.

3120. Do you think an appeal gives the defender as good a remedy as if he had the record made up and the evidence taken in the Supreme Court?—I should say as good.

3121. You think a case cannot be lost by the evidence being badly taken, or the record being badly made up?—If the party who is to make up the record and take the evidence was utterly incompetent, that might be so; but I don't look on our Sheriffs as of that class.

3122. I don't speak of the Sheriffs?—But you must take into account the character of the person who takes the evidence and makes up the record.

3123. Do you think it is not often a matter on which cases are lost or won—the making up of the record, and the taking of the evidence?—It may be in a few cases; but that will be owing to the fault of the agents.

3124. But you force the defender to submit to that chance, if the stake is above £50, unless the Sheriff gives leave to go to the Court of Session?—Yes; because I think the Sheriff is quite competent to say whether a case should be remitted to the Court of Session or not.

3125. *Dr. Barclay.*—And when an appeal was ultimately taken, I presume you would allow the Court of Session to amend the record or have a new trial?—Yes, certainly.

3126. *The Chairman.*—Would you have civil cases tried by jury before the Sheriff?—No; I don't think that would be relished at all.

3127. Would you deprive parties of the power of removing causes into the Court of Session, where they can have them tried by jury?—Yes, except with the leave of the Sheriff.

3128. Then you would enable the pursuer to bring a cause of any amount before the Sheriff in the small debt form, and you would thereby exclude altogether the intervention of a jury?—Yes.

3129. *Dr. Barclay.*—I observe you are not friendly to jury trial?—No.

3130. Neither in the Supreme Court nor the Inferior Court?—No.

3131. *The Chairman.*—You think a jury is not a good tribunal for ascertaining facts?—I don't think so.

3132. *Mr. Webster.*—Is that the result of your coming in contact with mercantile people?—It is partly that. I cannot distinguish in my own mind how much of the opinion is attributable to that.

3133. *Mr. Clark.*—Among the mercantile community, with whom you are very largely associated, what is the prevailing opinion as to jury trial?—They do not like it at all.

3134. Is that from its expense or its uncertainty?—Both from its expense and its uncertainty.

3135. It is not the mere expense that they object to, but the element of uncertainty also?—Yes.

3136. *The Chairman.*—They would rather have the judgment of a single judge?—Yes; they can generally trust to a judge, while they cannot trust to a jury.

3137. *Mr. Clark.*—In a certain class of cases, such as slander, do they not see the propriety of having a jury?—That might be a very proper case for a jury.

3138. Do you know how the community with which you are associated feel on that matter?—It is more actions for resting-owing that I have been speaking of.

3139. Money claims?—Yes.

3140. *Mr. Campbell.*—And breach of contracts?—Yes, mercantile questions. Slander, injury by railway accidents, and such cases, might still be left to a jury. I am not speaking of that class of actions.

3141. *Mr. Clark.*—You are speaking of actions which properly fall under mercantile contracts?—Yes.

3142. *Mr. Shand.*—Even including actions of damages under mercantile contracts?—Yes.

3143. *Dr. Barclay.*—And yet you exclude trial by jury in the Sheriff Court in cases above £50?—Yes.

3144. In cases where you think jury trial is the proper mode of adjudication, would you not allow parties to go to the Court of Session without the leave of the Sheriff?—Yes. In fact, I was not alluding to that class of cases; and any observations I make are chiefly to be construed as bearing on proper mercantile claims.

3145. *Mr. Shand.*—Have you heard common complaints from parties engaged in conducting cases under the Debts Recovery Act in reference to the remuneration given?—No; I think the remuneration is quite adequate.

3146. You have not heard any complaints from any quarter on that subject?—I have heard that the Society of Solicitors in Ayr have resolved not to take up cases under the Act.

3147. Have you heard any complaint of that kind by agents in Edinburgh?—No.

3148. Or from any other quarter except Ayr?—No.

3149. *Dr. Barclay.*—Was the complaint in Ayr that the fees were not remunerative?—I think so. But I think the remuneration is quite adequate. In fact, people are kept back from the Sheriff Court at present on account of the cost of the actions. The opinion of the mercantile class is this: Here is an institution kept up by the Government for the settlement of disputes and for the recovery of debts, and we are debarred from taking the benefit of it by the enormous expense that we must undergo. People come to me every day with disputes of about £15 or £20; and the first question I ask is, 'Are you prepared to risk £10 a side upon it?' They say, 'No, we would risk £2 or £3 a side, but we would never think of running the risk of having to pay costs amounting to about as much as the sum in dispute.' I think something ought to be done to enable parties to get the benefit of the decision of the Sheriff upon questions of dispute, where the sum involved is small, at little expense.

3150. *The Chairman.*—The remuneration now under the Debts Recovery Act is by a certain fixed sum?—Yes.

3151. Not in proportion to the amount of labour or

Peter Morison.

time spent on the case?—That must be received with certain limitations. For example, the first duty of the Sheriff in a case under the Debts Recovery Act, is to inquire if it is a proper cause to be tried in that summary manner. Now I would say it is an element in the Sheriff's judgment whether the cause is one of difficulty or not, or would require a great number of witnesses, and a great deal of time to elucidate the facts. That ought to be an element in his judgment, whether he should remit the cause to the ordinary roll or leave it to be tried in the summary form; and if he thinks it is a simple cause, which ought to be tried in the summary form, I think the remuneration is adequate.

3152. How does the Sheriff make that inquiry?—He hears the parties. There are generally agents, but sometimes the parties appear; and if they do, the question of costs does not come into play. An agent ought to know his case when he comes up with it; he should know whether it is difficult or not.

3153. Has any case occurred in your experience which was remitted to the ordinary roll for such reasons as you now state?—I do not know, but I have no doubt there have been such cases.

3154. *Dr. Barclay.*—You think it is an advantage that the parties should know exactly what a case is to cost them?—Yes, they know what they are doing when they go into court. Prudent people like to be able to count the cost before going to law.

3155. *Mr. Baxter.*—Would you pay an agent the same amount whether he has little or much trouble?—No; he ought to know his case when he comes before the Sheriff; and if he sees he is to have much trouble, he could state so, and the judge would remit the case to the ordinary roll.

3156. *Dr. Barclay.*—But suppose the case is not remitted?—I am supposing only a simple case.

3157. *Mr. Clark.*—Suppose the trouble the agent has had in preparing the case is very great, is he not to be remunerated for that trouble, though it may come to be a very simple and short case ultimately?—If the parties knew beforehand that it would cost much, they would rather not go into it.

3158. That is their option?—Yes, but in many instances people do not know what the expense may be.

3159. And therefore you are to give the procurators an inadequate remuneration, to enable parties to get their cases disposed of, because they don't choose to pay an adequate remuneration?—The procurator is not bound to take the case up.

3160. *Mr. Harrison.*—Do you consider that the advantage of the maximum expense being known is so great as to make these exceptional cases worth risking?—Yes. I know that the larger class of merchants, before the Debts Recovery Act was passed, would not go into the Sheriff Court on any consideration; they would rather submit to anything.

3161. *Mr. Clark.*—Do you think the Sheriff is a proper judge of whether the case has cost the procurator so much trouble as that he should remit it to the ordinary roll or keep it in the summary roll?—Yes, whether it is likely to cost him trouble.

3162. There may be considerable discussion as to whether the case is likely to be long or short; and suppose ultimately it is found the Sheriff is wrong in holding that there has been little trouble, the procurator gets no remuneration unless before the case begins he can satisfy the Sheriff that it is to be a long one. Is that reasonable?—I think that the remuneration provided under the Debts Recovery Act as it stands is quite adequate. You must take the Act as a whole.

3163. *Mr. Baxter.*—Then it must be more than adequate in short cases, and not adequate in long cases?—In any case the cost is smaller than before the passing of the Act. But I understand the Act does not contemplate long cases coming under it at all.

3164. *Mr. Clark.*—How can a Sheriff, who knows nothing about the case, decide whether it is to be a long or a short one? The one procurator says it is to be very short, and the other says it is to be very long; is the Sheriff to take evidence upon that matter?—The vast majority of cases brought under the Act are book debts.

3165. But you are proposing to extend it to all classes of cases?—If that was done, probably there might require to be a revised scale of fees.

3166. An *ad valorem* scale?—For the summary causes, I would certainly have an *ad valorem* scale.

3167. If a case is remitted to the ordinary roll, would you leave it on the present principle as to expenses?—Yes.

3168. You would leave it to the Sheriff at the commencement of the cause to decide whether it should be an *ad valorem* scale, or whether it should be the present scale of remuneration in ordinary cases?—Yes; causes above £50 the Sheriff would be bound to send to the ordinary roll.

3169. At the option of either party?—No, unless both consent to its remaining. In cases below £50 the Sheriff would have the power which you allude to.

3170. Above £50, both agents not agreeing to have the case disposed of in that way, it would, as a matter of course, go to the ordinary roll?—Yes.

3171. And as a matter of course, the remuneration of the agent would be paid according to the work done?—Yes.

3172. And so the *ad valorem* scale, in your view, should be limited to cases under £50?—Yes.

3173. *Mr. Shand.*—Would it not be a mistake to send cases away from the roll in which they may be disposed of in a summary mode, in order to give the agent a claim to a larger remuneration? Would it not be better to keep the case in the position in which it may be summarily and rapidly dealt with, and yet to give the agent somewhat more remuneration?—The object which I would have in remitting the case to the ordinary roll is, that cases above £50 are generally cases of more importance than cases under £50. I do not propose that with the view of anything concerning the procurators at all.

3174. Confining your attention to cases below £50, why do you propose to send one to the ordinary roll, and keep another in the summary roll?—Because one class of cases is more difficult to determine than another.

3175. Is it to create more procedure?—No; but to determine them by another mode of procedure.

3176. If you could get them determined in the summary roll satisfactorily enough, would you keep them there?—Yes.

3177. You would not send them to the ordinary roll in order to give the agent a claim for more remuneration?—No.

3178. If he has had more trouble than usually occurs in cases in the summary roll, should he not be remunerated for it?—I don't think he would have more trouble.

3179. You don't mean that all cases cause the same amount of trouble?—Very nearly. For conveyancing there is an *ad valorem* scale of fees.

3180. Don't some cases give a great deal of more trouble than others?—Not so much as would make much difference in the cost.

3181. *Dr. Barclay.*—May a case below £50 not be more nice and more difficult of solution than one above £50? Is it merely the sum that regulates the difficulty of the case?—No, not as a rule; and that is why I would give the Sheriff power to remit cases below £50 to the ordinary roll.

3182. *Mr. Webster.*—At present the fees are the same, whether there be or be not a counter claim?—Yes.

3183. So that there is no allowance for supporting a difficult and complicated counter claim?—No. At present there is no allowance; but if all counter claims were admitted, there might be provision made in the revised table for this.

3184. *Mr. Baxter.*—And it would be the same whether there is or is not a proof led?—Yes.

3185. *The Chairman.*—Did I understand you to say, that if the agent satisfied the Sheriff that it was a case which cost him more trouble than the fee was an adequate remuneration for, he might send it to the ordinary roll?—Yes.

3186. Although the case was in its own nature one

very expedient to be settled in the summary form, would you, for the purpose of enabling the agent to get adequate remuneration in the case, he having had a great deal of trouble in taking precognitions and otherwise, have it transferred to the ordinary roll?—Not for that reason alone; but that might be an element.

3187. Do you think that in that case the procurator should not be properly remunerated?—I think the scale of fees provided by the Debts Recovery Act gives adequate remuneration. That is to say, it provides as much as parties would care to pay for the service rendered. Should it cost more, they would prefer to want it.

3188. For the greatest amount of trouble that can be had in such a case?—Yes; in the cases contemplated by the Act.

3189. And that they are too large where there is not much trouble?—The amount of trouble is very much the same in all these cases.

3190. *Mr. Baxter.*—Do you think that a case is attended with the same trouble which does not require proof at all, as a case that does require proof?—No.

3191. *Dr. Barclay.*—Is there any reason for the Sheriff sending a case from the summary roll to a more tedious and expensive one, simply to give remuneration to the agent?—I don't say that. I merely say that would be an element.

3192. *The Chairman.*—But suppose that to be the only element?—Then the judge ought not to remit it to the ordinary roll upon that ground alone.

3193. *Mr. Clark.*—Would you allow the judge, in deciding to what roll it should be sent, to take into consideration the remuneration of the procurator?—I would allow him to take that as an element,—that the procurator could not carry it on according to the scale of fees allowed for cases to be tried in a summary manner.

3194. *The Chairman.*—What other element would you combine with that?—Justice to both parties.

3195. But supposing the justice to both parties to exist without that element, that would not be enough by itself?—Yes.

3196. Therefore he would not care for the remuneration of the agent; that would form no necessary element in the justice of the case?—The case would then be a simple case.

3197. And it would go to the ordinary roll?—No, it would remain in the summary roll.

3198. If the justice of the case required it to be sent elsewhere?—No; if the parties had not much trouble with it, it would be a simple case; and if they had much trouble, it would be a complicated case.

3199. *Mr. Clark.*—What you are contemplating would necessarily raise an immediate conflict at the very commencement of the cause between the interest of the agent and the interest of the client. It would be the interest of the agent to have it remitted to the ordinary roll; it would be the interest of the client to have it retained in the summary roll?—Yes.

3200. And according to the representations which the agent gave to the Sheriff, the Sheriff is to decide whether it is to remain in the one roll or to be remitted to the other. Do you think all that satisfactory?—I think we might trust to the Sheriff keeping that right.

3201. But the parties interested in getting the case remitted to the ordinary roll are the agents; they are the only persons before the Sheriff, and they represent to the Sheriff the character of the cause. How is the Sheriff to decide?—The Sheriff will satisfy himself. He hears what they have to say; and if their statements convince him that the cause is likely to be complicated, he will then remit it at once.

3202. But it is statements made by the interested parties that he is to decide upon?—Yes.

3203. And he has nothing but the statements of the interested parties to enlighten him?—In many cases it is the statements of interested parties that decide the case altogether.

3204. With other evidence. But there is nothing here except the statements of the two parties who alone are interested?—No.

3205. *The Chairman.*—Do you think that this system of remuneration is all that could reasonably be desired for the agents in any cause?—I think it is the best that we could get for simple causes.

3206. On a balance of matters?—Yes. It practically comes to this, that cases for sums under £50, be they ever so simple or ever so complicated, are to be put through the same steps of process, and a fee become exigible on each, as is now the case in the ordinary court; or that an *ad valorem* scale be adopted which would be applicable to the simpler causes which form the vast majority, and allowing the more complicated to be sent to the ordinary roll.

3207. Do you think there may be grounds in certain cases for the agents complaining that they have not sufficient remuneration, but that in other cases it is made up to them by very handsome remuneration?—Yes.

3208. Do you think that is a good principle?—I think it is a principle that satisfies both parties; at least it satisfies the public.

3209. What do you call the public?—The clients.

3210. It satisfies the party who is to pay?—Yes. There is one thing to be considered, and that is that the agents have a monopoly. They surround the court, and they cannot be allowed to have the making of their own fees, lest justice be obstructed.

3211. Neither they have?—You must have some scale of fees; and what I say is, that for these simple causes the *ad valorem* principle is the best.

3212. *Mr. Harrison.*—It may operate as a hardship in certain cases?—Yes.

3213. But you think, on the whole, it works well?—Yes.

3214. Are you aware that in Ayr the procurators refuse to act under it?—Yes.

3215. Do you think that the fact of their possessing a monopoly of the right of practice imposed on them the duty of accepting the fees appointed by the Act, until they were altered by the proper authorities?—I do; and the procurators have power under the Act to apply to the Supreme Court; and if they can satisfy that court that they have cause for complaint, it has power to substitute another table of fees.

3216. *Mr. Webster.*—Is it your view, that each procurator before the Sheriff has a duty to conduct these cases for the fees specified in the Act?—I don't say that he is bound to take up any case that any person goes to him with; but I say that no body of solicitors ought to pass a resolution that they will not take up a certain class of cases for the fees provided by the Legislature, more especially seeing they have another remedy of which they do not avail themselves.

3217. *The Chairman.*—A resolution of the body which should place the individual members at variance with their body, if they break through the rule?—Yes.

3218. *Mr. Webster.*—But you have no fault to find with individual members declining to accept these cases?—No.

3219. *Mr. Gordon.*—You think this system of remuneration is sufficient, looking to the simple nature of the causes which are covered by the Debts Recovery Act?—Yes.

3220. As a general rule, they are very simple cases?—Yes.

3221. Do you know that there is in the County Courts in England a similar provision with reference to debts under £20?—Yes, I do.

3222. And the utmost amount that can be claimed there for a debt not exceeding £20 is 15s.?—I know the fees are similar, but I think, on the whole, larger under the Debts Recovery Act than under the County Courts Acts.

3223. Under this Act it is 7s. 6d. where there is a decree in absence, and 30s. where there is opposition?—Yes.

3224. Do you think that the effect of the Act is to lead to a great many more actions being brought into court?—I do. Before the passing of the Debts Recovery Act, several parties have come to me and have said, 'A. B. is in difficulties, and I have a claim against him.' The first question I put is, 'What is its amount?'

Peter Morison.

The answer is £20. I said, 'I hesitate to send this case to our solicitors, because it appears quite evident that the debtor must become bankrupt; and if you go on with the cause, you may have heavy expenses to pay; the dividend you may get from the estate may not cover the expense.' Another person would come with a claim against the same individual, amounting to £11 or £12; and I would tell him to take out a summons in the Small Debt Court, and he may recover his money. That has been done; and the one has recovered his money; whereas the other was afraid to take his case to the ordinary court because of the expense; and he did not want to restrict it, because then he would only get a dividend on the smaller sum, and a creditor with a smaller claim might have acquired a preference, and carried off the greater part of the estate. I don't think that should be allowed.

3225. *Mr. Clark.*—What is your remedy for all that?—The remedy is to simplify the procedure, and lessen the cost as much as possible. The time consumed in the ordinary court in carrying through a sale is much larger than in the Small Debt Court; and where there are two creditors, it is very often a race which is first, and the man in whose favour the short time runs is the successful competitor. Now there should be nothing like that.

3226. *The Chairman.*—How would you remedy that?—By bringing all actions for debt in the manner provided for in the Small Debt Act; and if the case is undefended, I would allow judgment to pass at once. Most of these cases are undefended. The debtor does not pay, because he is embarrassed.

3227. *Dr. Barclay.*—Decree in absence in the ordinary court is not an expensive thing?—It costs about £2 on the average; but, after decree, the execution of diligence to carry through a sale could not be less than £4, 12s. 9d. according to the lowest scale, that is under £25, or £5, 13s. 3d. according to the medium scale, or under £100. The expense of a sale under the Small Debt Act is 13s. 7d.; and under the Debts Recovery Act, if a procurator be employed, and he got the maximum fee of 10s. for a debt of £50, a decree in absence would cost 15s. 7d., and the cost of execution would be £2, 5s. As to the time: in the Sheriff Court it would be 37 days, whereas in the Small Debt Court and Debts Recovery Court it would be 20 days.

3228. *The Chairman.*—Have you any further remarks to make?—With reference to arrestments and poindings, I think that poindings under the Small Debt Act ought to be recorded.

3229. *Dr. Barclay.*—As is done under the General Diligence Act?—Yes. Then every decree should have a charge of payment. I think that very great oppression is committed by the power to arrest workmen's wages.

3230. On the dependence?—That is not competent under the Small Debt Act, and I am not aware that it is done in the county of Edinburgh; but I think that if a provision was made, such as I suggested with reference to judgment summonses, the arrestment of wages might be abolished. Poor people's wages are often arrested, and there may be arrestment after arrestment, till they are left next door to starvation, it may be for three months, till the pursuer chooses to bring an action of furthcoming. No doubt a workman might bring an action against his master, but that would amount to dismissal from employment. I think something should be done to remedy this.

3231. What?—What I would propose would be to abolish the arrestment of workmen's wages.

3232. *The Chairman.*—Entirely?—I would prefer it to be entirely abolished. If there was power given to the pursuer to bring the debtor before the judge, and to say, 'This debtor has means of paying my claim, but he does not do so,' it would be incumbent on the creditor to show that the debtor had the means of paying; and if the judge was satisfied, he might order a certain sum to be kept off the debtor's wages every week, or he might make a peremptory order on the debtor to pay a certain sum, or in default to be imprisoned.

3233. What class of persons do you call workmen?—Day labourers and artisans. People who earn weekly wages.

3234. *Dr. Barclay.*—Without any respect to the amount?—Yes.

3235. *Mr. Clark.*—But weekly wages reach pretty high?—Sometimes. I have known as much as £2 or £3 made by the higher class workmen. The difficulty is in drawing the line. I should say that about 15s. a week in towns is as little as could be allowed to support a family.

3236. *The Chairman.*—Where the wages amount to £2 or £3 a week, which are much more than the wages of many persons who are paid quarterly or half-yearly, would you except the one from the arrestment and subject the other?—No; but if there could be a provision framed which would also exempt those parties whose wages were to be paid quarterly, and leave the power of arrestment so as to attach other funds, such as merchants' accounts, and sums of money lying in the hands of third parties, that might be done.

3237. That is not wages?—No; but the difficulty would be, that unless it was specified that it was weekly wages, you might injure the power of arrestment. I would be disposed to recommend that even quarterly salaries should not be arrestable if they were below a certain amount, or of whatever amount, if I got the judgment summons.

3238. *Mr. Clark.*—There being a sort of summons under which you could get a decree which virtually assigned to the creditors a certain portion of the salary?—Yes, if the judge was satisfied that the debtor had the means of paying, and did not do so. I don't think it should be left with the creditors, as it is just now, to perpetrate any amount of cruelty.

3239. In short, you think there should be, as it were, cause shown to the judge before the creditor could get the remedy of arrestment, or some equivalent?—Yes.

3240. And the equivalent would be what you have stated?—Yes; that is the only thing that occurs to me.

3241. *The Chairman.*—You think the arrestment of small wages is a bad thing?—I do.

3242. It may have the effect of giving credit to the workmen; but perhaps that is not a good thing in itself?—No. In large towns there are a number of dealers known by the name of clubmen, who keep canvassers to go round to workmen's houses with their goods, which they tempt the workmen's wives to buy on credit, in the absence of their husbands. The wives too easily yield to the temptation, and the result is great oppression; whereas if they were left to go to shops, they would not take the things at all—they would not take credit so extravagantly. But these clubmen rely on the power of arrestment to recover their money.

3243. Wages are not paid in advance?—Not as a rule.

3244. The workman must have some little credit for the week?—He gets his wages at the end of the week.

3245. You think he would receive credit for that period, if he paid regularly at the end of the week?—Yes; but a workman ought not to require credit for a week, if he is a respectable man, and does not spend his money foolishly.

3246. How is he to live the first week?—He begins generally as a young man, and his father is bound to support him till he is able to support himself.

3247. Suppose he has no father?—The Parochial Board is bound to support him.

3248. *Dr. Barclay.*—But if he is an ablebodied man?—I was beginning at the beginning—when he is a young man.

3249. *The Chairman.*—Take the case of a man who has lost his means by misfortune, and has been some time out of employment from ill health: he gets employment on public works, or otherwise; how is he to support himself the first week?—If he is an honest man, he generally gets credit.

3250. And if he pays faithfully, he will get credit the next week too?—Yes; but he ought to lay by as much as would keep him the following week.

3251. Are there not some weeks in which his ex-

penditure is necessarily greater than in others, being exceptional?—Yes. I am not for abolishing credit; but I am for abolishing the arrestment of wages. It would be a hardship to abolish credit, or the means of recovering these sums altogether.

3252. You mean that the party could get all the credit he should get without the remedy of arrestment?—Yes.

3253. *Dr. Barclay.*—Seeing the very summary nature of small debt claims, would you advise the abolition of arrestment on the dependence altogether?—No.

3254. Wages are not arrestable upon the dependence?—No. In the county of Edinburgh, every officer invariably asks if it is likely to be wages that are arrested, and he will not lay an arrestment in the hands of a master upon a summons. Sheriff Gordon put a stop to that in the county of Edinburgh; and it is never now done.

3255. *The Chairman.*—Apart from the debtor and creditor in such cases, are you aware whether it is obnoxious to the masters to have arrestments laid in their hands?—It is.

3256. It is attended with great trouble and inconvenience?—Often.

3257. Don't they sometimes dismiss a workman because they have been put to the trouble of receiving arrestments?—Yes.

3258. *Dr. Barclay.*—Would you not recommend that the schedule should say that the arrestment does not include wages?—Certainly I would; and in some counties I believe that is put in. In Glasgow, I think, 'wages excepted' is put in.

3259. *The Chairman.*—Have you any other suggestions to make?—The days of charge in all cases ought to be equalized. For example, a charge upon a bill is six days, upon a small debt or debts recovery decree ten days, and on a Sheriff Court decree fifteen days. These ought to be equalized, because the tendency is to give one creditor a preference over another. Either the charge on the bill ought to be extended to ten days, or they ought all to be brought down to six. I would recommend ten days for all. Then a small debt decree does not carry interest, which seems to be an omission in the statute.

3260. *Dr. Barclay.*—You may have interest up to the date of judgment?—Yes; but not beyond that. After the debt is constituted by decree, I think the debtor should pay interest.

3261. Might the pursuer not afterwards bring an action on a small debt decree for the interest accumulated?—I know in some counties that was tried, and held to be incompetent. The judge said the warrant should have been put in execution.

3262. *The Chairman.*—These small debt decrees are generally against very poor people?—Not always.

3263. Are they not generally?—Yes, the majority.

3264. And there is very summary power of execution?—Yes.

3265. Would it not be rather hard upon poor people to take interest on proper small debt cases under £12?—Well, yes, if the poverty continued.

3266. If the parties are at all able, the pursuer can recover his debt?—But in many cases the parties go away, though they are perfectly able to pay.

3267. Can they not be got at?—It is often very difficult. For example, a person in a Government office; unless the decree is above £8, 6s. 8d., it is utterly impossible to recover the money, because Government money is not arrestable; and there are among them many young men who have no effects, so that there is no way of getting at them. At present a small debt decree falls on the death of the creditor. I think the provisions of the Personal Diligence Act ought to be made applicable to the small debt procedure, and also to the debts recovery procedure. Then as to summary removings, at present removings are competent in the Small Debt Court where the rent is under £30, and the set is for less than a year. I think they ought to be competent where the set is a year, because it is often much easier to prove a yearly set than a set for less than a year, and throughout Scotland the rule is that the set is from year to year.

3268. *Dr. Barclay.*—Would you leave the rent unaltered?—I would have no objection to extend it. I think something should be done to equalize the work performed by Messengers-at-arms and Sheriff-officers. I know that in the Court of Session Act that is done to a certain extent, but I think Sheriff-officers should be empowered to do everything which Messengers-at-arms now can do in the way of process relating to debt.

3269. *Mr. Gordon.*—Is there not some difficulty arising from vested interests in the existing Messengers-at-arms?—The interest is vested in them for the public good; and if it is found to be more for the public good that it should be taken away, I would not hesitate to do so; but if it is necessary to give them compensation, let that be done. The same remark is applicable to procurators. I think something ought to be done to equalize the admission of procurators.

3270. *The Chairman.*—How do you mean?—A man may be a procurator before the Sheriff in Edinburgh, and he is not entitled to remove to Glasgow and practise there. Now, if he is a procurator before any one court in Scotland, I think he should be entitled to practise in any other.

3271. *Dr. Barclay.*—Always excepting the Supreme Court?—I would also say that an agent entitled to practise before the Supreme Court ought to be entitled to practise before the Sheriff Court.

3272. And *vice versa*?—Yes. I would have a general body of solicitors over the whole of Scotland.

MONDAY, 28TH DECEMBER 1868.

Members Present:—

LORD COLONSAY.	JAMES ADAM, Esq.
E. S. GORDON, Esq., Q.C.	A. B. SHAND, Esq.
A. R. CLARK, Esq.	T. GRAHAM MURRAY, Esq.
JAMES CAMPBELL, Esq.	CHARLES MORTON, Esq.
W. SMYTHE, Esq.	JAMES WEBSTER, Esq.
A. ORR EWING, Esq.	J. B. BAXTER, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

Alexander M'Neel-Caird.

ALEXANDER M'NEEL-CAIRD, Esq., examined.

3273. *The Chairman.*—You are a practitioner in the Sheriff Court of Wigtown?—I am. I appear here as Vice-President of the General Council of Procurators for Scotland; and I have been requested by the General Council to state their views to this Commission. With your Lordship's permission, I propose to read a paper containing the substance of their views, and then to undergo any examination you may think fit.

3274. Was that paper drawn up at a meeting of the Procurators?—No; the paper was not drawn up by the Council of Procurators, but we have taken means to ascertain the views of the whole of our body; and by discussion in the General Council we have arrived at certain unanimous conclusions, which, without having them formally drawn up at the meeting, I was directed to state in substance. I am exceedingly anxious that I should state neither more nor less than I was instructed; and therefore I would ask leave to read the paper.

3275. Then it is a paper containing your understanding of the sentiments of the Council of Procurators?—Yes, as ascertained after obtaining returns from all the faculties whom we represent.

3276. Did that opinion give effect to what was expressed in the returns sent to you?—In substance it does so, with certain corrections which were made by all parties unanimously after discussion.

3277. What do you mean by all parties?—All the representatives of these faculties.

3278. The General Council consists of representatives of these faculties?—The General Council represents about 1060 members of the profession.

3279. How do they represent them?—The members of the profession, being scattered all over the country, are formed into 23 faculties. The Deans of these faculties are members of the General Council; and the General Council assemble here, or wherever they think fit, and deliberate on behalf of their respective bodies;—this is in substance the result of their deliberations.

3280. It is the result of the deliberation of the Deans?—After having obtained returns from each faculty.

3281. Does that paper give effect to the opinions expressed in the returns?—The returns were not in every point agreed. The representatives of the faculties met, and after discussion came to agree; and this is the substance of what they came to.

3282. The representatives having considered the returns made to them from the different faculties, which returns did not in all respects agree, came to an opinion of their own?—After discussion they came to unanimous conclusions.

3283. They came to a conclusion of their own?—They did, being representatives of the local bodies, and coming direct to each consultation from among their respective bodies.

3284. Is the paper the opinion of the Council of Procurators, after having considered the returns from the respective bodies, which returns, however, were not all agreed?—That is so—with the explanations I have given.

The whole legal profession in Scotland, including all branches, consists (according to the official lists) of 1998 members. Of these the General Council represents about 1060, who form 23 statutory faculties; and there are rather more than 100 country procurators who have not yet enrolled themselves in any faculty. These faculties have their headquarters at the principal towns, and each faculty is represented by its Dean in the General Council. Through this organization we have been at pains to ascertain the prevalent views of our branch of the profession, and I have been instructed to state them to this Commission. The Glasgow faculty has a limited but inadequate representation in the General Council. It contains about 213 of our members; and being a body of sufficient importance to take separate action, will no doubt use its own means of stating its views to the Commission. It will of course be understood that I in no respect imply the concurrence of that body in the views which I have to state.

Constitution of Sheriff Court, Local Appeals, etc.

There is a decided, and I may say almost unanimous, opinion in our body in favour of retaining a prompt and inexpensive appeal within the Sheriff Court. There is also a general opinion that the emoluments and status of the resident Sheriffs should be materially improved, in order to obtain superior men; and that the usefulness of the appeal Sheriffs might be greatly increased. A smaller number of appeal Sheriffs, adequately paid, with a better distribution of work, would render more efficient service, while the charge to the public might perhaps be diminished. The present annual charge for Sheriffs-principal is, I believe, about or nearly £17,000 or £18,000. A moderate number of Sheriffs, say at from £1500 to £2000 a year, could do the duties of appeal judges satisfactorily at a considerable reduction of cost; and the saving might be well employed towards improving the position of the resident Sheriffs.

It is desirable that the litigants should in in all cases have a right to be heard by the appeal judges in open court. It is not possible, when the pleadings are wholly written, to prevent occasional misunderstandings and miscarriages, which might be prevented by a few words of personal explanation.

The preponderant opinion in our body is in favour of appeal courts of two Sheriffs. Our General Council, after much discussion, came unanimously to the conclusion that such a court would be a great improvement on the present system. An appeal from a single judge to a single judge is not satisfactory where they differ. The decision of two judges, when the judgment of a resident Sheriff is altered, would have much greater weight. If they affirmed, the concurrence of three competent judges would terminate the great majority of Sheriff Court litigations. If, again, one appeal judge concurred and the other differed from the judgment of the resident Sheriff, the judgment would stand, with the advantage in the public mind of two opinions against one, unless altered by the Supreme Court.

We regard an appeal within the Sheriff Court as of the last importance. The great bulk of the litigations in the Sheriff Courts cannot afford the cost of Court of Session proceedings. However you attempt to reduce the costs in the Court of Session, a case cannot be carried on in that court without counsel and agents in

actual attendance on the court; and if you take only two counsel on each side on an appeal from the Sheriff Court, you have thus six additional advisers to instruct and pay, whereas in the Sheriff Court the appeal would be discussed by the two agents who were already familiar with it, and at a trifling cost. Appeals in the Sheriff Court are so inexpensive, that nearly every case is at present finally determined by an appeal judge. To abolish the local appeal would, in a great majority of Sheriff Court cases, shut out appeal altogether.

The small proportion of cases advocated from the Sheriff Courts shows this; and it is also remarkably illustrated by the experience of the English County Courts. Though appeal is there allowed in all cases from £20 upwards, yet in 1866 there were only 15 appeals from the County Courts in the whole 59 circuits of England, out of more than 8000 cases which exceeded £20.

The abolition of caution in advocations, and the simple note of appeal now permitted to the Court of Session, will probably lead to the first step of appeal being frequently taken, for purposes of delay or negotiation. But, owing to the expense, the number of appeals prosecuted to judgment is not likely to be materially greater than in the past.

Therefore, as we have the good fortune to have in Scotland a cheap local appeal, we have come unanimously to the conclusion that we should endeavour to improve it, but that we should not lightly part with it.

In order to raise the status of the resident Sheriffs, and induce competent men to undertake the office, we think they should not only be adequately paid, but that distinguished service by eligible men in that position should be recognised as giving a claim to the post of appeal Sheriff; and similar service in the office of appeal Sheriff should also be recognised as a claim, on fit opportunities, to the place of judge in the Supreme Court.

Enlarging Jurisdiction of Sheriffs.

There is an entire concurrence of opinion in our body that the Sheriff Court should be made a court of first instance for all civil causes, and that this might safely be done without qualification. Cases of magnitude would naturally be taken at once to the Supreme Court. But if, contrary to our views, it should be thought prudent to fix a limit to the new jurisdiction, it might be provided that, wherever it is shown to the Sheriff that the action exceeds such limit of value, or wherever it is a question of status, either party should have a right to require that the action be at once transferred to the Court of Session.

Questions of Heritable Title.

In regard to questions of heritable title more particularly, an extension of the Sheriff's jurisdiction is urgently called for. It seems unreasonable that a judge who is competent to determine all questions of personal estate, however intricate and great, should be regarded as unfit to judge of any question of heritable title, however insignificant the value involved. And as the procurators of the Sheriff Courts now conduct a great part of the conveyancing business of the country, and have thus from day to day to solve for themselves questions of heritable title, under a heavy personal responsibility, they may surely be regarded as competent to discuss the same questions in court. At present, with rare exceptions, the law is practically not available, and is not availed of, for questions affecting heritable title where the property is of small value. In most such cases the whole would be consumed in the Court of Session long before a judgment could be obtained. And this applies not merely to cases of dispute, but to cases of debt, as where a man dies in debt leaving a house worth perhaps £40 or £50, where the whole property would not pay the expense of a Court of Session adjudication and sale. Such cases bring no business to the Court of Session, and operate as a denial of justice.

Divorce, Marriage, Legitimacy.

Some of our faculties at first reported their opinion that questions of marriage, legitimacy, and divorce should be reserved for the Supreme Court. But in regard more particularly to divorce there is a decided preponderance of opinion (indeed, after discussion, the General Council came to be of one mind) that the restriction of that class of cases to the Supreme Court (which is by no means accessible when *both* parties are poor) operates with cruelty upon many of the humbler classes, and has promoted irregular connections and crimes of violence.

It is thought that if the husband should require a divorce case to be transferred to the Court of Session, he should be bound to provide his wife with the means of carrying on the case on a scale suited to Court of Session costs; and if, on the other hand, the wife made the like requisition, it should be in the discretion of the court, having in view the circumstances of the parties, to award only Sheriff Court expenses.

Protection of a Deserted Wife's Earnings.

We are unanimously of opinion that it is a most cruel and unjust state of the law which requires a woman deserted by her husband to seek protection for her earnings in the Court of Session exclusively. Cases continually arise in our experience of grievous hardship from this cause. In England such protection is promptly and inexpensively obtained in the County Courts.

Judicial Nomination of Arbiters, etc.

We are also agreed that it would be of great practical use if the Sheriff were permitted by law, when authorized by any agreement or deed, to nominate arbiters, valuators, or oversmen for lawful purposes, and with powers specified in the deed; and also to name arbiters under any agreement to arbitrate where the parties themselves fail to name the arbiters. The extrajudicial settlement of disputes is often prevented by the legal rules which make it incompetent for parties to delegate to a judge the power to nominate arbiters, and which make it incompetent for him to enforce an obligation to refer which does not name the arbiters. Proceedings akin to those suggested have been already introduced into Scotland to a limited extent in the Railway Clauses Acts; and the principle has been fully and beneficially adopted in England by the Common Law Procedure Act 1854, clause 344 and following clauses. Indeed, it has there been carried even further, for the courts have power to order arbitration, in fit cases, whether the parties choose or not.

Appointment of Curators Bonis, Trustees in Lapsed Trusts, etc.

A less expensive jurisdiction, than at present exists, is greatly required for appointing new trustees under lapsed trusts, and curators *bonis*, etc., where the property is of small value.

Guild Jurisdiction.

We are also of opinion that, except in the largest towns, the Sheriff should have a cumulative jurisdiction with the Dean of Guild, if the Guild Court should be continued.

Process Records.

The process records by condescendence and defences both in the Sheriff and in the Superior Courts, are frequently circumstantial and unnecessarily voluminous. We think that the system of pleading may be much simplified.

Simpler Writ of Summons.

If all actions in both the superior and inferior courts could be brought into court by a simple printed writ, having indorsed upon it the demand made, in the terms in which judgment is desired, decree for all undisputed claims, whatever their value, might be obtained in any of the courts at a very small cost. An option should perhaps be left, for a time, to resort to the present forms in any cases of peculiar difficulty. This suggestion also has obtained the cordial and unanimous assent of the General Council.

Citations through Post Office.

We think that much expense might be saved by permitting summonses and intimations to be served by registered letter through the Post Office, the officer's or clerk's certificate of service being verified by the Post Office receipt or stamp. Interdicts, sequestrations, inhibitions, and proceedings of that character,

Alexander M'Neel-Caird.

would require to be excepted. And the court should always have the power to direct personal service on seeing cause. Service through the Post Office has been sanctioned in regard to joint-stock companies by the Act 25 and 26 Vict. c. 89, secs. 62, 63, and also in regard to the citation of jurors by the late Justiciary Act.

Warrants to arrest and inhibit.

We would recommend that all summonses should contain in brief formal terms, or should imply, a warrant to arrest and inhibit on the dependence.

Appeals during Progress of Cause.

We are also agreed that, in order to shorten litigations, no appeal should be allowed without leave of the court, during the progress of a cause, except when proof is ordered or a remit made, or an appeal taken by a witness on the ground of confidentiality.

Summary Jurisdiction for all Claims not exceeding £50.

The General Council have instructed me to state their unanimous recommendation that all claims, of whatever nature, not exceeding £50 in value, should be tried in a summary and inexpensive manner, subject to appeal. The Debts Recovery Act is objectionable, from its giving special privileges to mere open accounts, which are denied to other debts, and even to the same debts when established by bill or acknowledgment.

Appeals on Case stated.

An appeal on points of law on a case stated ought to be given with leave of the judge in all cases, and without leave if above a moderate value. We would extend this right to the Small Debt Courts, probably with conditions as to expenses or caution. Considerable evils and dissatisfaction grow out of the law being laid down differently, without remedy, in different districts, according to the individual and uncorrected views of the respective judges. The power of dealing absolutely with both law and fact is too great to be left without check in the hands of a single man. And the knowledge that the parties can appeal, always exercises a salutary influence on the mind of the judge, even when (as would probably be the case in small questions) the right to appeal is seldom exercised.

Failure of Causes by Lapse of Three and Six Months.

The provisions of the present Sheriff Court Act as to actions falling by lapse of three and six months, have been fertile in delays and expense; we are unanimously of opinion that they are mere pitfalls, and ought to be abolished.

Consolidation of Acts.

We also recommend that the Sheriff Court Acts should be consolidated, and the tables of fees revised.

Reciprocal Opening of Courts to all Practitioners.

We think it desirable that all law-agents should be subjected on admission to the same tests of qualification, and after admission should be equally entitled to practise in any court.

Jury Trial.

The general voice of our faculties is in condemnation of the Jury Court, and in favour of having evidence taken down by a shorthand writer, with proper precautions to guard against mistakes in his notes.

Most of the dissatisfaction which is felt with the Jury Court arises from the great expense which has hitherto attended it in Scotland, and from its being entirely confined to the Supreme Court in civil matters.

I am myself disposed to think, that if an option were given to have a small jury of five or seven for the settlement of facts in the Sheriff Courts, even if as an experiment it were confined to cases not exceeding £50, that mode of trial would become much more popular than our present cumbrous and expensive written proofs, which are generally far from satisfactory. If the facts were thus finally settled in the Sheriff Court, any further litigation in the Supreme Court would be limited to matters of law. But while here stating my own views, I am bound to say that the majority of our body is by no means favourable to jury trial in civil cases.

Jury of Sheriffs.

It might give satisfaction, and avoid written proofs, if the resident Sheriff and the two appeal Sheriffs were to sit together as a jury to settle the facts finally in all Sheriff Court causes, subject to appeal on points of law.

Eligibility of Procurators for Office of Local Judge.

According to the present law, Sheriff Court procurators are eligible to the office of Sheriff-substitute; but by an understanding which has been acted on by the principal Sheriffs in Edinburgh, with scarcely an exception, during many years, the procurators practising in the Sheriff Courts have been systematically excluded from their only channel of professional promotion. It can scarcely be doubted that many of them are by training and practice, and are shown by the test of professional success to be, better qualified to execute the duties of the office than some of the inexperienced young gentlemen who are occasionally sent from the lower ranks of the bar to administer justice in the provinces. And I am instructed by my professional brethren to take this opportunity of recording their respectful but unanimous protest against the continuance of this system.

3285. How many judges do you think the appeal court which you suggest should consist of?—Two.

3286. Two for all Scotland?—Two for each district.

3287. What should be the number of the districts?—We have not statistical information to form a correct judgment on that subject. We hope to get it through this Commission.

3288. You contemplate an appeal from that court to the Court of Session?—Certainly, in cases of any magnitude.

3289. Would you fix a limit of amount?—We think that in all cases there should be an appeal in point of law. In other respects, we would not object, I think, to a limit of amount.

3290. As I understand, you open an appeal to that appellate court for cases under £12?—We propose to open an appeal by leave of the court, and upon security being found or a deposit made. The appellant might have an option, on a point of law, to go either to the Sheriff's appeal court, or at once to the Supreme Court.

3291. Do you propose that there should be an appeal from that court to the Court of Session on points of law in cases under £12?—We don't think that would be essential, if you give an option.

3292. Is it not part of your proposal?—It is not necessarily a part of our proposal.

3293. Do you think it would be inexpedient?—Upon this point, of course, I must give my personal opinion. I think it is of immense importance that the law should be administered with uniformity all over the country. I don't know how that is to be absolutely secured without a central court of appeal.

3294. Would you allow an appeal to the Court of Session from the court of two Sheriffs upon points of law in cases under £12?—With security as to costs, I would myself be disposed to do so upon pure points of law; and I say so from the necessity which I have mentioned of bringing the administration of the law everywhere under one rule. I don't see how that can be secured absolutely without a common court of appeal.

3295. That is, the Court of Session?—Yes.

3296. What do you point at when you speak of security as to costs?—Of course I don't now presume to specify a particular limit; but speaking generally, in a small case, I don't think that an appeal by a defender against whom a judgment has been pronounced, should be allowed without his giving security that he will fulfil the ultimate judgment, and pay the costs.

3297. That is, in small cases?—Yes.

3298. Might that not be a hardship upon parties who are litigating small questions, and who are frequently persons of very limited means?—I don't know that it would, because if the party had no appeal he would have to put down the money. At present he has no appeal, and it is no hardship to say that you will give him an appeal if he finds security; when, if you give him no appeal, he would have to fulfil the judgment then and there.

3299. But a person appealing a case in which a larger sum is involved is not bound to find security?—

Not according to the late Court of Session Act; I confess I don't value that provision much.

3300. Do you think such persons should be required to find security?—I think all persons appealing against a final judgment to the Court of Session had better find security, but that is only my personal opinion. That matter has not been discussed in our body.

3301. Your opinion is, that in all cases an appeal to the Court of Session should be accompanied with security for costs?—Yes; and in small cases I think there should also be security found for fulfilling the decree; otherwise appeals would be taken in very small cases, in order to evade the decree.

3302. Do you think it is more likely that appeals would be taken in small cases?—Yes—sham appeals. I don't anticipate that under any form of appeal to the Court of Session which can ever be devised there would be a large number of appeals actually prosecuted to judgment. I rather refer to the controlling effect which arises from a judge having in his mind a knowledge that there may be an appeal.

3303. In regard to these small cases, do you think it would be expedient that the leave of the two Sheriffs, sitting as an appellate court, should be given to such appeal?—Certainly I think so, if the appeal was from their judgment.

3304. Even though it were a question of law?—I think so. If they saw that it was likely to be used for an improper purpose, I think they might interpose, or if they saw that it was really not a point of law of general interest. But many questions of law arise in our Small Debt Courts which are of the utmost possible importance in general practice. I may instance questions about the arrestment of a farm-servant's wages, where the present state of the law is really very loose. The wages are arrestable for all beyond what is necessary for the man's own subsistence; and the master, the arrestee, is bound to judge for himself, and determine how much he will give, and how much he will reserve for the arresting creditor. If he gives too much to the servant, the result is, that when he is brought up under the arrestment he is made to pay a second time; and if he gives too little, the servant strikes work. I have known the labour market of a district dislocated by a judgment on that subject in the Small Debt Court, which could not be reviewed.

3305. Then, do I understand that, in cases of small amount, you would require the party to have the sanction of the appeal Sheriffs to getting the review of the Court of Session?—I would be inclined either to require that, or to require that the appeal should be only in cases involving general principles of law. I am speaking of very small cases.

3306. Who is to determine that?—The local judge must determine it. I think it comes to what your Lordship puts, that it must be in the discretion of the judges.

3307. Do you think that check would sufficiently prevent appeals for the sake of delay, and so supersede the necessity of finding security?—I am not sure of that. A judge is not in a position to determine with certainty the objects of the party who asks the appeal. The party may be able to state ostensibly a very fair ground of appeal, while all he wishes is really to stave off payment, and the judge cannot know that. I think the requiring of security is an advisable thing; but I don't say it should be imperative if you require also the consent of the judge.

3308. The judge knows that there is a reasonable point of law to be considered; but he does not know the motive of the man in trying that point of law?—Quite so.

3309. Do you think the form in which an appeal is now taken, is a good form?—Yes; I think it is very desirable that it should only be an intimation of appeal.

3310. It is a cheap thing?—It is the cheapest possible thing.

3311. You think the new form an improvement?—I think it a very important improvement. I think the old advocation was a most unnecessary and expensive writ, of no practical use whatever.

3312. You think the pleadings before the appellate courts of Sheriffs ought to be entirely oral pleadings?—I think they should see the papers beforehand; but we as a body object very strongly to the determination of cases without the parties having the right to see their judge.

3313. Would you allow reclaiming petition and answers?—I think that undesirable.

3314. Would you allow the parties to have the assistance of counsel at the discussions?—We have no objections to having the assistance of counsel; but we would object very much to the attendance of counsel being made indispensable. We think it would destroy the value of the court as an appeal court of moderate expense, if it were a condition that the parties should be heard of necessity by counsel; but we would have no objection that they should have power to bring counsel if they thought fit.

3315. And that if it was a reasonable thing that counsel should be instructed to plead the case, the expense should be part of the costs of the action?—That ought to be in the discretion of the court, as it is under the existing system.

3316. You talked of a small jury of five or seven for hearing cases in the inferior court; what is your reason for limiting the number of the jury?—Because of the inconvenience (which is very much felt in criminal cases) of summoning large bodies of men, and taking them away unnecessarily from their employment; and I believe that a smaller number would have a greater feeling of personal responsibility.

3317. And there would be some saving of expense if they are to be paid for their attendance?—Yes. A jury of five is allowed in the County Court in England.

3318. Should their verdict necessarily be final?—Much would depend upon the constitution of the appeal court.

3319. How so?—I mean, that if we had a local appeal court of two judges of the highest class, I think that these two judges should be entitled to exercise the same powers with reference to verdicts that the Supreme Court at present does.

3320. That is, on a motion for a new trial, or an exception?—I don't mean to say that the particular forms of the procedure should be so; but in substance I think it would be right that there should be a revising power if there was an adequate court.

3321. Either on the ground that the verdict is contrary to evidence and the justice of the case, or on the ground of misdirection, or wrongous admission or rejection of evidence?—Yes; and in such a case it should be required that the judge who presided at the jury trial should take his seat on the bench with the appeal judges.

3322. In such a case, would you allow a motion to have the verdict set aside upon such grounds?—Yes; and if the judge was the resident judge of the district, I think he should be called on to sit with the other judges in considering that point.

3323. You would allow a proceeding for setting aside a verdict on these grounds?—I would be disposed to do that within the Sheriff Court.

3324. You wish to have it disposed of by the appeal court, the resident Sheriff being one of the judges in dealing with that matter?—Yes.

3325. If they set aside the verdict, you would give a new trial?—Precisely so.

3326. So that in one form or another the question of fact would be conclusively settled in the Sheriff Court?—I think that is extremely desirable. I think some of the greatest evils under which we suffer arise from the facts not being settled in the court where the evidence is taken. I have thus far been speaking of appeals from the resident Sheriff with a jury; but if the resident and appeal Sheriffs were to sit together as a jury, the review would of course be in the Supreme Court. In both cases it might be the right of either party, on paying the expense, to have the whole proceedings taken down in shorthand. Thus, I think, you would have superior materials for grounding complaint to a higher court than under the present system. The present mode of dealing with appeals on written proofs

Alexander M'Neel-Caird.

seems to me unsound in principle and hazardous in practice. The appeal judge, who has not seen or heard the witnesses, reads the notes of the judge who has, and dealing with them, not as in a jury case by cancelling the proceedings for gross error, is expected to form an original judgment on the facts for himself, and to vary or reverse the findings of fact as freely as if he had equal information with the judge who took the evidence,—and all this without assistance or explanation from that judge. In notes of evidence so taken, there are probably passages which were quite intelligible in their proper sense to the judge who wrote them, but which, when read by another who did not hear the witnesses, convey a different meaning. And wherever there is a direct conflict of evidence, many of the best tests of comparative truthfulness are totally superseded whenever the case passes by appeal to a judge who was not present when the evidence was given. I think that, except in extreme cases, or where there is error in law, the verdict or findings as to fact of those who have seen and heard the witnesses is more likely to be right than the judgment of more skilful men formed upon the same words without these aids. While on this subject, I must add that circumstantial records and written proofs are, in my judgment, twin roots of great delay and cost in the whole of our procedure. They are incompatible with reasonable despatch or moderate expense, and it is most desirable that a remedy should be found for them.

3327. If the objection to the verdict arises from a misdirection in point of law, would you allow any appeal to the Court of Session from the judgment of the appellate Sheriff Court on the point of law?—I think that is implied in what I said before, that there should be an appeal on points of law to the Supreme Court at all times.

3328. Do you think there is a hardship in not allowing the remedy of divorce in the Sheriff Court?—I think there is a great deal worse than hardship. It leads to a great amount of crime. There is no such thing known in practice as relief by divorce among the lower classes. They must find it practically in some other way.

3329. You suggested that there should be a power in the local judge to compel arbitration; he would name the arbiters?—Yes; I think the power to name arbiters in fulfilment of agreements to arbitrate would be well in the hands of all our courts, the Supreme Court as well as the local courts.

3330. What class of cases do you refer to?—If, for example, parties at the beginning of a nineteen years' lease enter into an agreement, as they very commonly do, that any dispute which shall arise shall be determined by arbitration, it is quite impossible that at the beginning of the lease they can foresee who are to be the arbiters towards the end of it, and at present a clause of that description is inoperative. I would propose that the court should have the power to correct that evil; that is what is done in England, where the common law courts have power to exercise that jurisdiction.

3331. *Mr. Shand.*—That is by recent enactment?—By enactment in 1854.

3332. *The Chairman.*—In such cases there is generally a clause in leases that the arbiters are to be appointed one by each party, and that they shall choose an oversman?—But if one refuses to nominate, what is the remedy? The common thing is that he does refuse. A very common case also is where parties have entered into a submission to two arbiters, with power to them to name an oversman, and the arbiters having disagreed in their judgment, disagree as to who shall be the oversman; in practice we sometimes try, but don't often succeed, to get the arbiters at the beginning to fix who the oversman shall be. That difficulty would be got over if the court had power to step in.

3333. Has the case ever occurred in your experience, that the arbiters, without going into the case, agreed to differ, and to name an oversman, leaving him to settle the whole matter?—I don't know any case of that kind, and I should doubt whether that would be valid. The usual terms of the submission are 'in case they shall disagree.' The condition of their power then is, that they shall first quarrel.

3334. *Mr. Baxter.*—Supposing one of the parties under the lease should refuse to name an arbiter, would you leave it to the court to name both arbiters?—The rule in England—and it is a very reasonable one in such a case—is, I understand, that if the one party gives notice to the other that a certain person is his arbiter, and the other fails within a certain time to name an arbiter, then the court may either authorize the one arbiter to proceed, or may appoint a second. I think that is a reasonable rule.

3335. *The Chairman.*—Would you give the court power to send cases to arbitration where there had been no agreement between the parties to arbitrate?—That principle also has been adopted in England, and I think it a sound principle.

3336. You approve of it?—There are cases of such a character that it is the interest of the parties, and sometimes even of the public, that there should be in the hands of the court a power of that description.

3337. What class of cases do you refer to?—A case occurred a few months ago in England which shows what I mean. An action was raised by a lady against a nobleman with whom she had lived for a great many years; and when it was brought before the court, the judge said it was not a fit case to go to a jury, and insisted on arbitration.

3338. *Mr. Smythe.*—You refer to Lord Willoughby's case?—Yes.

3339. I don't think it was compulsory there?—There is such compulsory power in the Act of Parliament. I rather think it was compulsory. There was pressure put on.

3340. I think the counsel had to give their consent?—I may have misunderstood what was done in that particular case, but I think I am correct in saying such a power exists in the courts of England. I think it is to be found in the Common Law Procedure Act of 1854.

3341. *The Chairman.*—Do you think that such a power should be given to the Sheriff?—I have doubts about giving it to the Sheriff. I think it would be better in the hands of the Supreme Court.

3342. There might be a risk of a judge wishing to get rid of a case by sending it to arbitration?—We cannot suppose that any judge would do such a thing.

3343. You would not entrust it to the Sheriff?—I think it is matter of such supreme discretion, that it should be in the hands of the highest judges.

3344. The other matter you alluded to was arbitration where there was an agreement to arbitrate, but that agreement was likely to be frustrated, either by accident or by the conduct of one of the parties. Do you think that that should be left with the Sheriff?—Most undoubtedly, because it is a difficulty which we experience continually, and it constantly brings arbitration to a dead-lock.

3345. And it indicates that the parties did not contemplate the decision of a court, but rather contemplated the decision of arbiters?—That is implied in the fact that they have agreed to arbitrate; and if they agreed to arbitrate in the knowledge that this was the law, of course they could not complain that the jurisdiction was exercised. The great difficulty is to get the parties to agree upon arbiters.

3346. *Mr. Smythe.*—Does not that difficulty arising under leases spring from the lease itself being defective?—No.

3347. This evil is not provided against by the lease?—In a lease which contemplates a transaction for nineteen years, it is impossible to name the arbiters with any confidence that they shall be available when required; and it is essential to the validity of the arrangement that they shall be named in the lease.

3348. Might not the lease contain a provision, that if the parties refuse to name an arbiter, the Sheriff should appoint one?—That would not be given effect to in law.

3349. Might it not be made part of the contract?—But in the present state of the law, as I understand it, that could not be carried out. The principle of the law is, that parties cannot delegate to a judge or to a third party the choice of an arbiter.

3350. *Mr. Shand.*—You say you think the Council as a body are satisfied that there should be an appeal within the Sheriff Court itself; what evils would you apprehend if justice were administered by a resident judge alone, with an appeal only to the Court of Session?—That practically, in the vast majority of cases, there would be no appeal at all; and in a country where, according to our practice, both law and fact are in the hands of the judge, that is a discretion undesirable to be left without a practical power of appeal. You can give a technical power of appeal which will be of no value, if the amount at stake will not pay the costs.

3351. You think that practically, without such intermediate appeal, there would be a denial of justice in a large number of cases?—In an enormous proportion. I conclude so, first, from the fact that, in our own experience, the advocations have been in such small proportion to the cases in the Sheriff Courts; and next, from the fact that in England the appeals in County Court cases, where appeal is open from £20 upwards, have been only 15 out of 8000 cases. Now we cannot suppose that, in the 7985 cases which were not appealed, the parties were necessarily satisfied with the judgment, or would not have sought an appeal if they could have got it. Although they were technically entitled to appeal, it was because practically the expense shut out the appeal that there were so few.

3352. Would you not be satisfied to have the judgment made final of such men as we now have as Sheriff-substitutes in the vast majority of cases?—I would think that a very great misfortune indeed, however much you may improve their position and qualifications.

3353. Do you think it is any advantage that there should be a power of appeal to judges who are not resident in the county?—There are advantages in that. You escape to a considerable extent the risk of local influences. We have not, as a body, come to any conclusion as to whether these appeal judges ought to be resident within certain districts, or whether they should be unattached to any particular district.

3354. What do you mean by local influences?—Social influences,—a man living in the county is necessarily meeting with the people on whom he may sit in judgment next day. I don't say that we find that mischievous. In my own experience I have never found it so. At the same time, a non-resident judge is likely to be more free from any suspicion of that kind of thing. I don't think it exists so much as that it may be suspected.

3355. Is it a subject of common remark that such influences exist?—I have heard remarks of that description made, in small debt cases more particularly (where there is no appeal), though I saw no ground for them. But the circumstance that the feeling may exist may fairly be taken into account.

3356. Does the circumstance that such a feeling exists, go to some extent to impair the value of the decision given?—I would not put it to that extent.

3357. There are at present five appeals competent during the progress of a case?—Yes.

3358. How many of these do you propose should be left?—My own feeling was rather against any appeal till the final issue of the case; but the general opinion of the body is that appeal might be allowed upon an order for proof, or what is tantamount to an order for proof—a remit to a reporter; and that when a witness pleads confidentiality, he should have the right of appeal, because that is a point that must be determined. They also propose that there should be an appeal at any stage by leave of the judge.

3359. Would you not add to these a right to appeal in any case where an interim decree for money is given, that being practically a decree which involves payment?—I think it extremely desirable to limit the number of stages at which a party may appeal. We have far too many of them; and I think also it is not enough to prescribe that appeal shall not be competent in any other stages, because you may have an appeal tendered to the Sheriff-clerk which is manifestly incompetent; but in practice the Sheriff-clerk says, 'I cannot judge, I must transmit it.' And you have the procedure stopped by an appeal which is not worth a farthing.

3360. What do you say to the point I am putting as to the propriety of allowing an appeal in the case of an interim decree for money?—It is a strong case.

3361. You have not considered it?—I have not fully considered it. I admit it is a very strong case for an appeal, if the party should be called on to pay down the money.

3362. *Mr. Campbell.*—It is disposing in part of the merits of the case?—I think it should be a condition of appeal in such a case, that he should deposit the money.

3363. *Mr. Shand.*—Do you see any necessity for so long a period as fifteen days elapsing between the date of an appeal, and the process being sent off to the Sheriff?—I don't see why it should not be sent off at once. The delay arises from the system of reclaiming petitions.

3364. There is a period of eight days allowed for the party to make up his mind whether he will appeal or not?—Yes; he has first time to consider; and after he has entered his appeal, he has another week to consider whether he will ask for an oral hearing or put in a reclaiming petition.

3365. Do you think the fifteen days might be diminished?—I think, if the system of oral hearings were adopted, it might be totally abrogated, and the moment the appeal is taken the process should go off.

3366. Supposing there were in some cases written argument ordered, don't you think fifteen days too long?—No. If you are to have a reclaiming petition, it requires some time to get it ready. You cannot expect the agent to throw aside everything else and buckle to it.

3367. Don't you think he could put in his paper within eight days?—I don't know. I should think it rather hard to shut him up so much; because if he omits to lodge it within the time, it is one of those papers that he cannot get in afterwards by leave. The agent may be ill or from home, and it would be extremely hard to shut out the party in such circumstances. If you are to retain written pleadings, you must allow a reasonable time to make the arrangements for them; but I am against allowing written pleadings.

3368. Under the system of allowing fewer appeals, and if possible shortening the time, as I have suggested, you would obtain an appeal at as small an expense and with as little delay as you possibly could from the local judge?—At present I think we have as cheap an appeal as can be conceived, if the party is content to send his case without a hearing; for he merely writes at the bottom of the interlocutor, 'I appeal against the above interlocutor.' Nothing can be shorter or simpler than that. But if a party wishes an oral hearing, that must stand till the court sits. In a bad case, it is sometimes the appellant's interest, under the present system, to ask no hearing, in order to shut his adversary's mouth, taking his chance of the appeal Sheriff starting some view of his own.

3369. Are there not now both delay and expense caused by the number of appeals allowed, and by the time which is occupied by each of these appeals?—I don't know in what part of a Sheriff Court process there is not delay at present. I would adhere to the simple form of appeal, and give oral hearings.

3370. And you would diminish the number of appeals?—Yes. I mean the stages at which appeal is permitted.

3371. How often do you contemplate that the appeal judges whom you suggest, should sit?—We are not possessed of statistics on which we could venture to form a distinct opinion as to that. We think the appeal judges should so arrange as to sit whenever there was business for them to do.

3372. I presume you propose that they should sit in your county town?—Not necessarily in the county town. It would be desirable that they should be in each county certainly, although I think it could be worked if the sittings were held at the circuit towns.

3373. What do you propose as to the places at which these two appeal judges should sit?—If we could have a sufficient number of judges to do it, I myself should like them to come to the counties to hear the cases in presence of the public, who had heard them

Alexander M'Neel-Caird.

before. There is a great advantage in having justice administered in presence of the people of the neighbourhood.

3374. How often would you expect that they should come to your county town?—That would depend on the amount of business to be done. I don't think it necessary that they should come very often.

3375. *Mr. Baxter.*—Once in six weeks or so?—It would be a very great relief to us if we could get our cases brought to a point in that time.

3376. *Mr. Shand.*—Then you contemplate once in six weeks?—We cannot judge of that till we get the statistics which we hope this Commission will procure.

3377. How often would it be necessary in your county?—I think once in six weeks would be quite enough.

3378. How long would you have them to sit in your county?—It is impossible to tell how long the cases would occupy.

3379. *Mr. Clark.*—How many cases would they have to hear every six weeks?—Very few indeed in my county.

3380. *Mr. Shand.*—How many would you expect that they would have to dispose of in your county once in six weeks?—I really am not prepared to say.

3381. *Mr. Clark.*—One?—I think sometimes there would not be any, and that there would not be a necessity for their coming so frequently. In my particular district I am not sure but that as good an arrangement as could be made, would be that the court should be held at the circuit town of Dumfries.

3382. *Mr. Shand.*—Coming there at intervals of about six weeks?—Yes. I am convinced that would be sufficient.

3383. Would that not create delay?—Nothing compared to what we have at present.

3384. How would you propose that an appeal in a summary case should be disposed of? Suppose the resident Sheriff grants an interim interdict, and the appeal court does not sit at Dumfries for six weeks, how would you propose that that should be dealt with?—If you have a local judge of sufficient standing, the parties must submit to that until they can procure its reversal by the next court that is held. I see no other remedy for it.

3385. Would that not to some extent be an evil?—That would to some extent be an evil, I admit; that is to say, that in an extreme case of interdict, if you could imagine an interdict granted without reasonable grounds, it would be a hardship that a party should remain for six weeks under the interdict; but I have known parties having to remain longer than that under an erroneous interdict by the present system.

3386. But that is by no means a necessary result of the present system?—I don't say that it is, but I have had my own experience of it.

3387. How would you propose that cases should be disposed of by the appeal court. Do you propose to have the papers printed?—I think it is most undesirable that there should be printing, and I think that might be avoided if there are only two judges.

3388. Then the process must first be taken home by one judge and then by the other?—Not necessarily. By the present rule, each agent is entitled to make a copy of the record and of the proof, and I see no reason why one of the agents—the agent for the party appealing, probably—should not transmit his copy of the record and proof along with the process, so that the process might go to one appeal judge, and the copy to the other.

3389. Do you propose that the judges should return to the county town to deliver their opinions?—I think that if they have met the parties face to face, and heard what they have to say, there should be no necessity for their returning. I may also state that it is not my own opinion only, but the opinion of our body, that it would be an advisable thing under such a system of appeal, that the Sheriffs, if resident in Edinburgh, should have a common office and a common clerk to receive and transmit the processes, and make the necessary communications.

3390. Do you contemplate that the Sheriffs should be resident in Edinburgh?—As a body, we discussed that question, and left it open. If you ask my opinion, it is that it would be desirable that they should be resident in Edinburgh.

3391. For what reason?—I don't think we could expect the best class of men absolutely to give up their practice at the bar, nor for my own part do I think it would be desirable.

3392. Do you think it an advantage that the Sheriffs are practising members of the bar at present?—That is my personal opinion, but I know that there is a great difference of opinion in our body on that subject. I think it is a great advantage that a man's mind is always abreast of the state of the law.

3393. Do you think it would be consistent with counsel remaining in practice, that they should occupy the office of one of these judges?—I doubt whether a man in leading practice would undertake the office.

3394. How many weeks of the year do you expect that his time would be occupied in going circuits?—If you will be kind enough to let me have the statistics, I could answer that question.

3395. But in any view, his time would be much broken in upon?—I think he ought to be handsomely paid. I think he should be of a rank only inferior to the supreme judges.

3396. Don't you think his time would be so much broken up and occupied by going circuit, that it would be impossible for him to remain in practice in the Supreme Court?—I think he probably could not remain in large practice in the Supreme Court.

3397. Do you think he could remain in practice at all?—I think he might, in moderate practice. But I think the essential thing is that he should be sufficiently paid, and placed in such a position in regard to prospects of promotion, that men of the first class could be got to undertake the office.

3398. *The Chairman.*—His ability to remain in practice would depend, in some degree, first, upon the number of appeal Sheriffs appointed, and second, upon the number of appeals brought before them?—No doubt it would very largely. On the other hand, the number of appeal Sheriffs goes, I am afraid, very much into the question of the salaries that you can give. If there is to be a large number, I don't suppose there is much prospect of getting a grant of public money to pay them; and therefore I fear that we are limited by the amount which is already allowed for this object; and that if you had a large number, you could not get the class of men whom we seek to get.

3399. *Mr. Shand.*—Do you contemplate that these judges should still retain the administrative duties of Sheriffs connected with all the counties in Scotland?—As a body we have not considered that question. I think the tendency of opinion rather is, that they should be relieved from that department of duty.

3400. That is the tendency of opinion in your body?—Yes.

3401. Have you yourself formed an opinion upon that?—I cannot say that I have formed a decided opinion upon it. I believe that the resident Sheriffs, especially if their position was improved in the way we suggest, are perfectly competent to do the administrative duties of their districts.

3402. *Mr. Campbell.*—To a large extent they perform these duties already?—To a very large extent.

3403. And in so far as they are liable to be interfered with by the advent of the Sheriff of the county, do you think that their influence in the administration which they actually exercise is diminished and impaired?—I don't think that, if things are working reasonably smooth. Difficulties might arise, but I don't think they should. At all events, that is not a necessary part of the present system. I have served under four Sheriffs-principal, and had much reason to be satisfied with their administration.

3404. *Mr. Shand.*—As matters now stand, do you know that when any emergency occurs, the Sheriff is usually sent for, and comes to the county?—Yes; he is the highest officer.

3405. *Mr. Smythe.*—Is not the Sheriff-substitute constantly in the habit of consulting with the Sheriff-principal in regard to any difficulties which he may

have in the performance of his administrative duties?—I am not in a position to answer that question.

3406. *Mr. Shand.*—You are aware that under the 40th section of the Judicature Act, power is given to remove cases from the Sheriff Court to the Court of Session for future progress?—I am aware of that. For jury trial.

3407. Do you propose to retain that power?—I never once saw it exercised. It applies to cases above £40. The expense of jury trial, as at present practised in Scotland, is so enormous, that few people would think of advocating a case of that amount for jury trial on the present system.

3408. Do you know whether the power which you stated is given to the judges in the County Courts in England to try cases with juries of five is used to any extent?—I am aware that the power of trial by jury in the County Courts in England is not used to any considerable extent; but I think it right, in making that answer, to give an explanation along with it. In the year 1866, the average amount sued for in each case in the County Courts was £2, 7s. 6d., and I don't think you can expect a jury to be called on to act about such a sum as that. But there were 8244 cases tried in the County Courts between £20 and £50 of value, and 879 were tried in that year by juries, or considerably more than 10 per cent. On the other hand, in Scotland the average number of civil cases tried by jury, taking the five years ending in 1867, was 28 in the year; on twelve years ending 1844 it was 41; while, taking the year 1866, the number tried at the superior common law courts and assizes in England was 2928, in addition to the 879 in the County Courts.

3409. *Mr. Clark.*—Do you think that is a fair comparison?—I don't mean it as a comparison. I mean it as indicating that jury trial has not itself had a fair trial in Scotland, owing to the enormous expense attendant upon our system.

3410. I suppose you are aware that in England, in order to get a decree in absence, you must have a jury?—I am not in the least aware of that.

3411. To prove your debt?—I rather think that is a mistake. I think that in the existing state of the law, the process for recovery of an undisputed debt is extremely simple. The party issues his writ; and if there is no appearance within a limited time, he may sign judgment and issue execution. I state this with some confidence, because, since I wrote a paper in which the subject of the record is treated of, I have had put into my hands an English common law cause which went to a jury.

3412. *Mr. Baxter.*—An actual record?—Yes; and I hold in my hand the whole case, including the bills of costs on each side, with all the writs, and even the citations of witnesses.

3413. The pleadings?—Yes; and everything else. When all put together, they would not make a corner of one of our commonest processes. Here is the original writ by which the party was called into court; and, as I understand, when a party sues out a writ of this description, he indorses on it the particulars of his demand, or files a declaration of the particulars afterwards.

3414. Would you read what these were in that case?—'Commission due to plaintiff from defendant, in respect of letting defendant's business at —— Street to Mr. ——, £100; also the like amount on accounts stated between the plaintiff and the defendant, and for work and labour done by plaintiff for defendant at his request.' That is £200 altogether. I am now speaking of what we would call a decree in absence. As I understand, their practice is, that when this writ is served, the party has a certain number of days within which he must appear; and this gives him notice that if he does not appear, the plaintiff will be at liberty to sign final judgment for any sum not exceeding the amount claimed. If he don't appear, the judgment is signed; if he does appear, they proceed with their pleadings.

3415. Did the party appear in that case?—Yes; and he fought it out to a jury trial and verdict. The costs, including counsel, witnesses, and all expenses, appear from the bills to have been under £50 a side. Now I think that shows that the great expense to which we are accustomed is not inherent in jury trial, and that if we had a fair trial of it upon such a system as this, the country would probably be better satisfied with it.

3416. *The Chairman.*—Did the defendant put in any plea?—Yes. But before going on with that, I was going to ask your Lordship to permit me to read a memorandum of the sort of pleading which I thought of suggesting.

3417. *Mr. Shand.*—For the Sheriff Court?—Yes; or it may be for the Supreme Court. I had noted this down before seeing that case from England to which I have referred. Two objects appear to be sought by our present records which might perhaps be separated with advantage: 1*st*, to prevent surprise, which I take to be the primary object of a record; and this might be secured by a few simple propositions fairly disclosing, without unnecessary detail, the grounds of action and defence. 2*d*, The second object is to procure admissions (which under the present system are not often made in very satisfactory terms); and this object, as it appears to me, more properly belongs to the department of evidence. The short form of record, which is occasionally used in the Sheriff Court by noting a minute of defence, might be much more frequently employed if the pursuer were to add a brief note in replication, and if the form itself were properly worked. It might tend to relieve our records from much redundant matter which obscures the issue, if both parties had a right, after the record was closed, to call for admissions of specific facts. It would not be necessary to compel answers. But if the required facts were not explicitly admitted, and were afterwards proved, the cost of proving them should be laid on the party who failed to make the admission called for. This rule to be enforced by the auditor without special directions from the court. In this manner admissions would probably be obtained, which are at present evaded, averments being frequently met by reference to something else. Undisputed facts and details would be eliminated from the record and oral proof, and the admissions only would require to be attended to or printed, as evidence, for the use of the court. A resort, after closing the record, to the old method of judicially examining the parties, might to some extent serve the same purposes; but it would in many cases cause inconvenience to the parties, and in others the parties would be unequally matched. That embodied my own views before I saw the papers in the English case. The whole pleading, according to their system, works itself: the court have nothing to do with it, the judge never sees it till it has been brought to an issue; and in this case the entire pleading in the cause for both parties is put upon a single page, brought to an issue, and then sent to a jury.

3418. *The Chairman.*—What was the plea in defence in that case?—'Defendant by his attorney says that he never was indebted as alleged.' The whole pleadings are on this half page of writing; and it is really not a digest; it seems to be a transcript of the pleadings of both parties. The plea in defence is probably more vague than would suit our notions of fair disclosure. But we might plead to such a case, Defender did not employ the pursuer; or, Pursuer acted contrary to his instructions; or, Pursuer was to be paid by commission on the rent, and his charge is excessive,—and go to trial at once.

3419. *Mr. Gordon.*—Was there no demand for particulars made in that case?—There is, I believe, a right in the party to call for particulars, and he gets access to them out of court.

3420. *Mr. Shand.*—I presume these particulars are equivalent to our condescendence?—No, they are as little as possible equivalent to our condescendence, because I think they have a provision in their rules that they shall not exceed three folios in length, in the cases in which they can be demanded.

3421. But these particulars aim at giving the information?—Yes, they are to give a substantial disclosure of the matter at issue, to prevent surprise.

3422. It is a condescendence briefly stated?—I don't wish to use the word condescendence because it is so misleading. We don't see condescendences of three folios.

Alexander M'Neel-Caird.

3423. You don't have it in name, but is not a schedule of particulars just a condescendence abridged?—It is what our condescendence, if you are to retain the name, might become. They call it a declaration of particulars.

3424. *Mr. Clark.*—Do you think that a convenient form for trying all cases?—I don't know that I have fully explained it; I don't pretend fully to understand the English system.

3425. But do you, as a Scotch lawyer, think that that is a convenient form for trying all cases which occur in Scotland?—I think it would be a vast improvement on our forms, and a great reduction of expense.

3426. And therefore a good form for trying all cases in Scotland?—I think it is plainly preferable to ours, in the cases to which it is applicable.

3427. Do you think it a good system?—I think it a good system in substance. I don't mean to say that I would transfer it to this country exactly as it is there, because our notions are different upon several points, more particularly with reference to specification; but I think in substance it is a good system. There is a form established for conveying the essence of every ground of action, and parties are bound to choose the form that is applicable to their case. These forms were prepared by the best lawyers—I believe by Mr. Justice Willes or the present Lord Chancellor. They have forms in which they have condensed the essence of nearly every ground of action. If the parties fail to use a correct form, they are met by a demurrer, and they take issue in law, and the matter is debated and decided. If there be no objection to the form of pleading, they come to issue at once on fact, and that goes to evidence.

3428. Do you think it an expedient thing to prescribe these fixed forms, so that if parties take the wrong form they will be turned out of court?—I would not turn them out of court; I would give power to amend on paying costs.

3429. *Mr. Shand.*—These forms are generally used in common law cases only?—Yes; we have no Chancery cases in the Sheriff Court.

3430. Are you aware that in Chancery or equity cases the English courts have adopted our system of pleading recently?—I have seen some of their pleadings in Chancery, and I certainly did not admire them.

3431. Are you aware that their bills have been adopted from our form of condescendence?—I am not aware of that. If they have come to us for a model, I think they have been unfortunate.

3432. *Mr. Clark.*—Is it not possible that we may go wrong by going to England for our forms?—I don't say we might not; but when we find the greatest lawyers of the day able to conduct every kind of question in such a simple form, and at so small an expense comparatively, I think we ought carefully to consider it. We are in great want of light, and in matters which have been recently legislated on in England, it is surely worth while to seek it there.

3433. Do the ablest lawyers of the day consider that a satisfactory system?—I have no knowledge of that.

3434. *Mr. Shand.*—While a very short form of pleading may be very useful, and may be safely adopted in common law cases, is it not necessary that a somewhat longer and a different form should be adopted in equity cases?—There may be a distinction. I have no idea of recommending either the simple adoption of the forms used in the English courts, or that they should be absolutely Procrustean. We have a system of condescendence and answers, in which one party begins and builds up a great castle of cards from the foundation; and the other party, after answering his adversary vaguely under reference to his own statement of facts, begins and builds up another castle of cards, putting in a card of a different colour here and there, till it is extremely difficult to extricate the facts.

3435. Are you describing the state of matters under the Court of Session Act?—I am describing a great many processes that I have had the misfortune to do with.

3436. Under the recent Court of Session Act?—There has not been enough of experience to judge of it.

3437. Do you know that it has practically abolished revised pleadings?—That is not the difficulty. It is the avoiding to meet one another fairly; so that in place of limiting themselves to the points on which they differ, each party builds his own edifice from the foundation, slipping in a stone here or there, different from what the other side has done. That system causes great confusion and expense.

3438. *The Chairman.*—Is that attributable to the manner in which the law is worked, or to the principle on which the rules for its working are constructed?—I think the mode of working has a vast deal to do with it.

3439. In the case you referred us to from England, could the party have pleaded under that defence, that in the employment he acted as agent, and did not bind himself?—I think they have a form of plea for that. At all events there seems no difficulty in devising one.

3440. Then you think he would not have been entitled to set that up under that defence?—I hope your Lordship will not ask me to solve a question of English law.

3441. What I want to know is, whether three, or four, or five different defences, resting on different propositions in law and fact, might not be set up under that?—I apprehend they would require to set up the defence appropriate to the class of case. If the party meant to plead that what he had done was by leave and licence, or that what he had done was as agent of another party, he should have a form of plea adapted to raising that question.

3442. That would apply only to a limited number of cases; they would still require that he should go into something more than merely denying the liability?—Yes, I apprehend so.

3443. Well, that case you put before us scarcely gives us an idea of what would be required as the statement of the defender in the great majority of cases?—No; but your Lordship will find in the Common Law Procedure Act of 1852 a mass of forms of pleading adapted to a great variety of cases.

3444. *Mr. Shand.*—Do you know how far that system would be suitable to cases which are not to be tried by jury?—I don't think there is any essential difference in principle, so far as the pleading is concerned, whether you try it by jury or by judge.

3445. You think these forms would be equally suitable for proof before a judge?—I cannot see why they should not. When you go to proof, you go to proof on facts.

3446. You have stated that you think there should be a considerable extension of the jurisdiction of the Sheriff: would you extend the Sheriff's jurisdiction to all classes of reductions and suspensions?—These are mere forms of action; they don't involve the substance of jurisdiction. Therefore when I said, on behalf of the body whom I represent, that we thought the Sheriff should have jurisdiction in all civil cases, I of course intended to include all forms of action that were necessary to expiscate his jurisdiction.

3447. Do you think the Sheriff ought to have jurisdiction in regard to reductions of deeds of settlement, whatever might be the sum involved?—I have no doubt that if a reduction of a deed of settlement, where the property was of sufficient value to justify incurring the costs of the Supreme Court, were brought in the Sheriff Court, it would be instantly removed by the parties to Edinburgh.

3448. You have not made up your mind whether that power should remain in the party?—If the Legislature should fix a limit to the Sheriff's new jurisdiction, I think the power of either party to carry the case at once to the Supreme Court should be reserved. That is on the assumption that, contrary to the opinion of our body, you choose to limit the jurisdiction. But indeed there is no use for an arbitrary limit under the new jurisdiction, any more than under the present unlimited jurisdiction as to personal estate. There is a natural limit, arising out of the interest and objects of the parties, and in general it will work itself, sufficiently at all events for practical purposes. The pursuer, when he selects his court, will naturally take that

which gives him the best prospect of having his demand soon satisfied. And if the case is of such importance that it is not likely to take end in the Sheriff Court, his interest is to begin in the court of ultimate judgment. He would only waste his time and money by doing otherwise. If there were added to that interest of the pursuer, a right in the defender to require a case of magnitude to be removed to the higher court at once, you would have a self-acting principle sufficient to guard against wrong cases being tried in the Sheriff Court, if you really apprehend danger from that cause.

3449. If the jurisdiction is extended, is there any case in which you think the power to remove the case to the Court of Session should be taken away?—I am now speaking not of the power of taking the case after judgment of the Sheriff for review to the Court of Session, but of the right of the parties to carry it there before judgment in the Sheriff Court.

3450. Well, is there any case in which you think that power should be taken away?—In a case involving the validity of a settlement of considerable amount, adequate to meet the expenses, I think it might be desirable to remove it at once to the Supreme Court for jury trial.

3451. *Mr. Baxter.*—That is, if the parties wished it?—Yes; I would not compel them to go to the Court of Session if both chose to remain in the inferior court.

3452. *Mr. Shand.*—In such a case as I have put, you would give the Sheriff the same power as the Court of Session to reduce all settlements?—Certainly, if the parties were willing to submit themselves to his judgment, but subject to review.

3453. And leaving either party to carry it to the Court of Session, if the value was how much?—We don't think there should be a limit to the review.

3454. *The Chairman.*—Suppose the jurisdiction of the Sheriff were extended, would you still apply the 40th section of the Judicature Act?—I don't think that the 40th section of the Judicature Act ought to be applicable to cases of such small value as £40. I think a remit to a jury trial in the Supreme Court for £40, or anything like it, could take place only for purposes of oppression, where the one party was rich and the other poor. I don't think it likely to be done for any legitimate purpose.

3455. *Mr. Shand.*—What sum would you say?—If I were under the necessity of naming a sum, I would say £500; but we have not deliberated upon that.

3456. *Mr. Clark.*—So that the pursuer might raise an action in the Sheriff Court in regard to a subject worth £500, and compel the defender to take the judgment of the Sheriff in the first instance, without the defender having any power to remove it to the Court of Session?—I have no objection to the Sheriff having power to remove to the Court of Session all cases in which he saw any cause for doing so; but we were talking of a right in the party to demand it.

3457. That is what I was speaking of?—If you are to fix a limit, I think that is the right way.

3458. You say that a pursuer may select the tribunal, and he may select the Sheriff as the first judge in all cases under the value of £500, and the defender must submit to the judgment of the Sheriff in the first instance?—If you determine that the Sheriff's jurisdiction shall be limited, the defender should have the right to require the case at any stage of it to pass to the Court of Session if that limit be exceeded. If, on the other hand, the Sheriff is to have an unlimited jurisdiction, I don't see why the Sheriff should not go on to deliver judgment, and then let the case be taken to appeal.

3459. If the Sheriff's jurisdiction is limited, you think the defender should be entitled in all cases to remove the case to the Court of Session?—Upon showing that it was a case above that limit.

3460. *Mr. Shand.*—£500?—Whatever limit you fix.

3461. But if the jurisdiction is unlimited?—If the Sheriff is to have an unlimited jurisdiction, he will exercise it.

3462. But suppose the Sheriff has an unlimited jurisdiction, and a pursuer raises an action involving many thousands of pounds, would you not give the defender the power of removing that action to the Court of Session when an order for proof is pronounced?—That involves the other question. If you come to the conclusion that the Sheriff ought to have an unlimited jurisdiction, I don't see why he should be interrupted in exercising that jurisdiction. If, on the contrary, you wish to fix a limit to the Sheriff's jurisdiction, then we suggest this mode of preventing cases above that limit going on in his court. But if the question reaches only to cases where there is an order for proof, I have already suggested £500 as a limit beyond which parties might claim jury trial in the Supreme Court.

3463. *Mr. Clark.*—Who is to judge?—The Sheriff. It must be shown to him that the value exceeds the limit, or that it is a question of status.

3464. If that is shown, then he is no longer to have any jurisdiction?—I think that is an objectionable mode of putting it. I think that, where an objection to jurisdiction is taken, whether upon such a ground as that, or upon the ground that the action has been brought in the wrong Sheriff Court, it is quite wrong that the action should be dismissed. I see no use of turning the parties out of court, and compelling them to begin again; in place of dismissing the case, according to the present practice, it should be simply transferred to the judge who has jurisdiction. You avoid delay and expense by that, and you put an end to captious pleas.

3465. *Mr. Shand.*—Are you of opinion that the Sheriff should have jurisdiction in questions of status, apart from questions of divorce?—If you lay aside the question of divorce, I think there is a broad distinction betwixt questions of legitimacy and marriage on the one hand, and almost any other class of questions that can be brought before a court.

3466. Does that lead you to think it is very doubtful whether these should be competent in the Sheriff Court?—I am more doubtful on that point than any other of the suggestions made.

3467. Are you of opinion that in that class of cases the Sheriff's jurisdiction should be excluded?—I don't feel warranted in saying that I think it ought to be excluded, but I think it may much more reasonably be excluded in regard to these cases than almost any others.

3468. *The Chairman.*—You are not prepared to give an opinion that such cases should be competent before the Sheriff?—I am not prepared to urge that matter. It is very different from any of the other branches of jurisdiction spoken of.

3469. *Mr. Shand.*—I think you said you thought the Sheriff and Dean of Guild ought to have a cumulative jurisdiction?—If the Dean of Guild Court is kept up.

3470. Do you not think that that would be apt to produce considerable confusion in large cities?—I excepted large cities.

3471. Then you don't think that in these cases it would be desirable to give the Sheriff cumulative jurisdiction with the Dean of Guild?—No, because in all probability you have in large towns an officer much superior to the Sheriff for cases of that class.

3472. You have stated that your body is of opinion that the power of agents to practise should be enlarged. To what extent do you mean that?—That all law-agents should be free to practise equally in any court,—that, if all admitted on equal trials and found qualified, Writers to the Signet and Solicitors before the Supreme Courts should have a right to come into any of our courts and practise freely if they choose; and that members of our body, found qualified on the same trials, should be at liberty to practise in their courts. We wish full reciprocity.

3473. The practice you allude to is practice as agents?—Yes. I may explain that we don't think that this involves any idea of country agents generally seeking personally to conduct business before the Supreme Court; but we feel that, although the great responsibility in the majority of Court of Session cases rests on the country agent, and he has the chief trouble in getting up and guiding the cause, yet he is not re-

Alexander M'Neil-Caird.

cognised by the court or by the auditor as a party to be paid for his trouble, while at the same time the law condemns any transaction betwixt him and the town agent for sharing the expenses that are allowed. We think that either that rule of law should be altered, or that the court should be thrown open to us, in order by that means to get quit of the difficulty.

3474. Do you think any benefit would accrue to the public from such an arrangement as you propose?—The present arrangement is unfair to the public. A litigant, whether successful or not, has always to pay his country agent out of his own pocket. And we think it has a good deal to do with the starving of the Court of Session. Every country agent has the deepest interest in diminishing the business of the Court of Session as much as he can; because, if he undertakes it, he has an enormous amount of anxiety, trouble, and responsibility: he gets no pay except at the cost of his client, and he is not recognised at all in the court; he is further under a very unfair liability to the town agent for the client. The town agent considers the country agent personally responsible to him on behalf of the client.

3475. *Mr Baxter.*—And he is so?—I believe he is held to be so in law, unless there be some special transaction to the contrary. Now, it is surely a reasonable thing that the country agent should not be made responsible for the mutual client unless he gives a written undertaking that he shall be responsible. We ask to have the present presumption altered; because it is a most unpleasant thing to go to your town agent before you begin a case, and say, 'Now, remember, I am not to be responsible to you for these expenses.'

3476. *Mr. Shand.*—If the present system were altered, do you think the Court of Session would be resorted to in a great number of cases in which it is not now resorted to?—If the points which I have referred to received reasonable attention, and if the work and responsibility of country agents were fairly provided for, I have no doubt that, in place of the pressure which we must of necessity exercise at present for our own sakes, to prevent cases going to the Court of Session, a considerable number of cases would come which don't come at present. A man in such a position as that cannot help feeling that he has no interest in encouraging, but a very strong interest in discouraging, litigation in the Court of Session; and, in many cases, a man is justified in saying that he will not put himself in the position of being surety for a client.

3477. *Mr. Smythe.*—All attorneys in England are officers of the Supreme Court?—Yes; that is the principle we aim at.

3478. Notwithstanding that, there are always town agents and country agents?—Yes; but in England the town agent and the country agent act as partners, and divide the fees, which is a thing we cannot do.

3479. *The Chairman.*—That is one of the alternatives you put?—Yes.

3480. Would it not be some inconvenience to an agent settled in the country to be attending to processes in Edinburgh? He must have somebody there responsible for the processes?—Certainly. It is in practice impossible that a man living at a distance in the country can be in attendance at Edinburgh to conduct cases of that kind personally. They must be conducted by parties within reach of the court.

3481. Then the removal of the obstruction to agreement for the division of profits would go very far to bring about the result you aim at?—To a considerable extent; but we think it would be a better arrangement altogether, that all law-agents should be put upon one footing, as in England.

3482. *Mr. Baxter.*—Although that were done, I suppose you don't anticipate that country agents would come to Edinburgh to practise?—I don't at all. Some might choose to come to Edinburgh to settle, and practise in the Supreme Court; but that would be a small number, and I think it would be more than compensated by the number of town agents who would go to the country. Be that as it might, I don't at all see why particular bodies should have a right of property, or an exclusive right to the public business of the courts, if means are taken to secure the qualifications of all practitioners.

3483. Do you think a party admitted in the inferior court should have right to practise in all courts?—Yes, understanding the question to apply to all Sheriff Courts. We have now an examination by a central body to determine whether a man is qualified to practise at all; and after he has been admitted by that central body, upon an equal examination with others, I think it very absurd that there is not an interchange among our courts, and that a man admitted into one court should not be able to go and practise in another without being admitted there.

3484. *The Chairman.*—Would that entitle them to be admitted into the several faculties which you have mentioned?—I cannot on this subject give anything except my own opinion, because it has not been matter of discussion; but my belief is, that there is a very general feeling throughout our branch of the profession in favour of throwing all these things perfectly open.

3485. *Mr. Baxter.*—You are aware that in Glasgow, Edinburgh, and Aberdeen, the faculties have exclusive privileges?—I think I saw a report of the Glasgow Faculty some time ago, in which views in favour of throwing open their own faculty, of course upon principles of reciprocity, were advocated.

3486. But at present they have exclusive privileges?—They have.

3487. Do you think these should exist?—I am opposed to exclusive privileges.

3488. *The Chairman.*—Some of the faculties have a hall and libraries; do you think it reasonable that a person coming to settle in a place where these are, should pay a certain sum as his contribution, in order to obtain the privileges of those halls and libraries?—I think that is perfectly reasonable; but I don't think it inconsistent with what I have been saying. I think these faculties might remain, and the admission to their benefits might depend upon adequate payments; but that the absolute right to practise should be thrown open to all who have been admitted and found qualified on an equal examination.

3489. *Mr. Shand.*—Did you get returns from any number of societies in answer to the note of points which was issued by your body?—We got returns expressing their views of first impression. These views have been reconsidered by us all, and I don't suppose there is any member of our body who has not upon discussion modified his views. I confess that I myself have very largely modified my views after discussion with my brethren.

3490. From how many societies did you get returns?—I cannot say.

3491. How many are there?—Twenty-three.

3492. Did you get returns from the whole of them?—I think from the bulk of them; but I am not prepared to state.

3493. The discussions you refer to took place at a meeting of representatives?—At a variety of meetings.

3494. Of representatives?—Yes; repeated after they had returned to their districts, and had an opportunity of testing the state of opinion among their own bodies.

3495. How many representatives were present at these meetings?—They varied very much.

3496. How many bodies might be represented at them?—I should think at some of the meetings there must have been representatives of fourteen or fifteen bodies.

3497. Are the returns you speak of contained in writing, or are they printed?—Some are printed, and some written.

3498. Do they contain the opinions that were expressed by these bodies about the constitution of the courts?—They express the first impressions of these bodies.

3499. When were these reports furnished?—Some months ago, in anticipation of this Commission sitting.

3500. Would you rather not give us these returns?—We don't think they are in such a state that it would

be desirable to put them in. They are in the rough state in which they were drawn up before discussion. I think it better to give the result after discussion.

3501. *The Chairman.*—I think you stated that the opinions communicated to you in that way represented the prevailing opinions in the different faculties or societies?—So I think I am justified in saying. These results were arrived at by careful collation of the returns made from the different faculties, and then meeting and discussing the points of difference; and the result of that was, that we came to one mind upon all the points I have touched upon in the paper I read at the opening of my examination, except the question of jury trial.

3502. That was the prevailing opinion of the faculties, but you cannot say that it was the unanimous opinion?—I can say that it was the unanimous opinion of the representatives who came up,—after full discussion. Of course I don't pretend to say that there was unanimity throughout the whole profession.

3503. You don't say that each representative represented the opinion of the whole of his faculty?—No, that would be absurd; but I think it was a fair way of ascertaining the prevalent opinion of the whole body.

3504. *Mr. Gordon.*—The English case to which you referred us claimed £100?—£200.

3505. Do you know whether it was not a random sum which was claimed?—I cannot tell that. It seems to have been one half for a general fee for trouble taken in the letting of a house, and one half for a sum due on an account stated.

3506. Can you tell me whether these were two separate claims, or two separate modes of stating the same claim?—I understand them to be two separate claims; but there are several counts to cover the various modes in which a jury might be disposed to look at the claim.

3507. You read it as implying that there were two separate claims of £100?—Yes, I understand it so. The sum sued for is £200.

3508. The sum recovered was only £35?—Yes.

3509. And the costs on one side were £48, and on the other side £45?—Yes.

3510. In the plaintiff's account there is an entry, 'Copy particulars in defendant's set-off.' Was there any set-off?—I cannot say. I observed that there was a charge of that description, and my impression rather was that it was a mistake in the account, because there is nothing in the pleadings to show a set-off.

3511. Although you may take decree in absence by default where appearance is not entered, is it not the rule in England that when appearance has been entered, and the pleading given in for the defendant, the case must be disposed of by a jury?—I think that extremely probable.

3512. Whether the defendant continues his defence or not?—I am not myself aware of that; but if it is so, the empannelling of a jury would be like our old system of empannelling a jury to receive a prisoner's plea of guilty.

3513. You mentioned that 2928 cases were tried in England in 1866. These represented all litigated cases in the common law courts?—They do not represent cases in which the court decided upon points of law by demurrer.

3514. With the exception of causes disposed of by demurrer?—I should think the cases involving pure points of law must have been a large number. However, the return I have is limited to the jury trials.

3515. The system of the common law courts in England is, that you can get your case tried only by going before a jury, unless it is disposed of by demurrer?—If there be a defence, I understand it is so.

3516. The 2928 cases represent, therefore, all the litigated cases other than those disposed of by demurrer?—They may, for anything that appears in the return. My reference to them was to show the enormous difference between the number of jury trials in Scotland and in England, where the system is better understood.

3517. Do you not know that it is the subject of regret on the part of the English public, that they must always go before a jury in these cases?—I don't know that. If the English public regretted it much, I should think they would amend it. I think if they went through one of our long written proofs, they would be thankful to go before any jury.

3518. But do you know that it is so?—I do not.

3519. *Mr. Smythe.*—There are a great many suits decided in Scotland without a jury, which in England would go to a jury?—There are a great many cases decided in Scotland on pure points of law. The same cases would be decided on points of law in England.

3520. But there are a great many cases decided by the courts in Scotland which go to a jury in England?—Yes, in all our courts we proceed upon written proofs, taken in the local courts by the Sheriff-substitute, and taken in the Supreme Court by a short-hand writer, which, if you are to have written proofs, is the best mode of doing it.

3521. Supposing the 2928 cases which were tried in England by jury had been in Scotland, a great many of them would have been decided in England without a jury?—I don't know that; I should think they all involved questions of fact. If they had not, they would not have been sent to a jury. If they had involved questions of disputed fact in Scotland, they would have gone to a proof.

3522. *Mr. Baxter.*—Not necessarily to a jury?—No.

3523. *Mr. Gordon.*—They would not have gone to a jury in the Sheriff Court at all?—No, I have no doubt the 2928 jury cases in England include a great number of cases of the class which, with us, would have been disposed of, on proof, by the court.

3524. On the pleadings, in respect of the admissions of parties, or after proof had been led?—The admissions of parties in England are given.

3525. But they are given in evidence before the jury. In Scotland you may dispose of a case on the admissions of parties as contained in the pleadings. In England, in common law cases, as I understand it, you must go before a jury to have effect given to the admissions?—I have not suggested the pure and simple adoption of the English practice. I mentioned it as suggestive of something worth consideration. If it has the defects to which you point, we might improve upon it. I have suggested a means of getting admissions after the record is closed, but I think there is no necessity for going to a jury for that purpose. If these defects exist, they are not essential to the jury system.

3526. *The Chairman.*—I do not understand how you propose to compel parties upon the subject of admissions. At present parties are required to admit or deny; you say they evade that, but the principle of our pleading is that they are to admit or deny the propositions stated?—But we have a cumbrous record about that, which is of no practical use. My proposition is, that, the record being closed, it shall be open to either party to call on the other party to admit specific facts. The other party need not answer unless he chooses; but if he fails to admit the facts, and if these facts are afterwards proved, the entire cost of proving them should be laid on the party who failed to make the admission, whatever the issue of the cause, and that should be invariably done without any order of court.

3527. You would put these propositions into a written paper?—Yes.

3528. And the party would be asked to admit or deny each separately?—Precisely so.

3529. Would you require him to admit or deny matters that were not properly within his own knowledge?—I think, if he failed to make the admission, he ought to have made the inquiry; and if he necessitated proof wrongfully, he ought to bear the expense of that.

3530. If he fails to admit facts, though not within his own knowledge, you think he should be responsible for the expenses?—Of proving these facts.

3531. *Mr. Clark.*—Though he gained his cause?—Yes, I think that is one way in which you may possibly get admissions. The advantage of that would be, that if you did not get the admission, you would not cumber the record with it.

Alexander M'Neel-Caird.

3532. *The Chairman.*—With what?—With anything about it. It would not be part of the record. It is a portion of the evidence. You put a specific fact to your antagonist, and ask him to say ay or no, do you admit that. If he admits it, it is good evidence to be taken into account by the court, along with the other evidence, and must be put before the court either by copying the portion which is admitted, or by printing it; but all that is not admitted would pass out of the case, and never come under consideration except by the auditor.

3533. Is there not some risk that that paper would be a repetition of the pursuer's averment in point of fact?—If the party did not admit implicitly, and the averment were afterwards proved, he would have to pay for proving it. That would discourage evasion.

3534. Does it not come to this, that it is a more proper kind of record than the one we have now?—It would not be matter of record unless it be admitted.

3535. But the purpose of a record is to get the allegation of the one party and of the other, and their admissions or denials; and if the record is made as it ought to be, should it not contain these things?—I think these are not essential. I think they rather belong to the department of evidence. We are using our records for the purpose of obtaining admissions before the record is closed, and we thereby cumber what we call our record with a vast amount of matter of no practical use.

3536. Then what is the use of the record?—To give warning of the case which is to be set up. There must be a sufficient record to disclose fairly the case which is meant to be tried.

3537. To disclose it in point of fact, and with pleas in law?—Yes; but what I mean to suggest is, that the substance of the case may be sufficiently disclosed without all that averment, and circumstance, and detail which we have so much of at present, for the purpose of getting admissions; and that these averments of circumstance and detail would not form part of the record, but those of the averments which were admitted would become part of the evidence, and would not require to be printed for the court unless they were admitted. There would be no necessity to refer to them on the part of the court in the discussions, except to particular points of fact that were admitted; but the auditor would look at it on the question of expenses. The object of the suggestion is to eliminate from the record and from the proof those points on which parties are agreed, and to bring the proof to the narrowest limits you possibly can, without cumbering the record with it.

3538. Have you any further observations to make upon the civil jurisdiction of the Sheriff?—On the subject of divorce, I think it would be well if the Sheriff is to have jurisdiction in such cases; and, indeed, I don't know that it would not be well in all our courts, that in every case of divorce there should be an inquiry and report under the direction of the judge as to whether there was collusion or not. I would submit also, that in divorce cases the decree should be suspended for a limited time after it was pronounced, in order that any party who felt an interest might be entitled to bring up the question of collusion. The precaution of inquiry is to a certain extent recognised in England by the right of the Queen's Proctor to intervene; but that intervention, I understand, is not invariable, but only occasional upon special cause. I think it would be well if the Sheriff had the power to make a remit to some public officer, possibly the Procurator-fiscal, to inquire whether he saw any reason to suspect collusion. I also think we should adopt the principle which is adopted in England, where a decree of divorce is made a rule *nisi*—that it shall not take effect unless it remains unchallenged on the ground of collusion for a limited time.

3539. Would you retain the oath of calumny?—I don't think it is of much use. I never saw the oath of calumny stop anything.

3540. *Mr. Baxter.*—Do you think there would be more danger of collusion if the Sheriff had jurisdiction than there is at present?—I think there would, because the Sheriff would be dealing with a much lower class of people. I think also, when you are going to extend an institution of this description to facilitate divorce, you are bound to use all reasonable precaution that it shall not be abused.

3541. *The Chairman.*—And the precaution you would suggest is what you have now mentioned?—Yes. I may also state that I think it would be well to adopt in Scotland the suit to perpetuate testimony which they have in England. They have not actions of declarator, and therefore they found such a suit to be necessary. But I would suggest that the Commission should consider whether we should not have that suit as a separate proceeding, independent of declarator or any other action.

3542. *Mr. Baxter.*—You mean before any action is brought?—Yes; that without a process being raised for the purpose of determining the question, the parties should have a right to bring a suit to perpetuate testimony.

3543. *Mr. Clark.*—To perpetuate that which in some circumstances may become useful for them?—Yes.

3544. *Mr Gordon.*—That would apply chiefly to questions of descent or propinquity?—It would, of course.

3545. We can raise the question by declarator in our courts?—A declarator will do it if the question of right is once stirred; but a declarator often forces a question into court that might never otherwise be brought.

3546. *The Chairman.*—Who would you make the respondent in such a suit?—I would follow the practice in England.

3547. Whatever it be?—Yes.

3548. Do you know what it is?—No.

3549. Then, good or bad, you would follow it?—Unless I saw a reason against it. The subject was no doubt carefully considered. I believe they call the party who is likely to be interested.

3550. Have you anything further to suggest?—I would submit for the consideration of the Commission, that in any table of fees which may be established, more particularly if it were of the character of that in the Debts Recovery Act—namely, a slump fee in full of all that an agent can ask for his work, from his client as well as from the opposite party—there should be reserved a right to parties to retain agents, and to give them a retaining fee, or for agents to stipulate by written agreement for a reasonable fee. That is allowed in the English County Courts. The provision there is, that the fee allowed shall be in full of all that an attorney can claim, unless he has a written agreement for more; and I think that is a reasonable thing, because if the fee be inadequate, and the agent has more lucrative employment, he declines the case. I believe that mercantile men at this moment are making complaints that, under the Debts Recovery Act, they cannot get professional men to undertake the duty; the reason of which simply is, that a law has been passed by which a professional man is to sell his goods at a statutory price, and is not to be entitled to bargain for more.

3551. *Mr. Orr Ewing.*—Would that not be a dangerous practice in the interest of the client?—They don't seem to find it so in England; and I don't know any practice that could be worse for the client than that he should have a nominal right to the services of a man for a fee so inadequate that no one will undertake the duty.

3552. *Mr. Shand.*—Supposing a proprietor were in embarrassed circumstances, and that his estate had been very much under the management of a law-agent for many years, would you not, by an enactment of that kind, put such a man entirely within the power of his agent?—I think that would not be desirable, certainly. I am afraid, however, that the principle would reach counsel as well as agents. We are proposing a change, merely because what we think an unreasonable law has been recently enacted, by which an agent is to be entitled to a fixed fee, and to no more, even from his

own client, however great his labour. I think the agreement of the parties should be limited in this way, that an agent should not be entitled to stipulate absolutely for a fee, whatever amount of work he should do; but that he should be entitled to agree with his client that the actual amount of labour which he has should be taken into consideration in fixing the fee, or that his fee should be so much, unless it were in excess of his labour.

3553. Is your proposal merely to procure a remedy for an existing evil with reference to the Debts Recovery Act?—Quite so; it is pointed at that.

3554. Then it is not a general measure you propose?—No; we don't care for it as a general measure, unless we are further put under a system of that description. We propose it as a means of getting out of a difficulty. Parliament has said that the fee shall not be more than a certain sum, whatever labour the agent may have; and it has also said that, if he takes an appeal, he shall be bound to conduct the appeal to the end, without getting anything more; so that he has an improper interest to advise his client not to appeal.

3555. *Mr. Orr Ewing.*—Would it not be better to get that law amended?—Certainly. I think it would be much better to amend that law in some reasonable way.

3556. And you would rather recommend an amendment of it?—Yes; I am merely suggesting that, if it is thought desirable to have a rule of that kind, it is desirable that there should be some mode of getting out of the difficulty.

3557. You mean a mode of defeating the law?—I don't think that is desirable. It would be better to get quit of a bad law, but I am only suggesting this in case the law should not be altered.

3558. *The Chairman.*—Do you object to the principle of a fixed payment?—I believe the bodies whom I represent have that feeling. My own feeling is not adverse to the principle of a cumulo fee. I drafted the Parliamentary Bill of 1861, which proposed that principle; and I have not any objection to a cumulo fee being fixed for remuneration, if it be not so absolute that a party cannot stipulate for relief in exceptional circumstances.

3559. *Mr. Orr Ewing.*—Do you think it right that a body of procurators should pass rules preventing members of their body from carrying out an Act of Parliament?—I should think that a very objectionable step.

3560. That has been done?—I have heard it said, but I am not aware of it. I certainly think it would be an objectionable proceeding.

3561. *The Chairman.*—You think that would be wrong?—I think so. Every man should be left free to act for himself. I think a combination on the subject would be wrong.

3562. There is a power in the Debts Recovery Act to alter the fees?—Yes, that power is given to the Court of Session.

3563. Without the necessity of going to Parliament?—Yes; and I think it would remove the practical difficulty if that power were exercised, for that Act has come nearly to a dead-lock.

3564. In what district?—I believe pretty generally.

3565. Has it become so in your district?—I have never seen a case under that Act, and I have never been asked to conduct one. I don't think there has been one in my county.

3566. What do you mean by saying that the Act has come to a dead-lock?—I mean inoperative.

3567. *The Chairman.*—If it has been stated to the Commission by Sheriffs resident in extensive districts that it is a valuable Act, and is much worked in their districts, I suppose you would change your opinion?—Certainly I would as to their districts. But the point can be settled by a return of the cases litigated under the Act. I would remind your Lordship that what I have said on this subject cannot arise from any objection to the principle of trying summarily cases of the kind referred to in that Act, because we have come here to-day to recommend that all claims of every class up to £50 should be tried in the most summary way.

3568. *Mr. Baxter.*—Do you approve of the appeal to the Sheriff under the Debts Recovery Act?—I think it is very objectionable to have an appeal without a hearing.

3569. *The Chairman.*—If your view were followed out, you would abolish to a great extent the distinction between small debt procedure, and procedure under the Debts Recovery Act, and make all cases of that kind appealable to the Sheriffs?—Up to £50 we are extremely anxious that all classes of debts should be placed on the same footing. It is very objectionable that one particular class of debts should be dealt with differently from others, and it is most objectionable that a man having a £50 account shall have priority over another man who has a £50 bill. There is also a provision in the Debts Recovery Act which seems to me very difficult to work, by which all counter-claims, and all claims in multiplepoindings brought under that Act, shall be of the same nature and value as those contemplated by the Act. Suppose a bankrupt owes me £100 upon a bond, or against whom I have a decree of court, sues me for a £30 open account, am I to be foreclosed from producing my bond or founding on my decree because he has brought his action under the Debts Recovery Act?

3570. But if you would extend the class of cases which might be brought under the Debts Recovery Act, of course the counter-claims would expand in a similar way?—Yes. There is a provision of the Act, that in such a case the Sheriff shall have discretion to send the case to the ordinary court; but as there is no provision giving radical jurisdiction under the Act as to any but its own kind of debts, I don't see how in the ordinary court the Sheriff could take in counter-claims of a different character from those contemplated, or in a competition of creditors how he could take in bill debts as against open accounts, in an action raised under that Act.

3571. Have you anything further to state in regard to civil matters?—No.

3572. Do you think the Sheriff's jurisdiction should be extended in criminal matters to classes of cases that he does not now try?—I don't think there is any grievance on that subject. Possibly the Sheriff might get the power of pronouncing a sentence of penal servitude; and in some cases that would save a little expense. I don't know that anything more is necessary.

3573. My question was as to the class of cases that he could try?—I don't think any change is necessary in regard to that.

3574. *Mr. Baxter.*—Would you not make him competent to try robbery?—I don't see any reason for doing so. Robbery is a very serious crime.

3575. Is it not sometimes very near theft?—There is the essential distinction that there is violence.

3576. *Mr. Shand.*—Is it not sometimes so close as to be undistinguishable?—I can conceive of it being very narrow.

3577. Would it not be very desirable that Crown counsel should have the power of remitting such cases, although they bear the name of robbery, to be tried by the Sheriff?—I don't at all object to that, but I don't see any clamant necessity for it. I don't think it would do much good or harm to give such a discretion.

3578. *Mr. Campbell.*—You are yourself a Procurator-fiscal?—I am. I have been so for thirty-three years.

3579. *Mr. Baxter.*—Are not these cases of robbery very often punished by imprisonment?—Yes.

3580. *The Chairman.*—What is your view as to extending the Sheriff's power of sentencing prisoners?—I think it might be occasionally useful if the Sheriff had power to pronounce a sentence of penal servitude. For example, in a case of petty theft of an article worth half-a-crown, if there were a dozen previous convictions, I don't see why the Sheriff should not have power to pass a sentence of penal servitude.

3581. *Mr. Campbell.*—Such cases are frequently tried by the Sheriff and a jury now?—Yes.

3582. And if the same cases had been tried before the Circuit Court, they would probably have been

Alexander M'Neel-Caird.

punished with penal servitude?—I should think that in cases where there was a large number of previous convictions, it would be so. There is no difficulty in dealing with the cases, and the Sheriff is just as competent to deal with them as with those he actually tries.

3583. *The Chairman.*—And there is the control of the public prosecutor as to what court they shall be tried in?—Of course.

3584. *Mr. Baxter.*—Have you considered whether you would give the Sheriff power of amending a criminal libel in such particulars as would not prejudice the interests of the prisoner?—There is a power of that kind in the Summary Procedure Act; but with reference to more solemn proceedings, I doubt very much if such a power should be given.

3585. *Mr. Shand.*—Suppose a correction as to the *locus*, which is not material in itself, or suppose the property has been stated as belonging to A, B., while it should have been to A. B. & Co. or the like, the panel having sufficient notice of the general charge, is there any reason why that should not be corrected at a jury trial as well as at a summary trial?—Our criminals are a very ignorant class, and I think a power of that kind might be used to their prejudice.

3586. Do you think it would be abused?—Not on the part of the Crown intentionally; but I think there is a reasonable jealousy for the liberty of poor people of that class, and I would not hastily recommend the introduction of such a change.

3587. Supposing it were left to the discretion of the Sheriff, would that not be sufficient protection?—It is one of the safeguards of the prisoner.

3588. *Mr. Campbell.*—Don't you think the power of alteration might be extended without danger thus far, that if there be anything superfluous in which there is an error, it should be in the power of the judge to strike out the superfluity?—He has that power already.

3589. Suppose it is stated that an assault was committed at a particular point on the high road, beside a particular church in the parish of A., but that it is really in the parish of B., would you not allow the name of the parish to be struck out?—But then you don't give the poor man fair play. A man of that class generally comes up without agent or counsel.

3590. *Mr. Shand.*—Would you not be giving him more fair play by making a slight correction of that kind, and sending the case rapidly to trial, in place of sending him to prison for a month till a new indictment is served?—I am not prepared to say that that should be done in cases of a serious character. I see no reason why the Crown should commit blunders in serious cases.

3591. *Mr. Baxter.*—Are you aware of a case in Fifeshire where a man's own house was described as being in a wrong parish, and the prisoner got off in consequence. Should there not have been power to amend such a mistake as that?—I think the Procurator-fiscal must have been to blame. He ought to have taken care that that blunder did not happen.

3592. *The Chairman.*—Do you think that the effect of giving such a power might be to lead to laxity in the preparation of the libels?—I have no doubt it might lead officers in my own position to take advantage of that power of amendment, and not to be so careful in the preparation of cases as we ought to be. We have been brought up in a school of severe accuracy, and I think it well that we should remain so.

3593. *Mr. Shand.*—Where there is to be no prejudice to the prisoner, why should not that power of amendment be allowed?—I think it is not enough, in a matter of this kind, that the prisoner is not to suffer actual prejudice. It is of great importance that people of that class should not suspect anything of that kind. I think if they had it in their power to say that an alteration was made in an indictment while the trial was in progress, it might give rise to a feeling on the part of persons of that class that they were not fairly treated. I don't say that I have any deliberately formed opinion on this subject, because I was not prepared to speak to it. I am merely stating my views on the spur of the moment.

3594. *The Chairman.*—Do you think that Procurators-fiscal should be prevented from taking any other business?—I can only say, that if that condition had been put to me when I was appointed to the office, I would have very respectfully declined to undertake it.

3595. Do you think there are certain localities where you could not get persons to undertake the office, and relinquish all chance of other business?—Yes, unless the office were made a much more valuable one than it has hitherto been. The best class of men could not be expected to undertake it upon that condition.

3596. And in districts where there is a small amount of business it would be unreasonable to tie up the whole time of a man?—It would be ridiculous in many districts. I presume I may speak without the slightest personal prejudice on the subject, because I have no doubt that if an alteration of that kind were made in my time, I should receive full compensation for the sacrifice. But I think it is very doubtful whether it would be an improvement. I think there is a good deal in this, that a man who is engaged in the active practice of his profession, and coming into daily contact, in business of every description, with his professional brethren, is likely to have a mind better informed and better fitted for the peculiar duties with which a Procurator-fiscal has to deal, because no man can tell what new description of offence may come under his consideration from day to day; and I think it desirable that the Procurator-fiscal should be, if possible, on all subjects quite abreast of the best man in his district.

3597. In large cities, and places of that kind, the time of the Fiscal would probably be so much occupied as to exclude him from taking private business?—That is an exceptional case. In large towns, where the emoluments are of course made correspondingly large, a first-class man will be induced to abandon every other prospect in order to take a position of that description. He has there usually access to the best assistance and advice; but a Procurator-fiscal in the country must be self-reliant in every emergency. At the same time, I must remind your Lordship that originally—indeed, at the time I was myself appointed, and for long after—the appointment was neither more nor less than the employment of an agent to act on behalf of the Crown in criminal cases, being paid according to what he did; and that he was therefore removeable at the mere will of the person who gave him his appointment, and he remains so to this day. Now, I think it perfectly clear that no man in good practice—and that is the class of men likely to be most useful as Procurators-fiscal—is likely to throw up his whole livelihood and chance of getting forward, for the sake of taking an office out of which he may be turned the next day at the mere will of an individual. This question involves a great deal more than the mere question of the Procurator-fiscal not continuing to transact private business. It also involves the tenure of his office, and it involves the necessity for retiring allowances; because, if a Procurator-fiscal is deprived of the privilege which he has always had of taking private business, he must be placed like every other public officer, on the same footing, and have a retiring allowance provided for him.—Then, again, crime is peculiarly intermittent, and when it occurs must be dealt with instantly, and with vigour, under pain of clamant failure. No man can dawdle with it in safety. We have no people less reticent than those who have suffered from crime. They know their right to have proceedings taken promptly at the public expense, and they are not slow to claim the right. The Procurator-fiscal consequently has to keep a staff up to the maximum requirements of his duties. And if he were restricted from other employment, he might in many districts have hard work for a week or a fortnight, alternating with considerable intervals, during which he and his clerks might have absolutely nothing to do. That would be very bad for the office, very bad for the man; it would promote indolent habits in his whole establishment, and would be wastefully expensive for the public.

3598. *Mr. Smythe.*—Would you recommend that the same reduction should be made in the number of the

jury in criminal cases as you have suggested should be done in civil cases?—I am going to propose a reduction of the number of jurors summoned; but I don't think anybody would like to see a change as to the number of jurors empannelled, because it has worked very well, and given great satisfaction to the public. That is one of the grounds of my opinion that the same mode of trial for civil cases would be very popular in Scotland, if it got a fair trial. But it is the practice, even where only a single case is to be tried, to summon forty-five jurymen. At many periods of the year that is a grievous hardship; to take 45 farmers away from their harvests, while only 15 are required, seems quite unnecessary. I therefore think that the number summoned might very well be reduced. Whether it could be reduced to a very small number more than the 15 who must be empannelled, would depend on whether it was thought safe to limit the time at which a panel or the Crown can make peremptory challenges. If the panel or the Crown were required to exhaust all their peremptory challenges, except one or two, at the first diet for pleading in a criminal cause, before the jury were summoned, you would not require to summon for the trial more than probably 20 or 25; but if you are to retain till the day of trial the right both of the Crown and the criminal to state peremptory challenges to any persons they please, without cause assigned, then of course you must have a larger number in attendance to provide for that.

3599. Then your suggestion is, that they should be required to state their peremptory challenges at the first diet?—I would require the Crown absolutely to do that. The Crown rarely exercises the right of peremptory challenge in a jury trial; and I think the panel might be required to exhaust them all but one or two.

3600. *Mr. Baxter.*—When you serve the libel, do you serve a list of the entire jury?—Yes, according to the present practice.

3601. *The Chairman.*—The challenges being taken, the number might be reduced to thirty?—You would avoid summoning those who were challenged.

3602. Would you avoid anything more?—Yes; you would then no longer be under the necessity of bringing up men to provide for the chance of the exercise of the peremptory challenge. You would require only to provide the fifteen men who are to go into the box, and such a number as might fairly be supposed would be challenged on good cause shown; and you would be able certainly to reduce the number to 25 with perfect safety; that is, if the Sheriff-clerk had his jury list in a proper state. If it was full of dead men, that would not do.

3603. That might answer very well if there was only one trial; but supposing there were two trials for the day, and the first jury retire, and having a difficulty in the case, are enclosed for a length of time, would you not require the number of jurors to make up a second panel?—That is not the case for which I sought to provide. The case of hardship which is most felt is where a single trial only is to take place. I remember not very long ago, a representation being addressed by a jury to the Lord Advocate on the extreme hardship of their having been summoned to the number of forty-five to try one case.

3604. Then you would apply your remedy only where there was one case to try?—I think that is the only case in which you can with perfect safety do it.

3605. *Mr Smythe.*—Would you still retain the number of jurors at fifteen?—It may be prejudice—I daresay it is—but I would not like to see the number of the jury in criminal cases changed. It has worked remarkably well.

3606. *Mr. Baxter.*—Does it not frequently happen that, though there are a number of cases at the first diet, they all plead guilty except one?—That happens very often.

3607. *The Chairman.*—Have you anything more to suggest on this subject?—Under the present system, a prisoner, when he petitions for bail, has to pay a fee, considerable in his circumstances, to the Sheriff-clerk for the use of the Crown, upon his petition and upon his bond of caution. I submit that that fee should be abolished. I think it is a great hardship on a prisoner lying in prison that he should be under the necessity of making such a payment, which is to pass into the exchequer. And I would submit that the same principle ought to be applied to poor prisoners applying for aliment under the Act of Grace.

3608. *Mr. Baxter.*—Do you think that the law of bail is on a proper footing just now?—I think the whole rules as to bail might be very well reconsidered.

3609. Do you think it would be an improvement to leave both the amount of the bail and the question as to whether bail should be granted or not, to the discretion of the bailing magistrate?—There are cases besides those that are capital, in which I think it would be well that the consent of the Crown should be given before bail was taken.

3610. Such as fraudulent bankruptcy?—I think that is a fair case for bail.

3611. Reset of theft to a large amount?—If it was to a very large amount, I think the consent of the Lord Advocate should be required. I think the whole subject might very well be considered.—There is another matter to which I would ask attention, and that is the necessity for a prisoner incurring the expense of running his letters if he wishes to obtain the benefit of our Scotch *habeas corpus*. I think something should be done on that subject—either to simplify the process very much, and reduce the cost of it, or possibly (and I don't see much objection to this) that a prisoner should have the right without application,—that his letters, or something equivalent to his letters, should run from the day he is committed for trial. Considering the rapidity of communication all over the country now, I think there would be no great danger if that were conceded.

3612. *The Chairman.*—Would you not require the party to give some sort of notice, simple and cheap?—That might be done by a simple notice transmitted to the Procurator-fiscal or to the Lord Advocate. I think that would be a good enough way to do it; but I don't see much objection to allowing the statutory time to run *ipso facto* from the day on which the man is committed for trial. Of course the prosecutor knows it. But a very inexpensive mode of doing it would be by causing the governor of the prison to deliver a letter to the Procurator-fiscal, or to transmit it by post to the Lord Advocate. Either of these would be a great relief to prisoners. If a notification of that description were adopted, notice would require to be preserved of the date at which it was given.

3613. That could be done in the jail books?—Yes, or by the certificate of an officer.

3614. *Mr. Smythe.*—What is the expense of running letters?—It used to be from £4 to £5.

3615. *Mr. Gordon.*—It consists chiefly of fees to the Sheriff-clerk?—It may be done by petition to the Sheriff. In the greater number of cases it is done by application to Edinburgh. In pleas of the Crown it must be in Edinburgh.

3616. Are you aware that the fees are passed from with regard to the poorer class of prisoners?—I am not aware; but I know that practically they prevent the thing from being done in the great majority of cases. I have not seen an instance of letters being run for many years, and I attribute that to nothing else than the cost being such that the prisoners cannot pay it.

3617. *Mr. Smythe.*—They have to employ an agent to do it?—Yes; but I don't see the least necessity for that.

3618. *Mr. Gordon.*—The effect of such a power being readily available to a prisoner, would be that almost every prisoner would force his trial to be brought on in Edinburgh?—Yes.

3619. And that would involve the expense of taking witnesses from remote districts to Edinburgh?—With the facilities of communication that we now have, I think it better that that expense should be incurred, than that prisoners should be kept in prison untried for five or six months.

3620. But that would involve a considerable addition

Alexander M'Neel-Caird.

to the cost of trial to the public?—In some cases it might.

3621. Would it in most cases add considerably to the costs?—Unless the Lord Advocate should think fit to let the case be tried in the local court.

3622. That could only be done in a case which could be competently tried before the Sheriff?—Precisely. But in a very grave case the element of expense is not so important,—a case of murder, for example.

3623. I suppose you are aware that, according to our Scottish system, the number of acquittals is very small indeed in proportion to the number of convictions?—On that subject I happen to have written a letter to a friend stating my views of it, which will show as briefly as I can state it how the matter stands.

3624. What is the date of it?—June last. It was written with the view of being used before a committee on which your Lordship sat in London. In that letter I said, 'In England the number of acquittals in proportion to prosecutions is more than double what it is in Scotland; and the excess indicates that either an undue number of guilty persons escape, or that an undue number of innocent persons are put unnecessarily to trial, for want of a public prosecutor.' I made that calculation from the returns of 1866 or 1867.

3625. I suppose your experience is, that the few prisoners who escape with verdicts of acquittal, escape from defects of proof rather than from their not being guilty?—I think our system affords most valuable protections to the innocent. A man must be first of all shown to be guilty by reasonable evidence to the satisfaction of the Procurator-fiscal; the Procurator-fiscal must satisfy the Sheriff or committing magistrate that there is sufficient evidence to afford a reasonable probability of conviction. The case must then be considered by the Crown counsel, and they must be satisfied also that there is strong probability of a conviction upon that evidence, otherwise the case will not be ordered for trial; and finally we have the trial itself.

3626. When a man is detained in prison for a couple of months, I suppose that is generally taken into account in awarding punishment; is it not?—No doubt it is; but that is no relief to the man who is found not to have been guilty.

3627. *Mr. Smythe.*—Where a man is guilty, he is not so apt to be desirous of forcing on his trial?—Unless he sees that he may as well have his punishment at once. I should think that, unless it were a capital case, he would be extremely anxious to get himself tried. When the sentence is pronounced, they seldom get full compensation for the time they have been in prison. If they get a sentence of penal servitude, it is impossible that it can be adequately taken into account.

3628. *The Chairman.*—Do you find any difficulty in working with the police?—I find it extremely simple. The police execute the instructions they get with great punctuality and attention. I have always regarded the police, and I believe in my county they regard themselves, as executive officers, and that I, as Procurator-fiscal representing the Lord Advocate, am the proper party to direct them in getting up evidence, and in all the proceedings to be taken in criminal matters. That has been acted upon on both sides, and has worked very well.

3629. *Mr. Smythe.*—Is there any delay in the reports by the Chief Constable to you?—All reports come to me immediately. I cannot say that there are no instances of delay, because inferior officers sometimes do make delays, but that is not systematic; on the contrary, I have every reason to be satisfied.

3630. Supposing a crime takes place in a distant part of the county, does the officer there report immediately to you, or does his report first go to the Superintendent of Police?—It goes to the Superintendent of Police, and then comes to me, unless it be a case of magnitude, and in such a case the officer in the district has instructions to communicate with me immediately. If the rule were established that every report must pass through the hands of the Chief Constable before coming to me, the system would be totally unworkable, because the Chief Constable lives at a distance of twenty-seven miles from my office.

3631. Have you an Inspector where you reside?—I have a Superintendent.

3632. *Mr. Gordon.*—Are serious cases reported first to the Superintendent?—The instructions are, in very serious cases, such as fire-raising or suspicion of murder, or any crime of that class, to report to me, and also to the Superintendent. I have had no reason to complain of any delay, and certainly nothing like collision or difficulty. There has been no attempt on the part of the police either to refuse to obey the instructions I had to give them, or to work with unnecessary friction. Everything has gone on pleasantly.

3633. *Mr. Smythe.*—A subordinate officer might make a mistake in not reporting to you a case which he should have reported to you?—In that case it would come to me immediately from the Superintendent.

3634. *The Chairman.*—The Sheriff is the superior authority in reference to the police of the county, is he not?—I take it to be so, and I think he ought to remain so, being the highest judicial officer in the county. When he is present, his order must necessarily supersede every other; if he were not present, and another magistrate were present, then, in case of riot, the order of the magistrate on the spot would be obeyed. But if the Sheriff were present, I have no doubt the duty of the police would be to attend to his instructions, and I think it desirable that it should remain so.

3635. *Mr. Smythe.*—You think the control and disposition of the force ought to be with the Sheriff?—I don't say exactly the disposition of the force. I mean the duty to be done and the general order to be given; but I think, in distributing the force, the Chief Constable must to some extent exercise a judgment. He gets his order to accomplish a certain duty, and should be left as to the details very much to his own judgment.

3636. *The Chairman.*—If the Sheriff desires certain assistance to be given to you in the investigation of crime, you consider it the duty of the police to fulfil that?—Yes; and the Sheriff in my county made a general order upon the police to attend to all instructions which they should receive from the Procurator-fiscal. There is a defect in the Police Act. The Police Act of Scotland appears to have been copied very much from the Police Act of England, and to have been prepared without attention to the difference between a country where there is a public prosecutor, and a country where there is none. But that has been the mode in which it has practically worked. Where there is a public prosecutor, his functions require that he should direct the executive in his department.

3637. Under that authority of the Sheriff, though he is not there at the time, you are his representative, and may demand that your instructions shall be fulfilled?—I would give to the highest officer of police who was there the instructions which I thought necessary.

3638. And you find no clashing between you and the police in the investigation of crime?—I have found my instructions faithfully attended to in general.

3639. Have you anything further to state?—There is a very small matter which I would like to mention. It is small in amount, but it is an important matter to the poorer class of litigants. The fee on a small debt summons is 2s., actually higher than the fee upon an ordinary summons of the largest amount. That is a very unfair thing for poor people. A servant seeking to raise a small debt summons has to pay a higher fee than a person bringing an action for £1000 into court.

3640. Would you raise the fee on the ordinary summons?—No; it is the clerk's fee I speak of. I think the fee on the small debt summons ought to be very much reduced.

3641. You think that fee is too large?—Yes: these fees are now received by the Sheriff-clerks, and accounted for to the Crown.

3642. You say that if the smaller fee is enough for the great case, a still smaller fee would be enough for the small case?—Precisely.

3643. *Mr. Orr Ewing.*—What is your opinion as to the Justice of Peace Courts?—I do not practise in the Justice of Peace Courts.

3644. Would you take away the licensing power of

the Justices of the Peace?—I think it would be a great improvement if the Justice of Peace Courts did not exercise a jurisdiction in cases of poaching. I think it would be well that that should pass into the hands of a paid officer. With reference to licensing, I don't see where you are to put a discretion of that character, unless you put it into the hands of the Justices of the Peace. It is not a judicial function at all. If there is to be a discretionary selection of houses for licence, I don't see where you can leave the power better than in the hands of the Justices.

3645. *Mr. Baxter.*—Would you give them the power of reviewing the magistrates?—That I think is much more objectionable. I think the magistrates of a town ought to be the judges in that matter. They are elective, and they are best acquainted with what passes in the town, and everything that affects the question; and I do think it an objection that country magistrates should be entitled to overturn the judgments of town magistrates in questions of that description.

3646. *Mr. Orr Ewing.*—What would you suggest instead of the review of the magistrates?—I don't know that there should be a review.

3647. *Mr. Smythe.*—Are you referring to the Quarter Sessions?—The question put to me, as I understood, was as to the review by country Justices of a judgment of burgh magistrates.

3648. *Mr. Baxter.*—I meant the Quarter Sessions?—The Quarter Sessions is a court composed, with very few exceptions, of Justices of the Peace not immediately connected with the burgh. The magistrates have a seat, but of course they are in a miserable minority. The town magistrates going to a court of that kind cannot be on a par in point of numbers with the whole Justices of the county, and therefore they are practically overruled.

3649. *Mr. Smythe.*—But where you have Petty Sessions, the Quarter Sessions overrule them?—The Quarter Sessions are a body of Justices of the same class, and with the same knowledge of country districts that the original magistrates have; but when country Justices come in and upset the acts of town magistrates, they overturn the acts of the supreme authority of the town, and I think that somewhat objectionable.

3650. My experience has been that the town Justices have sometimes upset the decisions of the county Justices?—I think that is equally objectionable. I think the town magistrates, being appointed by their fellow-citizens from their special interest in and knowledge of their own town, ought to be entitled to exercise their discretion within their own limits; but on the other hand, I think they ought to be confined to their own limits.

3651. Would you have no court of appeal?—I don't see the absolute necessity for a court of appeal. The only reason for a court of appeal is, that you cannot have the whole Justices of a county assembled in the first instance; but you have the whole magistrates in the town assembled, and a majority of them may fairly rule. If the first meeting was a meeting of all the magistrates of the county, I don't see why there should be an appeal.

3652. *The Chairman.*—Would your view apply equally to all towns? Take such a place as Inverkeithing. Would you allow the magistrates' decisions to be conclusive there?—I must apologize for speaking on this subject, because I had not the slightest idea that such a question would be put, and therefore I had not considered these details.

3653. *Mr. Smythe.*—Is it not difficult to speak of districts and towns, because there are large villages and towns in the west country as to which the magistrates in the district, knowing more of the circumstances, may be better qualified to decide than local parties?—I don't think there should be much difficulty in distinguishing between town magistrates, who are elected by their fellow-citizens, and country magistrates, who hold their offices on a different tenure. I think the character of the office makes the distinction. But all I have said on this subject is the thought of the moment.

3654. *The Chairman.*—What is your opinion as to the jurisdiction of Justices of the Peace in small debt actions?—I am rather favourable to its remaining. I think the Act as to the Justice of Peace jurisdiction should be carefully reconsidered. It is a very old statute now, I suppose forty years old, and there are many of its provisions which require amendment; but I am not sure that in cases up to £5 there is not some advantage in enabling people to go before a court of common sense rather than a court of law; and though they don't uniformly get common sense from the Justices, still that is the principle on which they try to go.

3655. *The Chairman.*—Do you consider it an advantage that country gentlemen should be induced to take an interest in such matters?—I think it is useful for themselves. I think also there are a great many cases of that amount which are better settled upon plain common-sense principles, such as an ordinary man unlearned in the law would apply to them, than by bringing in the technical rules of law for their decision. I think up to £5 there is a good deal in that view.

3656. Country Justices have probably some influence personally in inducing parties in their district to settle their claims?—That influence they could exercise without sitting as magistrates.

3657. If the parties came to them?—Yes. I am afraid, when they get into court, it seldom ends in an amicable arrangement. But if that jurisdiction were taken away from the Justices, I don't know what Justices would remain for. Their duties would then be limited to granting occasionally a criminal warrant, and to sitting upon questions of licence. I don't think it is a jurisdiction that I would be prepared to abolish, but I certainly would not extend it. I think a revisal of the Act would be productive of considerable advantage.

3658. Do you think that it is expedient to continue the jurisdiction of Burgh Courts in civil matters?—It is very little used in civil matters; in my experience, very little indeed.

3659. Then the abolition of it would not be attended with inconvenience to the community?—I don't think so.

3660. *Mr. Baxter.*—They have very cumbrous forms of process?—For sums of 40s. they have a quick enough process.

3661. But I mean the ordinary court?—It is practically out of use for that purpose, so far as my experience goes, and I have seen very few of the 40s. cases even.

3662. *The Chairman.*—Do cases of removing come before them?—I don't think these cases are well disposed of in that court. It becomes the court of an irresponsible officer, and I don't think it desirable that that should continue; but I think the police jurisdiction of the magistrates ought to remain. It is a useful jurisdiction in petty crimes.

3663. That is, under their police authority?—Yes.

3664. Are there any burghs of barony in your district?—There are several burghs of barony, but I never knew a court held in them.

3665. Any burghs of regality?—There is no burgh of regality in my neighbourhood.

3666. Do you see any practical advantage in continuing the jurisdiction of baron bailies?—I think it is a most objectionable kind of jurisdiction.

3667. They decide, if they decide at all, between the landlord, who appointed them, and his tenants; do they?—I think it is a very wrong thing that a landlord should appoint a man to pronounce judgment in his own favour, but it really does not practically exist in our part of the country.

3668. Have you anything further to suggest?—No; but I was instructed to say, on behalf of the General Council, that as they understood the inquiry at its present stage to be with regard to the Sheriff Courts, they trust that, at a later stage of the inquiry, when the Supreme Court comes under consideration, they may be allowed an opportunity of submitting anything they have to say on that subject; and also, that as we understand the Commission has agreed that the evidence should be from time to time made public, if we should find in the evidence anything which we can explain or make clearer, we may have an opportunity of doing so.

TUESDAY, 29TH DECEMBER 1868.

Members Present:—

LORD COLONSAY.	A. B. SHAND, Esq.
E. S. GORDON, Esq., Q.C.	JAMES WEBSTER, Esq.
GEO. HARRISON, Esq.	J. B. BAXTER, Esq.
JAMES CAMPBELL, Esq.	ADAM PATERSON, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

John William Thomson.

JOHN WILLIAM THOMSON, Esq., examined.

3669. *The Chairman.*—You are a practitioner in the Sheriff Court of Forfarshire at Dundee?—I am.

3670. How long have you been so?—For about thirty-six years.

3671. Do you hold any official appointments?—I hold the office of an Honorary Sheriff-substitute for Forfarshire; and I am also Vice-Preses of our Faculty, of which Mr. Baxter is President.

3672. As Honorary Sheriff-substitute, do you make formal orders and grant warrants, if necessary, during the absence of the Sheriff-substitute?—Yes, during his necessary absence.

3673. You do not in that capacity advise causes and decide them?—No, except with regard to the appointment of trustees in sequestrations; and I have also decided in cases as to service of heirs in his necessary absence, but not often.

3674. *Mr. Baxter.*—You do not decide ordinary causes?—No.

3675. *The Chairman.*—Have you anything to suggest to the Commission as to the constitution of the Sheriff Courts, as consisting of a Sheriff and his substitutes?—It occurs to me that our present system of Sheriff and Sheriff-substitute is one that ought not to be done away with. There may be improvement with regard to the mode of appeal from the Sheriff-substitute; but I think, from what I have seen in practice, and from what I have heard from my brethren in the profession, that it is most desirable that we should have a court of appeal within our own jurisdiction. It has been found to be a ready mode of obtaining an appeal; and, generally speaking, it has been a very satisfactory one both to the profession and to the public. We find that the Sheriff, while he has of course all the qualifications of, and we perhaps would hope more than, the substitute, has also in oral hearing the same advantage that the Sheriff-substitute has had in hearing the statements of parties. He has also the advantage of the Sheriff-substitute's views; and we find, generally speaking, that the judgment we get from the Sheriff-principal is very satisfactory in most cases—indeed, in the majority of cases; for there are a great many cases that are never thought of being taken beyond the appeal of the Sheriff-principal. It has occurred to us that there might probably be some arrangement made so as to discourage vexatious appeals to the Sheriff, by allowing him or enjoining him to dispose of the matter of expense of the appeal when he disposes of the appeal itself. It is the practice just now to allow that to go as a part of the general expense of the process; but in my view there might be a proper check upon useless appeals if the Sheriff were, when disposing of them, to lay upon the unsuccessful appellant such small amount of expenses as might serve the purpose in view. With regard to the different positions of Sheriff-substitute and Sheriff-principal, it occurs to me that it would be a good thing to lay upon the Sheriff-substitute all the ministerial duties of the office, so as to make the appellate Sheriff or Sheriffs—as that may be resolved upon—more completely devoted to their duties as judges of appeal. That has also occurred to us.

3676. *Mr. Campbell.*—Would it not follow from that view, that the Sheriff-substitute, under the alterations you suggest, would become an independent officer, and no longer hold the character of substitute?—I would rather take away the name of substitute from him altogether, and call him a resident Sheriff.

3677. I do not speak so much of the name; but if you charge him with all the ministerial duties, and make him the necessary judge in the first instance in all causes brought into the Sheriff Court, would you not restrict the functions of the Sheriff to those of a judge of appeal, and would you not then change altogether the character of the office of Sheriff-substitute as it exists in the theory of the law at present?—In very few particulars would there be a change, because just now almost all the ministerial duties are performed by the Sheriff-substitute. In fact, with the exception of only a few of what you may call formal duties, he does all.

3678. But does he not do them for the Sheriff, and in respect of the absence of the Sheriff?—Of course the Sheriff, were he present, might do these duties, and he does them occasionally. Our Sheriff-principal sometimes hears cases in person which the Sheriff-substitute might take up in his absence, and does take up in his absence generally. I understand he sometimes tries cases summarily in the criminal court; but I do not attend it. He also in other matters does the duty which is usually performed by the Sheriff-substitute, but at present the main duties of the office of Sheriff are performed by the Sheriff-substitute.

3679. *The Chairman.*—Would you state further what views you have to submit on the matter you had begun to explain?—It has also occurred to me that it would be very desirable to extend the limit of the finality of the judgments of the Sheriff—that is to say, that the Sheriff's judgment should in the ordinary case be final up to £100. It is so up to £25 just now; but the expense of appeal is so disproportionate to small sums, that I think the ends of justice would be served by extending the limit of finality to £100. Perhaps it might be useful were that extension to take place with, say in cases above £50, a power to the Sheriff to certify to the Supreme Court any case of difficulty, as I understand is done in the Justiciary Courts sometimes. With such an exception, say in cases above £50, I think that with all safety the Sheriff's judgment in cases up to £100 might be final. It has also occurred to myself that it might be desirable to allow the Sheriff's jurisdiction to be extended to the case of defenders living in different counties—at all events within that limit which I have taken the liberty of mentioning; that where there are several defenders living in different counties, they might be taken in any one county, with the usual powers of calling the others, and also with power to any of the defenders to represent to the court any special circumstances which would make it specially injurious to any of them to have the case tried in that jurisdiction, and then with power to the Sheriff to remit to another Sheriffdom where that objection would not apply. We think it a hardship in some cases that we are obliged to go to the Court of Session in small cases, from the simple circumstance that the defenders live in different jurisdictions.

3680. *Mr. Campbell.*—Would you also be disposed to allow a foreigner, whose funds had been arrested for the purpose of founding jurisdiction, to be sued in the Sheriff Court where the jurisdiction had been founded?

—I would decidedly say so. I think it would be a very great improvement indeed.

3681. *Mr. Baxter.*—Did you ever know any case of hardship arising from being obliged to sue a foreigner in the Court of Session?—I know an instance of very great hardship in a case where a client of mine was sued. It was a very striking case indeed.

3682. What were the circumstances?—An English vessel belonging to Sunderland came to Dundee, and the master had on board of her a small quantity of dunnage wood, which he had had from a West India voyage. A person who had been his mate, but who had been discharged as mate before the proper officer, took it upon him to sell, or it was said he had sold, this small quantity of dunnage wood, which was said to be of the value of £17 altogether. The master did not approve of the sale, and refused to implement it. The party who said he had made this trifling purchase took the step you have referred to. He applied for and got a warrant to arrest, to found a jurisdiction. This was passed *de plano* by the Sheriff, and he then raised an action. The warrant of arrestment was taken out against the owners of the ship, who were English people belonging to Sunderland. Under this warrant the ship was arrested; and then this individual, upon a statement that the vessel was about to leave the port, got a warrant to dismantle her, and they set to work and stripped the sails off the ship, and took them ashore. When matters had got this length, I was applied to, to see what was to be done. The first thing was to get the arrestment removed, and the sails restored to the ship; and we obtained authority to have this done upon consigning the £17 which was said to be the value of the wood in dispute, and £10 as contemplated damages for the alleged breach of bargain, or £27 in all. We consigned that sum, and so got the first arrestment loosed. The vessel was then got to sea immediately, for the purpose of avoiding the second arrestment, which was in prospect on the dependence. The pursuer pressed the matter, and carried it into the Court of Session, for the £17 as the value of the wood, and £10 of damages, which raised the amount to what I suppose he thought necessary to allow him to get into the Court of Session. Of course he was obliged by the forms of process to go to the Court of Session, seeing he was seeking a remedy from English people, that is, from foreigners. When the summons was served, the English shipowners were very indignant, and did not suppose it was possible that any court would recognise proceedings of that kind for so simple an object, and they insisted upon defending the case. The action went on; it was tried before a Lord Ordinary without a jury, and the result was a judgment against the owners, upon the ground that the master had sanctioned the sale. Judgment went out for the £27, with £120 of taxed expenses. If that case could have been brought before the Sheriff, we would have got quit of it much more summarily, and with much less expense. There is another matter which I wish to mention with regard to Sheriff Court practice and jurisdiction. We think that a domicile might be allowed at the place of business of a defender as well as at his dwelling-place. I would of course make the exception that that place of business must be the defender's own place of business, and not his employer's, because mistakes might otherwise take place; but we think it would be desirable for both parties, both pursuer and defender in many cases, that the domicile of the place of business should be added to the domicile of the place of residence. In Dundee, for example, we are on the verge of two counties besides our own. We have the county of Fife directly opposite, about two or two and a half miles from us,—at some places only about a mile; and we have also the county of Perth about four miles from us. In Fife, more especially, there are a number of our respectable Dundee merchants and others who have their places of business in Dundee, and reside in Fife. Now, it has been felt to be very inconvenient, both for pursuer and defender in a case of that kind, that they are obliged, when they reside in Fife, to go to Cupar instead of the case being tried in the town where they themselves are daily present for business, where their business connections are, and where the witnesses are generally found. I think, therefore, that no harm could ensue from such an alteration as to domicile, with this qualification, of course, that it should be the defender's own place of business. It would not do, if he were a servant, to serve a citation on him at his master's place of business; in that case, they would require to serve it at his dwelling-place.

3683. *Mr. Baxter.*—Would you protest bills at the place of business also?—I would. I would hold that to be the domicile; and now you have mentioned that, I may also state that, from the extension of banking transactions, I have found it myself on various occasions, and I have no doubt that men of business have often found it also, that there arises a difficulty where there are different places at which the business of one bank is carried on in the same town, and parties at a distance are not aware of that, but make bills payable simply at this bank by name—for example, at the Bank of Scotland of Edinburgh—which has branches in different parts of a town. That raises a matter of difficulty and doubt as to where you have to protest. That is also a matter—the domicile of a bill—which should be fixed in some way or other. Probably presentment at one of these branches should be sufficient to meet the requirements of the law.

3684. *The Chairman.*—Have you been perplexed by that difficulty?—I have, several times.

3685. I am taking it in the case of Edinburgh, as you put it. Would you not think it a very simple thing to go to the head office?—We trust nothing in the case of a simple diligence that we can help. It is a dangerous instrument, and therefore in these cases I invariably send round to every branch office.

3686. Even though the head office is in your town?—No. We have no head office in Dundee now.

3687. But the case you put was the case of the Bank of Scotland, Edinburgh, which has its head office here. Would you be perplexed in that case?—No. Undoubtedly in that case you would be safe enough at the head office; but it is very different with us, where the large establishments have taken up our native ones. We have only branches of them all.

3688. *Mr. Baxter.*—Would you not think it a convenient thing if you could protest a bill at a party's place of business as a domicile?—I think it certainly would.

3689. Would that get rid of a good deal of trouble and expense?—It would.

3690. *Mr. Paterson.*—Do you think that would in all cases meet the views of the parties at the time they made the bill? If a bill is granted payable at the Royal Bank of Scotland, the arrangement of the parties may have been that the bill should be presented there because the acceptor may have his funds there to meet it. Do you think it would be sufficient to protest that at a branch of the Royal Bank in Dundee?—They are all branches in Dundee. We have no native establishment there now.

3691. But what I mean is this: Where parties make a bill, do they not have it in their power to arrange and insert in the bill the place of payment? Suppose they elect the Royal Bank of Scotland, which means at Edinburgh, as the place of payment, and that the acceptor has money there to meet the bill when it is presented, could that bill be presented with justice anywhere else than in Edinburgh?—Certainly not. If they simply say 'the Royal Bank of Scotland,' that must mean the head office in Edinburgh; but if they simply say 'the Royal Bank in Dundee,' which I have frequently seen, then the difficulty I have stated arises.

3692. *The Chairman.*—What would be your remedy in that case?—Presentment at any one of these branches, because I say that if a party will accept a bill payable in that loose general way, he must take his chance of the consequences.

3693. You say that in that case presentation at any one of them will be sufficient, because he has not been specific?—Yes; and the reason is this,—A notary may

John William Thomson.

not know the opening of any of these branches. It may be done in a day without notice, and there is no special notice required, so that the negotiation may fail.

3694. *Mr. Baxter.*—Is not the difficulty always greater where there is no domicile in the bill—where it is not payable anywhere?—That is a very difficult thing to reach.

3695. In such a case, don't you think the domicile might be held to be the place of business of the party?—I think so, if it could be got.

3696. Where there is a domicile, there is not so much difficulty?—No.

3697. *Mr. Paterson.*—Then all you point to is, that in a place like Dundee, where there are several branches, presentation at any one of them should be sufficient?—Yes.

3698. *The Chairman.*—You mean, that when it is 'the Bank of Scotland, Dundee,' without saying which branch, any branch will do?—Yes. Then, as a sort of corollary, so to speak, from my suggestion as to the finality of the Sheriff Court jurisdiction being extended to about £100, the Court of Session should not be the court in the first instance in which to bring actions within the £100; or if brought there, inferior court expenses only should be allowed.

3699. *Mr. Baxter.*—Unless, I suppose, the court should be satisfied that there was something peculiar in the case that made it fitting to bring it there?—There could be no harm in that, and I think it might be fair. I think there should be in all cases power to remit. It is a great pity that, if an action is for a proper object, it should be thrown out, and cannot be saved by simply remitting it to the proper jurisdiction. It might serve the purpose to allow either party to move that the case should be remitted, and then the question would arise whether there was any cause why it should not be considered where it was; and if it be remitted—unless the court see fit to order otherwise—the inferior court expenses should be allowed to the successful party. Then it has occurred to me as well as to others, that the system of short records might be extended not only in the inferior courts, but also in the Supreme Court. It is thought that it might be possible so to simplify the procedure as to do away with the necessity for lengthy records which we still—I do not say frequently, but which we still—do find in use. We think that probably the substance of the action might be put into a much shorter space than it is at present; in short, that the principle of our last improvement in Sheriff Court practice, of a short minute of defence, might be extended to other cases with beneficial effects. It has been thought to be possible to bring parties into court by a mere writ, stating what might be the pursuer's conclusions, and what he would expect to get judgment for if they were not opposed. We think the minute of defence which we have, when it is properly made, is such a statement as could embrace the defender's statement and pleas; and that there should be not only permission, but an injunction upon the pursuer, to give in a brief reply. The defender is left at a disadvantage when he has only the present very unsatisfactory statement in the summons, while he is bound to state his grounds of defence. We think he is entitled to the advantage of seeing what the pursuer's statement is, however brief, and the grounds on which he is to put his action; and if that could be carried out by proper forms, we think that the writ and short minute of defence with its pleas, and the short reply with its pleas, might form the record. It also appears to me that there would be a great advantage in consolidating our forms of process. We have got too many now. I reckon we have five different kinds of process. We have the small debt jurisdiction under the original Small Debt Sheriff Court Act, 1 & 2 Vict., up to £8, 6s. 8d. We have the extension of that jurisdiction to £12 under our Sheriff Court Act, 16 & 17 Vict., with an additional privilege to a defender, if imprisonment takes place, that he can appeal, but not till imprisonment takes place; that is another form. We have then the Debts Recovery Act up to £50. We have the ordinary court procedure of ordinary actions and summary actions.

3700. *The Chairman.*—These two are not identical?—No; they are not identical.

3701. *Mr. Baxter.*—Then there is the Commissary Court?—Yes; there is the Commissary Court also. Now if we could get a summary jurisdiction up to £50, such as the Debts Recovery Act contemplated in a limited sense, we might include in it all the smaller actions of £8, 6s. 8d. and £12. My feeling would be to repeal that Debts Recovery Act altogether, because if it is a good thing it ought to be extended; but we do not find that it works well in practice. I do not speak so much for myself, because I have not gone into that court. I have had only one case in it, a case in absence.

3702. Would you extend the Sheriff small debt form of process to £50? Is that what you mean?—I think we might have just the same sort of writ now provided in the Debts Recovery Act to apply to all cases of £50 and under. There is a dubiety as to the cases to which that Act applies, which you would get quit of in that way; and it seems to be a somewhat absurd thing, that the remedy, if it is a remedy, should be confined to a very limited class of cases: that if an account stands open, you may have this summary remedy; but if you put it into the shape of a bill, you lose your remedy.

3703. *The Chairman.*—You lose the remedy of that particular Act?—Yes.

3704. *Mr. Baxter.*—And you lose the remedy of pleading compensatory claims if vouched by bill?—Quite so. I think, therefore, that a consolidating Act would be a very useful thing, consolidating our different procedures under the Acts of Sederunt which have been made with regard to each, and applying to the tables of fees also, which are very perplexing and multiplied. For example, we have fees applicable to the first two classes of cases, where no agent's fees are allowed at all, that is, the £8, 6s. 8d. and the £12 cases. There is one set of fees for them. Then you have another set of fees with regard to the Debts Recovery Act, which are utterly unremunerative; and then you have still another set of fees applicable to ordinary and summary causes in the ordinary court; and also another set of fees applicable to the Commissary Courts. Now I think it is very desirable that some general rule should be adopted so as to simplify these diversities.

3705. *The Chairman.*—Do you mean by that, that the fees in all classes of cases should be assimilated?—Yes, made something in proportion to the work required. I think the agent should be paid for his labours—certainly not overpaid; but he should be paid, and according also in some measure to the scale of the causes to which his labours are directed. I think also that some expense might be saved in the ordinary court, where decreet in absence passes, in consequence of no appearance by the defender. I see nothing to prevent the clerk of court issuing an extract of the decreet at once, without the necessity of going to the court at all. I see no necessity either for a pursuer in that case going before an auditor, putting in an account of expenses, and getting it taxed, because up to that stage there is no difficulty in fixing what the expense ought to be, where there is no appearance and merely a summons. I think the clerk of court might be authorized to issue an extract where there is no appearance for the defender, and insert in that extract the fees which he knows to be right. I think that would save some unnecessary expense.

3706. *Mr. Shand.*—Would that not imply the clerk of court granting a decree of some kind in the first instance?—There must be a decree of some kind for an extract. In the Small Debt Courts there is nothing but that.

3707. There the Sheriff signs the book and grants the decree?—Yes.

3708. But in some shape you must have a decree before you can have an extract of it?—You might have it declared in your statute that no appearance should operate as a decree in favour of the pursuer.

3709. *Mr. Baxter.*—Then in the vacation time the clerk could give out a decree also?—Yes.

3710. *Mr. Shand.*—That purpose would be served by allowing the clerk to write a formal decree, and to sign it in place of the Sheriff?—Yes.

3711. Do you think there is really any loss of time by the Sheriff signing these decrees in absence?—You would get your decrees in vacation.

3712. *Mr. Baxter.*—Does it not cause an additional expense?—There is the giving in of the account, the taxing of the account, and the judgment for expenses. You would save all that.

3713. *Mr. Shand.*—Do you think the agent should get no fee for the step you would have in lieu of all this?—We have one fee up to decreet, where there is one in absence now.

3714. Do you think the agent's fee for that step should be diminished from what it is now?—I am not disposed to say that, because he has all the responsibility of the summons. It may be a defended cause, for anything he knows. I think the fee at the beginning should probably remain as it is.

3715. But that the trouble should not exist?—There would be the same trouble to begin with.

3716. *Mr. Baxter.*—But the expense would be diminished?—It would be diminished, of course, by the cost of all these steps—the preparing of an account, the lodging of an account, the fees of lodging, and the judgment conform. You have the enrolling to get decreet for your taxed account, and a fee for attending to get decreet.

3717. And for getting the auditor's account approved of?—Yes, and the expense of auditing. It would save you the cost of a number of little steps.

3718. *Mr. Paterson.*—Is the practice of having the auditor to tax fees in absence invariably observed in Forfarshire?—Yes.

3719. Have you reason to know whether it is so in other counties?—I am not aware.

3720. *Mr. Shand.*—Is it not the case that in some other counties the Sheriff-clerk just fills in the sum?—I am not aware.

3721. *The Chairman.*—What is the purpose of remitting to the auditor in these decrees in absence?—There is not, properly speaking, a remit. You put in your account. The purpose of remitting is, of course, to tax the account.

3722. What is the use of doing so?—I do not see any use for it.

3723. Is there a fee for taxation?—Yes, both to the auditor and to the agent.

3724. If there is a necessity for a check, you say that the clerk would be a sufficient check on the charge made?—Yes, I think so.

3725. If it is an expense to be paid by the defender, you think the clerk is a sufficient protection for the defender, because the matter is so simple and so clear upon the table?—That is my opinion. Then it occurs to me that the days of charge might be shortened. We have now fifteen days' charge upon a Sheriff Court decree; while we have six days' charge upon protests. I think these might be assimilated, and that six days' charge is quite sufficient in these days of rapid communication; and if, as I would take the liberty of suggesting either now or afterwards, there were a power of suspension given to the Sheriff, there would be no danger of any injury accruing from so short a charge. Then it has also occurred to me, as well as to others, that we might save at all events one appeal in the course of an ordinary action. We think that the right of appeal which we have just now, when a dilatory defence is disposed of either by sustaining it or rejecting it, might be reserved until the next stage for appealing, which would come to be when proof is allowed. I know that some think there should be no appeal even at the time when proof is allowed. I do not agree with them, because there may be and there are cases where there is a pure question of law started which ought to be disposed of at once before parties are put to the expense of, it may be, a lengthy and expensive proof. But I do not see any harm there would be in reserving the right to rest upon dilatory pleas until that stage. There is no great expense incurred up to the point of allowing proof. I think, however, that there ought to be not only this privilege of appeal on allowing a proof in the ordinary sense of the word, but that we ought to have also the same privilege where a remit is made to a man of skill and an accountant. We often find that the expense of such remits is more than the expense of the proof; and we think that is a very fair stage where we could get our dilatory pleas and our objections to the necessity of such a remit brought before the principal Sheriff.

3726. *Mr. Campbell.*—Don't you think that a considerable number of appeals and considerable inconvenience might be obviated by allowing the Sheriff-substitute the power, which he does not now possess, of opening up the record on such conditions as to expenses as he might think proper?—I think so. I would give very broad powers indeed to the Sheriff-substitute with regard to the management and amending of the records. I think it is a great pity that actions should be thrown out of court on such grounds, when they can be remedied with anything like fairness to the parties. That with me would be a matter of expense. If any injury is caused or expense occasioned to the other side, let them get what is necessary to recompense them; but I think it is a great pity to destroy a cause upon more formal points, if this can be avoided.

3727. *The Chairman.*—In these appeals you would allow at the stages you allude to, would you think it safe to give a discretionary power to the Sheriff-substitute to allow them or not at that stage?—No; I would make it absolute. I would give the parties the power.

3728. *Mr. Shand.*—In any case, there cannot by possibility be much expense until the point when a proof or a remit is allowed?—I think not. If you get to a system of short records, there should not be much expense.

3729. *Mr. Paterson.*—In what you say about suspending the right of appeal, are you assuming that a shorter form of record than by condescendence and answers is adopted?—I would take it with either form; but, of course, there would be less objection to it if there was less expense incurred in the meantime. Then we find great objection to the provision in our existing Sheriff Court Act, with regard to the dismissal of an action at the three and the six months' end. We do not see that that has done any good. It has caused a great deal of expense, and I think it is wrong in principle. I do not see why—if, as I have seen on various occasions, the parties and their agents find it would be beneficial to allow the case to stand over, probably without reasons that would satisfy a judge,—the case must be kept constantly in motion in order to meet the provisions of the statute. We think, therefore, that without any disadvantage the provisions of the Act with regard to the three months' and the six months' dismissal might be safely repealed. Cases have arisen where it has been thought to be doubtful whether the provisions applied or not, so that a case may have fallen that way when it was not so intended.

3730. *Mr. Campbell.*—I suppose you refer particularly to sequestrations for rent, where that is the remedy which is sought, and where nothing can be done to any effect during the six months?—Quite so. You may have your sequestration the day after the term, and the rent not due till the following term, so that of necessity you must get the case continued. It has also been doubted whether, if the court sists a case, it continues in existence. I had an instance of that myself, where a party raised an action, and the other party raised a counter action, in order to get the whole matter brought forward; and because the counter claim was larger than the original claim, the Sheriff-substitute thought it would be better to take the second action first, and sisted the first action. The parties did not see fit to go on with the second action; and after it went to a certain stage, it was allowed to fall. But in the meantime more than two years had elapsed from the time of the sist, and nothing had been done in the first action. The question now stands, whether that first action is dead or alive. The Sheriff-substitute thinks

John William Thomson.

it is alive, but the Sheriff-principal thinks it is dead. We think that these questions may very well be saved altogether, and that it may be left to the parties to arrange as to proceeding with their actions as they see fit; because it need never happen that a case falls asleep, unless both parties are willing that it should do so.

3731. *Mr. Baxter.*—Do you think it should sleep at all?—I don't think it should.

3732. *Mr. Shand.*—Do you think the court should have no power to compel the parties either to go on with the case, or to take it out of court?—If both parties are agreeable to let it stand, I think I would let it stand.

3733. Don't you think that clients frequently blame the law's delay in cases where the delay has arisen from arrangements between the agents themselves?—In that case they should change their agent, and get an agent who would do their work.

3734. Is that the remedy you would propose to meet that evil?—I think so. He may ask his agent to use diligence in the action, and then, if that fails, he has the remedy I have pointed at of getting another. A client should not be a sufferer through the fault of his agent.

3735. Is it not the case that a client is frequently in ignorance that the delay is being caused in that way?—It may be so.

3736. Have you no other remedy for that, except that he must change his agent?—I see no other remedy for that. He should complain; and if his complaints are not listened to, he can then employ another.

3737. Do you know that that was the purpose of the enactment we have been referring to?—I am aware. It is said that it was intended to reach the judge as well as the agents.

3738. *Mr. Baxter.*—But you think it has produced harm instead of good?—I think it has caused great expense without corresponding benefit.

3739. *Mr. Webster.*—Where an action has fallen by force of the statute, and the pursuer ultimately wishes to press on his claim, he has to be at the expense of new proceedings?—Yes.

3740. And the defender has to be at the expense of new proceedings also?—Yes.

3741. Is any one benefited but the agents?—No; and the pursuer may have lost an arrestment or an inhibition on the dependence.

3742. *Mr. Shand.*—Do you think agents have a claim for expenses in cases that they have allowed to lapse in that way?—I don't think they should have a claim. If they are to blame, they should not be paid for their remissness. I think I have now gone over the chief points which occur to me.

3743. *The Chairman.*—One of your suggestions was, that actions for debt for sums not exceeding £100 should be final in the Sheriff Court?—Yes.

3744. And not subject to appeal to the Court of Session?—Yes, except in the limited case which I took the liberty of mentioning, with power to the Sheriff, in cases say between £50 and £100, to certify and take the opinion of the Supreme Court, if he found the case to be one of difficulty, and in which he thought such an appeal to be necessary.

3745. Do you mean that the case should be remitted to the Supreme Court, and should then become a case in the Supreme Court?—No; that it should come up in the shape of a report.

3746. You think that the Sheriff should consult the Supreme Court?—Yes, if that could be managed. I understand that sometimes a Lord Ordinary may report and take advice in the Inner House, or something of that nature.

3747. *Mr. Paterson.*—Might not the Supreme Court in such a case not just as easily decide the case at once?—They would in effect decide it by giving their opinion, according to which the Sheriff would act.

3748. *Mr. Webster.*—Would it not be cheaper, when a case is before the Supreme Court, that that court should do what is actually requisite, and finish it, in place of it going back to the Sheriff to do something in carrying out the opinion of the Supreme Court?—I am not fond of removing a case out of its original jurisdiction.

3749. *The Chairman.*—What is the advantage of retaining it in its original jurisdiction?—The saving of expense. I hold that the expense of the Court of Session is, in comparatively small cases, disproportionate to the amount of the sums in dispute.

3750. When a case prepared by record and ready for consideration is brought before the Supreme Court, what is it that causes the expense?—In the inferior court we have no counsel; we have counsel and agent in the same person. We would thus save the expense of counsel.

3751. Do you mean that the Supreme Court should decide it without hearing counsel? Should they give their opinion without hearing counsel?—Is your Lordship referring to a special case?

3752. I am talking of a remit. What is it that would cause the expense in the Supreme Court?—Of course you would require counsel to state and plead the case there were it carried there, and then to be made a Court of Session cause.

3753. But if it were sent there for the opinion of the court is the case I am putting. You propose a remit by the Sheriff to the Court of Session for its opinion; what would be the expense that would arise in that case?—Unless counsel were to be heard, the Sheriff might, for his own information and guidance, state a case for the opinion of the Supreme Court. If he stated the matter in a case, I think counsel need not be heard at all, but that the judges might sum that up and consider it. But I do not press that part of my suggestion. My main intention is to state that, in my opinion, the finality of the Sheriff's judgment should be made £100 instead of what it is at present.

3754. There is a power to courts in England to obtain the opinion of the court in Scotland upon certain questions regarding Scotch law. A case is prepared and sent down for the opinion of the court in Scotland; but in such cases the court in Scotland has been in use to hear counsel fully. Would not the same be necessary here, in order to enable the court to form an opinion, and to do justice between the parties?—It might. Of course, if the court thought that were necessary, I would say you are better without the reference to the Court of Session. I would rather take the Sheriff's judgment, such as he would give it.

3755. Then you do not feel strongly the advisability of obtaining that power of reference which you have suggested, if it were to add to the expense?—I am not strongly in favour of it in that case.

3756. How do you think it could be worked out without expense?—I am not familiar with the practice of the Court of Session, but I have seen a Lord Ordinary come into the Inner House, and take a case verbally to the court, and get the court's opinion upon that, and then retire.

3757. Are there not often counsel there also to state their views?—There may be, but your Lordship is much more familiar with these things than I am.

3758. Suppose cases occur where the court require to be fully master of the subject, and to hear counsel before forming an opinion; suppose the court are ripe to pronounce judgment, or to give an opinion—which is the same thing as judgment—what would be saved by the court abstaining from pronouncing judgment, and giving only an opinion, and sending the case back?—Of course, if the Court of Session gave judgment thereupon, there would be no additional expense.

3759. *Mr. Shand.*—Don't you think many cases must occur in Scotland, where the amount in dispute is under £100, in which the party would desire to have a decision of the court of last resort?—There may be such cases; but then that depends altogether upon the views of the parties. You will find people just as greatly wedded to their own views in an £8, 6s. 8d. case as in a £50 case, and they would desire it just as much in the one as in the other.

3760. Assuming that to be so, do you think it a reasonable thing to make the jurisdiction of the Sheriff

Court privative up to such an amount?—I would not make it so much privative. If causes of that amount were brought into the Court of Session originally, then I would only give them inferior court expenses, unless the court, as Mr. Baxter suggested a little while ago, saw that in any particular case it was a fair case to try before the Supreme Court; but I would say in the ordinary case, that if parties will go to the Court of Session to get the benefit of its superior experience and judgment, they should not lay upon their opponents more than what would be the expense of getting an inferior court judgment.

3761. Would you still allow the power of initiating such cases in the Court of Session, subject to the power of striking down the expenses to those that would have been incurred in the Sheriff Court?—I would give the power to a party to call a case that might afterwards be taken to the Sheriff Court.

3762. But would you still allow the parties to originate a case in the Court of Session, subject to that power in the court to disallow the expenses if they thought it was a case that should have been brought in the Sheriff Court?—I do not see so much objection to that. It is more a matter of expense I have been looking to.

3763. Have you seen advantage taken very much of the power to advocate cases to the Court of Session under sec. 40 of the Judicature Act?—I have very few advocations now.

3764. Are you aware that a power exists, and is used, of transferring causes from the Sheriff Courts to the Court of Session, immediately upon an order for proof being pronounced, where the value is above £40?—Yes.

3765. Would you still leave that power to any extent?—I would not, because the object there is to get it tried by a jury. That is the power that is given.

3766. But you know that, when a case comes to the Court of Session, it is just taken up in its ordinary course, and the interlocutors are reviewed in the ordinary way?—Yes.

3767. In cases where the value is above £100, would you still allow that power?—I should think so.

3768. *Mr. Paterson.*—As I understand you, you draw the line of finality at £100, with this qualification only, that in cases above £50 you would give the Sheriff power where he thinks proper to certify a case on a point of law to the Supreme Court?—Yes.

3769. Is not that virtually making the appeal dependent upon the leave of the Sheriff, and in a limited class of cases?—It is.

3770. Do you think that is a power that the Sheriff-principal would wish to have?—I don't know whether he would wish to have it or not. Of course that is not a thing I would insist upon. As I have said before, my main object is the extension of the finality of the Sheriff, so as to get within his jurisdiction and keep within his jurisdiction as much as possible cases of a moderate amount.

3771. May not many people reckon £100 a considerable sum?—If it costs £50 or £60 to try the right to £100, then I say that is disproportionable.

3772. But suppose they felt themselves aggrieved, should they not have that right? Should they be dependent, in exercising that right, upon the will of the Sheriff who has already given a judgment against them?—Perhaps I would not interfere with people indulging in the luxury of litigation, if they are prepared to pay for it; but then their unfortunate opponent may have to pay.

3773. Supposing you were a Sheriff-principal, and that you esteemed your own law to be quite good, and one of the parties felt himself, on the other hand, greatly aggrieved, would you insist that you should have the right to force that judgment upon him, although he is quite willing and able to have a judgment of the Supreme Court?—It of course goes further than that, because the same principle would apply to cases of smaller amount. I don't see where you are going to draw your line, and there must be a line drawn somewhere. I don't see any great hardship in a case up to £100, of saying that you must be satisfied with the judgment of two such Sheriffs as we have, for example. I think you have got a very fair trial of your case, and should be satisfied with it. If you are the pursuer, it is a great hardship to your opponent that he should be dragged away to a more expensive jurisdiction; and if you have had a fair opportunity of stating your case, and getting the opinion upon it of two eminent judges, I think there is injustice done to no one.

3774. Is it in consideration for the parties that you would let it stand there?—It is.

3775. *Mr. Harrison.*—Is there not an inducement to the Sheriff-principal to be more careful in his judgment when he knows there is an appeal?—I have no doubt that every judge does his duty better under the fear of an appeal; and that, when a man is irresponsible, he is apt to get careless.

3776. But you are willing to sacrifice that advantage in order to save expense and to get rapid decisions?—Yes; but there must be a limit somewhere. You may say the House of Peers has no proper feeling of responsibility, because there is nothing beyond it. There must, as I say, be a limit somewhere; and I think, in simple cases, the limit should be within the Sheriff himself.

3777. *The Chairman.*—What is the limit in the House of Peers?—I am not aware of any limit there.

3778. *Mr. Shand.*—You think there must be a limit somewhere; and the question is between £25 as at present, and £100 as you suggest?—I do not mean a limit with regard to the amount of money; I mean to say with regard to appeals. There must be an end to appealing.

3779. But I think you said you propose to limit that power according to the amount at stake?—Quite so.

3780. And the question just is, whether it should be £25 as at present, or £100 as you suggest, or between these sums?—Yes.

3781. You said the present system of appeal was in your opinion valuable because it was cheap and satisfactory. In your experience, do you find there are few advocations from Forfarshire to the Court of Session?—I should say there are comparatively very few. Speaking for myself, they are very few indeed.

3782. To what do you attribute that?—Well, we have a great dread of the cost of the Court of Session, and we have a great dread of getting into a jury trial.

3783. As a rule, are you satisfied with the administration of justice as at present under the appeal you have now?—Do you mean under the last Court of Session Act?

3784. I mean having the appeal to the Sheriff of the county, without finding it necessary to go further?—Yes, in almost every case we find the parties are satisfied.

3785. Is it quite an exceptional case where it is otherwise?—It is indeed. In my own experience, it is entirely exceptional.

3786. Suppose it were found that an appeal or advocation to the Court of Session could be obtained at an expense, in many cases say of £10 a side, would that affect your opinion as to the propriety of retaining the appeal within the Sheriff Court itself?—I would say, in the first place, that I doubt extremely if such an appeal could be carried through at that expense. I think it would cost more. I do not see how you could manage it with that expense. Still, though it could, that would not affect my opinion that it is desirable to keep an appellate jurisdiction within the Sheriff Court.

3787. Why would that not affect your opinion?—I find that parties are generally quite content with their local judges, and have no desire to go any further. They have got substantial justice near at hand, and within a reasonable time and at a reasonable expense, and they have no desire merely for litigation's sake to go beyond it.

3788. Do you find that justice is obtained at much less expense in that way than in the way I have put before you even at the expense of £10 a side?—I would say so.

3789. *The Chairman.*—Would you contemplate giving a power of appeal from the local judge as you call him, or the resident judge, to the appellate Sheriff, in cases

John William Thomson.

under the Small Debt Act?—My own personal feeling is rather against that. I know that some members of our faculty think that might be done by the statement of a case if required; but I am not myself very favourably disposed towards it.

3790. *Mr. Baxter.*—Do you mean in cases on points of law?—Yes, on points of law.

3791. *Mr. Shand.*—You said that you would be disposed to lay all the ministerial or administrative duties upon the resident Sheriff, so as to enable the Sheriffs to devote their time completely to appeals. Don't you find that the Sheriffs, as the office at present exists, do devote sufficient time to appeals?—I have never had reason to complain. We have no ground for complaint in our Sheriffdom. We get every justice done to us.

3792. And, in point of fact, is it not the case that generally throughout Scotland there is no complaint of that kind?—I cannot speak beyond my own county.

3793. Do you think there is any necessity for giving Sheriffs more time, or that that is a good reason for relieving them at all from those ministerial or administrative duties which they have been in the practice of performing?—I am looking forward to the possibility of there being a diminution in the number of appellate Sheriffs, and that they will require all the time they can get for the performance of their appellate functions.

3794. Then it is in the view of their whole time being required by their appeals that you make that suggestion?—Yes.

3795. *Mr. Baxter.*—Do I understand you to mean that there is a desire in the profession that the appeal court should be strengthened?—There is.

3796. In what way?—It has been thought desirable to get, at all events, two appellate Sheriffs.

3797. You mean two minds instead of one?—Yes, two minds instead of one. I confess I had the feeling at first that three might be better, but I am quite satisfied now that two would not only be more economical, and therefore better suited probably to the funds that may be got, but that really it would be better than three.

3798. Do you mean more deliberative?—Yes; that you would get the two judges to state their opinions to one another with more chance of their agreeing than you would get three to do so. Then, with two appellate judges, suppose they were to differ, you would always have the opinion of two upon one side. Suppose the resident Sheriff gives a judgment, and the two appellate judges do not agree upon that judgment, but one agrees with the resident Sheriff, then you have two minds against one, which I say is a very fair verdict.

3799. Do you think that if there were two appellate judges, that would give great satisfaction to the country?—I think it would.

3800. *The Chairman.*—I think you said you had no cause to be dissatisfied with the judgments you obtained from your Sheriff-principal?—No.

3801. Then what would be the advantage you would derive from two judges if you have no cause to be dissatisfied now?—Two heads are better than one.

3802. But if the one does the thing satisfactorily, what more do you desire?—If you would always give us a good single Sheriff, that might do; but we may not always have the same advantage, and therefore I think we have a better chance of always having a good appellate court by having two judges in it.

3803. You think you have been fortunate?—Well, we have certainly had no reason to be dissatisfied.

3804. Suppose you had two appellate judges, whom you take from among persons who are supposed to be superior lawyers, and suppose they differ upon a case, do you think the party who has lost that case, where there is a division of opinion between the persons who are considered to be the best judges, will be satisfied with that being final under £100?—I think he ought to be satisfied, because he has got first of all the opinion of the resident Sheriff, and he has got that opinion confirmed just as good as we have at present by one other mind, as your Lordship has said, it may be of higher capacity.

3805. Do you think he would be confirmed as much as he is now, when another judge of an equal mind sitting with him is of an opposite opinion?—But we have got two minds in that case.

3806. But at present there is no dissenting voice, while in the other case there would be one half of the higher court against the judgment?—Still the dissenting judge is in a minority of mind. We have got two minds against one; and I have more confidence in the two against the one, than in the one against the two.

3807. Do you think that would be a more satisfactory judgment than if there was only the one?—I would say so. It would be equally satisfactory, at any rate.

3808. You think the antagonism of the other would in no respect detract from the weight of the judgment?—I don't think it.

3809. You say that sometimes there may not be very satisfactory Sheriffs. Might that not happen in the case of appellate judges too?—I have only spoken about our own Sheriff. I am very well satisfied with him, and I cannot speak about others.

3810. Suppose the appellate court were constituted as you have suggested, and that the satisfactory judge should be the refractory one against the judgment, and that the other who was not so satisfactory should concur in it, what would be the result?—It would be a pity that that should be so, but it would not alter my opinion.

3811. *Mr. Shand.*—Would there not be the same risk of unsatisfactory appointments in the case you put as there is at present?—Yes, there would be the same. *Humanum est errare*—we cannot get perfection.

3812. *Mr. Baxter.*—Would you not contemplate increasing the salaries of these appellate judges, and if possible getting superior men?—I would certainly contemplate that. You should get first-class men, and give them first-class salaries; so that you would have less risk of getting inferior men.

3813. At present you appeal from the Sheriff-substitute, who is now a good man, who has made up the record and taken all the proof. Do you think he has a superior opportunity of judging of the case from the one man to whom you appeal at present?—I always thought there was an advantage in that, and it cannot be denied.

3814. And you would like to strengthen the appeal court by having two men instead of one?—Yes. The judge who sees the witnesses has of course an advantage which the other cannot have.

3815. *Mr. Shand.*—Would you have the same system throughout Scotland that you have spoken of, or are you speaking only with reference to Dundee?—I think the principle applies universally.

3816. Would you propose that these judges should sit in every one of the towns where the Sheriffs now sit, or only at the Circuit towns?—I have a strong feeling that they should not be made resident. If it were possible, I would have them all resident in Edinburgh, but that may not be possible.

3817. For what reason?—I think they ought to be kept up to the daily knowledge of their profession by coming in contact with practising barristers in the courts, whether they had business there themselves or not. I think they should be at the seat of the Supreme Court if it be possible.

3818. Would you contemplate that they should be practising members of the bar?—Well, they would not have much time for that.

3819. Do you think that such judges should sit in all the towns where the Sheriffs now hold sittings, or that they would hold circuits?—I rather think they should hold circuits.

3820. Probably in the leading towns in Scotland where the circuits are now held?—That might be tried to begin with. If it was found not to answer, and if they required to extend their circuits, that might be done; but probably it might be sufficient as a trial in the first place to take the Circuit towns.

3821. With the suggestions you have now made, how many appeals do you contemplate might be made in the course of a case?—There would be no appeal

until a proof was allowed, or a remit made. That is one. Then on disposing of the merits there would require to be an appeal.

3822. And if an interim decree were given for money?—That of course is the merits.

3823. But suppose an interim decree given in the course of a case, would you allow an appeal there?—Of course.

3824. Suppose a witness objected to a production on the ground of confidentiality, would you allow an appeal to remain there?—I think so.

3825. So that there might be four or five appeals in the course of a case?—Yes.

3826. Suppose a case should be appealable five times to judges coming round upon circuit, how do you think that would work with respect to delay?—Of course you would require to make the periods frequent at which the judges were to come round; and you would get your remedy in that way.

3827. Have you formed any idea how often you would expect these judges to go round upon circuit?—I would like them to come round once a month at least. Of course that must depend upon how the thing is found to work, because it is a new thing; but I think probably once a month might do.

3828. So that in that way, if such a number of appeals as you have suggested were taken, there might be delays of three weeks or a month between the taking of the appeals and the hearing of them?—There might.

3829. Don't you think there would also be greater delay in giving decisions upon questions of principle, when these two judges have each to form his opinion and to give a judgment?—That might perhaps be checked by requiring that a judgment should be issued within a certain period after the hearing.

3830. Whether the judge had had time to make up his mind upon it or not?—I suppose he would not find much difficulty in making up his mind within the period they would allow him.

3831. Would not each judge require to see the process?—It would not do for the two judges to be living at different places.

3832. Assuming that they both lived in Edinburgh, each would require to have the process?—Yes, of course he would.

3833. Would that not take up more time than the giving of a single judgment?—I think not. You would not have more delay in that way than you have now.

3834. Then with regard to expense, suppose these courts were held at the Circuit towns, are there not many procurators who would have to travel from four to five hours in order to reach the court where their cases were to be heard, such as in Banffshire, Ross-shire, Caithness-shire, and Sutherlandshire?—We have something like that just now in our present system in Forfarshire. The procurators of Brechin, and Montrose, and Arbroath require to go to Forfar. Now it would not be much more trouble to them to go to Dundee, and so I suppose it would be in other cases.

3835. Does not that evil exist now to a much more limited extent than it would under the system you propose?—I do not think it would be greater.

3836. As matters now stand, does the Sheriff not go to the parties' own doors to hear the cases in Banffshire, and Ross-shire, and Sutherlandshire, and in all the northern counties?—I do not know as to other counties. I do not speak beyond my own.

3837. But you know that the Sheriffs of all these northern counties go to the leading county towns?—Yes.

3838. Under the system you are proposing, he is not to go to the county towns; and assuming that the procurators have to travel four or five hours in order to get to the Circuit town, does not that imply that they must leave the day before in order to be present at the appeal court?—It would certainly put them to more inconvenience; but if it was found in practice that that was a crying evil, you could then make your perambulatory court of appeal meet the case by going to all large towns.

3839. But in the view you have put of their going to the Circuit towns only, do you not think that the expense would be considerably increased beyond what it is at present?—Well, it might be so with procurators at a distance from the towns.

3840. On the other hand, do you think it would be right that an appeal court, consisting of two judges of such standing as you have mentioned, should go down to all the smaller county towns, where there might be only one case waiting them?—You must not despise small things. They must attend to the cases if they undertake to do so.

3841. Do you think that would be a reasonable arrangement, that such a court should go to towns where there are often only one or two cases at the most?—Decidedly; it would be reasonable. If the judges undertake the office, they must perform its duties if they are paid for it. If there is only one case, I say they ought to be there to try it.

3842. Therefore you rather think the court should go to all these smaller places?—Yes; always under the explanation I gave before, that you should first try the Circuit towns. If that will serve the purpose without giving any cause of complaint, then keep by it. If, on the other hand, you find that there really is good ground for complaint, by procurators having to come from a great distance, you must just suit the court to these circumstances, and relieve them, because these gentlemen whom you are to make the court of appeal will have a duty to perform, and it ought to be performed by them at the least possible trouble and expense to the public.

3843. Would it not be a hardship in summary cases that there should be no appeal, it might be for a month or six weeks, until these judges came round?—That is probably one of the points that I have not quite seen through. It would be a question whether in a summary case of that kind a written reclaiming petition should not be allowed. That is certainly the remedy that occurred to me.

3844. Do you think it would be possible to make an arrangement for a written reclaiming petition to be well disposed of by two judges, and possibly two judges who are away upon a circuit?—Of course you cannot meet every case to the best advantage. If a party who wishes to get their opinion thinks that cannot be done, then he must wait for the circuit.

3845. Would that not create a great hardship in a class of cases which are now only summary cases?—Just now there is very little distinction made in hearing appeals betwixt ordinary cases and summary cases.

3846. Have you not many cases in Dundee in which interim interdict is imposed, and ought to be immediately recalled, where you ought to have a summary appeal?—There are many of these cases.

3847. Would the evil that has been suggested not be a very pressing one in that class of cases with a court of two perambulatory judges?—I don't see that it would be more so than we are exposed to just now.

3848. Can you not at present put in an appeal and a reclaiming petition to the Sheriff within twenty-four hours, if you wish it?—You may, and so you might in the case supposed. I don't see that your remedy would be changed.

3849. Do you mean you might have such a petition with two perambulatory judges?—If they are perambulating, you are sure to get them together.

3850. Where and how do you propose that such petitions should be disposed of under the new system?—Of course they would be considered by the two judges. They would simply be advising a reclaiming petition, and they would advise that on circuit as well as at home.

3851. Do you think it would require to be sent to them wherever they happened to be, and read by them there, and advised in that way?—Surely, if promptitude is wanted in the disposal of the case.

3852. Would there not be a great difficulty in working all that out?—As I mentioned to you, the alternative is just what we have now—to wait for the Circuit.

3853. Do I not understand that at present you may

John William Thomson.

get a judgment immediately upon a summary matter by at once putting in a written argument, to be disposed of by a single judge?—Yes; but I fail to see the distinction between the one judge and the two; because, if the two are together, they are one in a sense.

3854. Then, in any proposal of that kind, you are satisfied that it would be of importance to keep the power of written argument?—In summary questions. That is certainly a point on which I have not seen my way to anything else. Probably some one else may suggest a remedy.

3855. But it has not occurred to you?—No other remedy has occurred to me but that power of putting in a written petition.

3856. *Mr. Baxter.*—You assume that these judges shall hold their courts in large towns?—Yes.

3857. Don't you think that the greater part of the business would just be in these localities, in the large towns, and that the others would be exceptional places?—We find that the business centres round the seats of population, and there must be comparatively few cases from extreme distances.

3858. Would you extend the Sheriff's jurisdiction to questions of heritable right?—I certainly would. We find that a very keen discussion generally takes place with regard to possessory questions as to heritage, and that the whole energies of the parties are exhausted in trying the question of possession; and we find that very seldom such questions go beyond the local courts, because beyond the possessory question nothing is tried in them. Now, it occurs to me that it would be much better that the heritable question, which is the true one at issue, the real right of property, should be allowed to be tried to begin with; and, of course, if the right of appeal is open, no harm can accrue to either party from a judgment upon the heritable right being pronounced by the inferior court; so that I think the jurisdiction with regard to heritable rights might be given with safety to the Sheriffs, under the usual power of appeal.

3859. *The Chairman.*—Would you give that power to any amount of money?—I have always a feeling that cases within £100 of value should be kept within the local jurisdiction; and if that can be ascertained, which I think it could be, I would say that within £100 the Sheriff's jurisdiction in heritable rights should be final also.

3860. What I asked was, whether you would extend the Sheriff's jurisdiction to heritable estate of any amount?—Yes.

3861. Including the titles to land?—Yes.

3862. And to decide the right to any estate in the country?—Yes.

3863. *Mr. Baxter.*—Do you not think that, when the estate is very valuable, the case would find its way to the Court of Session?—Yes. I think that practically all the important cases would be brought in the first instance in the Court of Session, and that it would only be cases of smaller value that would be tried in the country at all.

3864. *Mr. Shand.*—Don't you think it desirable that a defender should have the protection of having the Court of Session to try very important questions of heritable right, such as questions of entail law and the like?—I don't know that I would shut them out; but then it comes to be to me a matter of expense.

3865. But would you leave it in the power of the pursuer absolutely to choose the Sheriff Court as his tribunal in such very important cases, and allow the defender no remedy against that?—I would allow a pursuer to choose his court; but I would allow a defender a power to move to get the case remitted to the Court of Session, with this qualification, that if it is really a case within £100 value, inferior court expenses only should be allowed.

3866. I am speaking of more important cases?—I would certainly give a power to move that the case should be remitted; but if the defender agrees to go on in the Sheriff Court, I do not see why they should not do so.

3867. Would you not give him a right to have such cases as I have alluded to tried by the Court of Session?—By a power I mean a right.

3868. Then you would not leave it merely discretionary in the Sheriff, but would give the defender in such cases an absolute right to have the case remitted at once to the Court of Session?—Yes.

3869. You mean where the cases are above £100 value?—Yes.

3870. *Mr. Baxter.*—Would you allow reductions and suspensions of charges to be competent to the Sheriff?—I would. Just now there is a jurisdiction in the Sheriff to the extent of £25 in a certain class of suspensions. I don't see any reason why that should not be extended, and also include reductions. Of course these would be, if exceeding £100 value, always under a right of appeal. According to my view of these things, I look upon every summons as in a sense a declarator; and I look upon every successful defence as in a sense a reduction. That may go to any extent just now in moveable cases in the Sheriff Court. If we succeed in our defence, we have reduced the pursuer's claim—we have set it aside to that extent; and why the distinction should be drawn betwixt a house, and it may be 100 tons of flax, I fail to see.

3871. *The Chairman.*—But we are talking technically of reductions. Your description would not apply to a reduction as we understand it under that name?—No.

3872. A successful defence against an open account is not a reduction?—It is a reduction of the pursuer's claim really, although not technically.

3873. But it is not a reduction in the sense which Mr. Baxter means?—No.

3874. *Mr. Baxter.*—Have you had any experience of the expense of appointment of factors *loco tutoris*, curators *bonis*, and such like?—I have not had many of them, but I have had a few; and I find it comes to be very expensive in small matters. You cannot get an appointment of a judicial factor at less than somewhere about £15 to £20. Now that comes to be pretty heavy in small matters; and it is worse getting quit of them—I mean the discharge.

3875. Have you had any experience of what the expense of discharge of a factor is in any case?—There are two cases before my mind just now in which there was a very heavy expense indeed. There was one which, before we got quit of it, cost somewhere about £150.

3876. Do you mean the discharge alone?—Not merely the discharge itself, but the investigation that took place in the Court of Session.

3877. I mean the proceedings connected with the discharge?—Yes, quite so.

3878. *Mr. Webster.*—Does that include the expense of a remit to a professional accountant, to make up a state of the factor's intromissions?—Yes.

3879. *Mr. Gordon.*—What was the value of the property?—It was a small property, worth about £30 or £40 a year.

3880. *Mr. Paterson.*—Was there any specialty in the case?—There was this specialty in the first one I am referring to, that the judicial factor was a law-agent, and there was some discussion as to what would fall under the proper expenses of the factory. That would take up some of the cost.

3881. *Mr. Gordon.*—Do you recollect the name of the case?—I think Thornton was the name of the deceased, and his family were the beneficiaries.

3882. *Mr. Shand.*—Was there not some litigation where the expense was so much?—It was partly incurred from the cause I have mentioned. But there was another case I came across accidentally the other day. I happened to be agent for one of the parties in Mr. Tawse's succession. There was a judicial factor on his estate, and I was told by Messrs. Shiell and Small that the expenses there had been upwards of £100.

3883. What was the amount of that estate?—It was a pretty good estate; perhaps about £3000, at any rate.

3884. Was much of that expense composed of the judicial factor's fee?—No; it was more incurred in the discussion before the accountant.

3885. You mean discussions between him and the Accountant of Court?—Yes; and the objections to his account from the other side.

3886. Litigated questions between him and the parties interested?—Yes; but I cannot speak to the details.

3887. *Mr. Paterson.*—Were they both cases in which objections were taken to the discharge of the factors?—Yes.

3888. *Mr. Baxter.*—Do you see any objection to entrusting the Sheriff with a power to appoint factors *loco tutoris* and curators *bonis* in lapsed trusts?—No. I think it would be a very beneficial extension of his power.

3889. *Mr. Shand.*—Do you think that in small trusts such a power would be of great value to poor people?—Yes.

3890. *Mr. Webster.*—Would there be any difficulty in the Sheriff Court, or how would you get over the difficulty in the Sheriff Court and adjust the matter of dealing with a factor resident beyond the Sheriffdom, and with the matter of caution? At present you know that the bond of caution for the judicial factor in the Supreme Court has to be approved of by one of the Principal Clerks of Session before it can be accepted?—Yes.

3891. How would you deal with these two matters—the matter of the factor being resident beyond the jurisdiction, and the matter of caution—if you were to give the Sheriff the power which you are proposing?—I think if the Sheriff were to see cause to approve of the factor's accounts, and to find that he was entitled to his discharge, the discharge should receive effect.

3892. But it is at the appointing. I asked you first, how would the Sheriff deal with appointing a factor, if the appropriate person were resident beyond his jurisdiction; and secondly, how would you deal with the matter of caution—to whom would you delegate the duty of judging of the caution?—Of course, if the Sheriff is to have power to appoint a factor, and that factor is not within his jurisdiction, you must give him jurisdiction over him. You must extend the Sheriff's jurisdiction over the party, as I said before.

3893. *Mr. Shand.*—Wherever he may reside?—Yes, wherever he may reside; and if the Sheriff finds that a discharge should be given, that discharge must receive effect in any part of the country.

3894. *Mr. Webster.*—As to caution, who would judge of caution in the Sheriff Court, which in the Court of Session is judged of by one of the Principal Clerks of Session?—The Sheriff-clerk judges of caution in our county.

3895. Is it the Sheriff-clerk, or one of the deputes, who practically does that?—It is one of the deputes; but I say that the Sheriff-clerk should do his own duty.

3896. With the Sheriff-clerks as they are, would you devolve the duty of judging of caution on large estates upon the person who is acting as Sheriff-clerk in the particular jurisdiction, or how would you provide for that?—I think you ought to have such a person as Sheriff-clerk who would be qualified and quite able to judge in such a matter; but I quite agree with what you are hinting at, that this should not be entrusted to a mere depute.

3897. *Mr. Baxter.*—You think the Sheriff-clerk should reside at the seat of the Sheriffdom, and attend to his duties?—Yes, as he is paid for them.

3898. *Mr. Paterson.*—You assume, I suppose, that he would follow the same plan as the clerk of court, and have an attestor?—Yes, he would take means to satisfy himself of the sufficiency of the caution.

3899. You proceed on the assumption that the Sheriff-clerk would do all that?—Yes. In Commissary cases just now we always have an attestation of knowledge and belief by a Justice of Peace.

3900. *The Chairman.*—You said you would give jurisdiction to the Sheriff over the factor: I suppose you would equally give jurisdiction to him over the cautioners, wherever they resided?—Yes, within Scotland.

3901. *Mr. Baxter.*—But I suppose, in the genera case, you would not anticipate much difficulty in the way of the Sheriff finding a proper factor in his own jurisdiction?—I do not think there would be much difficulty.

3902. *Mr. Paterson.*—Supposing the subject of the factory to be large landed properties in the particular county, would he have any difficulty in finding a suitable factor for them?—In certain cases he might probably find a difficulty within his own county; but if he has his jurisdiction extended, he might choose a proper party elsewhere as factor.

3903. *Mr. Baxter.*—And I suppose you assume that, in the case of very large estates, the appointment would go elsewhere?—Yes; I think the case would never arise.

3904. *The Chairman.*—Suppose a motion for appointment of a factor on the estates of Breadalbane, for instance?—I don't think that would ever come to be tried in Perthshire.

3905. *Mr. Paterson.*—Do you put any limit to the value of the estates where you would allow the Sheriff to appoint the factor?—No, I would put no limit.

3906. *Mr. Shand.*—I presume you would leave a power of review of the appointment, if parties appeared as respondents and litigated it?—I should think, on good cause shown, there should certainly be such a power.

3907. But do you mean that you would not give a power of review in those cases?—I would give a power of review.

3908. That is, to the Court of Session?—Yes, to the Court of Session, always provided the estate exceeds £100 in value.

3909. *Mr. Baxter.*—Then, as to questions under the Conjugal Rights Act, with regard to protection for a wife's earnings, and provision for her husband's desertion; do you think these questions should be within the jurisdiction of the Sheriff?—I have only had two cases of that kind in my own practice. One of them passed in absence, unopposed; and in the other the husband unfortunately made his appearance.

3910. Of course you went to the Court of Session?—Yes; and it comes to be a very great burden.

3911. Is it not almost a prohibition?—Yes, it is virtually a prohibition. If there is to be opposition at all, it is a prohibition. In the unopposed case, I think it cost from £14 to £20. The other, which was a very hard case, was that of a poor woman, a widow with a family, who was married to a widower with a family, and she had a family to him. There were thus three families; and the man deserted her, and went to California. He was twelve years absent, and all he sent home to her during that period was a little bit of gold to make a ring. That was all the support he gave her. She in the meantime took up a little shop, and saved a few hundreds of pounds; and as it accumulated, she began to get afraid that he might make his appearance. She applied for the benefit of the Conjugal Rights Act, and while the case was in court the husband made his appearance. He came home all the way from California, and, as a woman will, she took him in. The Court held that they could not grant her any remedy; and the case cost the poor woman about £70.

3912. *Mr. Shand.*—That was a litigation which does not seem to be a good illustration of the probable expense?—Of course there are just the two classes of cases, either unopposed or opposed. In the unopposed case I think it cost under £20.

3913. Do you think it would be a great advantage that these things should be done by the Sheriff at a less expense?—Yes.

3914. *Mr. Baxter.*—Do you think the Sheriff's jurisdiction should be extended to questions of divorce and declarator of marriage?—At first I had some hesitation upon these points; but I think now that that jurisdiction should be given more especially in cases of divorce. I think the expense of divorce, according to our present system, is most prejudicial to morals; and it is a great inducement to concubinage and bigamy. I had an illustration of that within the last few months. A seaman came to me about a small share of a suc-

John William Thomson.

cession, and he took the opportunity to put a question to me about the expense of divorce; he let out what I believe is rather too common—that he was living with another man's wife. I spoke to him seriously about his position, both in a moral and legal point of view; but he said, 'Well, the woman is as good as divorced already, and we cannot afford to be at the expense of getting it legally done.' The husband had deserted her for many years.

3915. *Mr. Shand.*—Are you satisfied that the cases are numerous in which parties have not the means of obtaining a divorce in the Court of Session, and yet where good grounds for divorce exist?—There are not many cases of that kind that come under my own personal observation, but I can very well suppose that they are numerous. I have only had two cases of divorce in my own practice, and the expense was considerable. The least expense, I think, is somewhere between £40 and £50. They do not pass, as a matter of course, without proof. You must get proof; and the expense of that is quite deterring to poor people.

3916. *The Chairman.*—Are you satisfied with the manner in which facts are inquired into in the court at present?—I think there might be an improvement in this respect,—that the introduction of shorthand writing might in many instances shorten the time occupied in taking proofs; but in that case, as well as in ordinary proofs taken in the ordinary way, I think we ought to have the Sheriff to dictate to a clerk or a shorthand writer, rather than that he should write his notes by himself. In the course of a proof there is no other means of ascertaining that the words of the witness are properly taken down. I think, therefore, there should be dictation orally and distinctly by the Sheriff to the person who takes down the evidence; that as each answer is given, there should be an opportunity of observing whether or not what is taken down is the answer of the witness.

3917. Then with regard to the judgment of the resident Sheriff upon a matter of fact, would you have his judgment on that matter of fact appealable to the appeal Sheriffs, as well as upon matters of law?—I think so. I would carry the whole case before them.

3918. Do you think there would be any expediency in trying questions of fact by a jury?—I do not; decidedly not. I have a very strong feeling on that point.

3919. What is your objection to investigation by a jury?—It is manifold. I think the general class of jurymen are not fitted by their education and training to perform the office, and to judge of evidence. I think it requires more than what we find in the general class of men to discriminate betwixt different kinds of evidence, and the value to be given to one testimony more than another. I think that a juryman is a judge, and very often most valuable and important causes are committed to him, while he has not opportunities which a judge ought to possess to enable him to come to a sound opinion. He is called in, I say, without proper training of mind to perform a very difficult duty, and he is introduced suddenly into the midst of a case which he has had no opportunity of studying, so that he has not the foundation for a judgment. The thing is done hastily; he is brought into the court, and he is asked to consider what may have puzzled the most acute intellects—the discrimination of facts, and the bearing of facts, and the value of evidence; and he is called upon to do this at once, although he is a man quite unaccustomed to that kind of work. Now I think you cannot have a satisfactory result from these premises. I have much more confidence in an educated judge than I would have in any jury.

3920. *Mr. Baxter.*—Have you had any jury cases?—Fortunately not many. I have had two or three.

3921. Have you lost them all?—No; I have not lost a jury case; but all I have seen of them has certainly gone to confirm my opinion of the unsatisfactory nature of jury trial.

3922. *Mr. Webster.*—Is there any objection to jury trial on the ground of expense?—That is a very serious objection to it; but I say also that the system is not a good one. A juryman is taken out of the mass, and he goes back to the mass. He is not like a judge who stands before the public, and is answerable to public opinion. After he gives his opinion, he goes away and mixes with the public, and there is no responsibility. Then he is not called upon to give any reason for his judgment, and yet it may be he decides matters involving thousands of pounds. Besides, the expense of the system is enormous, and quite deterring to us in the country. I know clients who have sacrificed large sums rather than venture to undergo the risk of a jury trial, and certainly I am not one of those who would advise people to face that risk if it could be helped. I find, from looking into two or three cases I had, that you cannot try a case with less risk than £400 a side. Now that is not justice. There is one case in particular that I have in my mind, where the actual amount put before the judge and the jury at the time of the trial was only £95. They did not know what I knew, that that case was put forward as a representative case, and that we had about £1500 or £1600 of similar claims behind it. Well, that case of £95 cost somewhere about £400 or £450 a side.

3923. *Mr. Gordon.*—What was the nature of that case?—There was a ship building in Dundee, and a ship chandler gave furnishings to the vessel. While the vessel was in the course of being finished, by a cleverness the builders' certificate was passed into other hands, and the vessel was registered in the name of parties who then denied employment. The ship was built at the expense of Dundee people, and these strangers came and said, 'This is our ship; and we will not pay you. We were not your employers.' The parties who came forward as the apparent employers to begin with, admitted the responsibility; but they became bankrupt. Well, this of course was very provoking to the furnishers. There was nearly £2000 worth of property lying before their eyes which they had made, and they could not get payment for it, and they determined to try the matter. One of the best cases was picked out for trial, and £95 was the amount of it.

3924. How many days did the trial last?—I think it was two days; but I am not quite sure.

3925. Was it a difficult case?—There was a good deal of evidence led, and there was a good deal of correspondence put in, which was one of the causes of the large cost. The jury gave us a unanimous verdict in the face of a charge by the judge against us. I considered at that time that it was a very unfit case for a jury. A perfect volume of printed correspondence was put before them, which it was impossible they could have studied, and which indeed they would not see.

3926. Was there any attempt to upset the verdict?—No; they threatened to do so; but they compromised by giving us a sum of money, which we took rather than go further.

3927. *The Chairman.*—You say that you generally prefer the judgment of a single judge to the judgment of a jury?—Yes.

3928. Does that remark apply to that case?—It would have applied to that case decidedly. It was more a case for a judge than for a jury.

3929. Do you think the judgment of the judge there was more to be relied upon than that of the jury?—I confess it was a very narrow case, and I could not have said the judge was wrong. I must say that his statement of the law against us was rather convincing.

3930. Do you think there is a good deal of chance and hazard in the verdict of a jury?—I do think so; and there are cases brought before them, which I think these men are not at all qualified to judge of, such as cases where questions of collision and seamanship or capacity to test, and such like, arise. Now the class of jurymen brought forward are not fit to look at these cases: they are not fit to grapple with them. They do not understand them.

3931. You said, about founding jurisdiction, that you think where a party has founded jurisdiction against a foreigner, that might be tried, or ought to be tried, in the Sheriff Court?—I think so. It could be done quite

satisfactorily there, and at much less expense than at present.

3932. Do you see any objection to the system of founding jurisdiction by arrestment? Have you known any practical evil arising from that?—No, I have seen no practical evil; but I have seen sometimes that it comes to be a very shadowy arrestment. We hold that it is not necessary to be of any great amount—that any amount, in short, founding jurisdiction is sufficient to create it; so that it is a mere form—it is not reality.

3933. Do you think that that kind of jurisdiction, being given to an inferior judge, should be a thing that would be repugnant to the feelings of foreign traders?—Of course it is only used in the case of our own people, it may be, suing a foreigner who may be wishing to get quit of what we consider to be a good claim; otherwise we would not bring it. Therefore I do not care about his feelings.

3934. You do not care about his feelings in that particular case?—No, not in that particular case, because it is only when the pursuer brings an action in this country that the case can arise. Of course a foreigner would think that any means used to bring him from his own country to ours would be a grievance. He cannot get quit of that feeling.

3935. But might he not prefer trading with England to trading with Scotland? If he were in England, that would not happen?—I believe there is a jurisdiction of that kind in London.

3936. Your jurisdiction extends beyond this step of arrestment?—It does.

3937. And if there is a debt owing to him there, you can get that?—Yes, to the extent of your claim.

3938. You first found a jurisdiction, and then you can afterwards lay your hands upon anything belonging to him anywhere you can get at it?—Yes.

3939. Now, might foreigners not consider that that was a reason why they should not trade with you?—We have such a jurisdiction in our system just now—that is to say, the Court of Session has no other foundation for its jurisdiction in these matters.

3940. But do you not think it might make a difference to them, that this was to be exercised by an inferior judge?—I do not think it should.

3941. *Mr. Webster.*—Is it not a jurisdiction that could be very largely abused, with reference say to foreign vessels, by parties getting up unfounded though plausible claims, and seizing the vessel in the docks?—Of course that may be so. The Sunderland case which I have already mentioned showed how the power was liable to be abused.

3942. Would it not be a more equitable system, to adopt some such practice as is in the common law procedure in England—that in order to found jurisdiction under the courts of Scotland, the claim upon which the arrestment is used should have been contracted in Scotland?—That would cut very deep into our legal principles, because I do not think you could limit it there. I think that would go further than you are thinking.

3943. Would you deem it right that a foreign creditor upon a foreign debt should have the power of seizing, under a local warrant, a vessel belonging to his alleged debtor, and keeping it there to try the claim in the local court, although originating in a foreign country?—I understand that when you go to a country, you get all the means and appliances which that country's courts will give you to obtain justice; and if you have means for your own countrymen by which this can be obtained, I do not see why you should exclude a foreigner from getting advantage of them. You expect the same from him when you go to his country.

3944. *Mr. Shand.*—All the evils that have just been spoken of exist under the present system?—They do.

3945. A party may seize a vessel and do all that has been suggested under the warrant of the Sheriff, followed by a warrant to arrest from the Court of Session?—Yes. I believe there is yet a doubt as to the effect of an arrestment *ad fundandam jurisdictionem*, whether it is in reality an attachment. I understand that is yet so far an open question. There is a judgment of the court which has certainly a leaning towards the view that there is something of an attachment in it, but what that something is has not yet been defined. Now I don't know but what you could get at what is quite sufficient to found a jurisdiction simply by the arrestment, holding that it did not attach the vessel or the thing, and merely giving notice to the party. For example, instead of seizing a ship by the present method, *ad fundandam jurisdictionem*, notice might be given to the master, or to any one connected with the foreigner, or to any one holding goods belonging to the foreigner, without interfering with the property itself until the action was brought. I know there are cases where no other step is taken except this initial one, and that is quite sufficient to deter the foreigner, and to make him pay. When this is served upon him, they seldom think of going any further, and probably never intend to go any further, but simply wish to get their attachment made under the initial step, and they gain their end on account of the fear of the subsequent expense. Now, if simple notice, so as not to attach, were sufficient to found jurisdiction, leaving the attachment to follow on the raising of the real action, probably many cases of grievance would be taken away. I do not well see why you should not have the power of attaching foreigners' property in this country, in the same way that you have the power of attaching the property of your own countrymen.

John William Thomson.

3946. *The Chairman.*—Do you think any hardship follows the dismantling of vessels?—A great hardship, and you would get quit of that by notice in the first instance at all events.

3947. But suppose they were, as the sailors say, to 'pay you with the mainsail,' what would you say then?—Or 'shivering the topsail.' There would certainly be a risk of that. But what I say is, that when you really and truly wish to raise an action and to pursue it, you should have the means of attaching the property until fair security is found for the debt that is involved in dependence of the action; but I do object to this initial step to found jurisdiction having any effect as an attachment.

3948. *Mr. Webster.*—At present, the party using the arrestment may delay raising his summons?—Yes.

3949. And if he so delays it, what means has a party whose ship or funds are arrested of getting rid of the arrestment?—He must apply to get the arrestment loosed, and find caution, which is a great hardship. In the case I have already referred to, they would not allow the arrestment to be lifted until consignation was made of the amount claimed.

3950. *Mr. Paterson.*—Have you ever acted professionally for any foreigner whose property was attached to found jurisdiction in this country?—Yes, I have.

3951. How did they view the remedy?—I acted not very long ago in a case where an American quarrelled with a seaman. The quarrel took place on the coast of America. The man refused to work; he came home with the ship, and the moment he came home he took proceedings to attach the vessel. The American was much put about, and applied to his consul, who took the trouble to inquire at the American Minister in London, in order to see whether the vessel could be got free; and he was told he must just abide the laws of the country where he was.

3952. Do you know whether this is a remedy very severely denounced by foreigners who are subjected to it?—Of course it is.

3953. *Mr. Webster.*—Do you know any other country where there is a similar remedy given against our traders?—No, I do not. I have not had occasion to inquire into that.

3954. *Mr. Paterson.*—Are you aware that it is a remedy which has been frequently abused?—I know that.

3955. And that a party will resort to it in order to enforce a doubtful claim?—The initial step I have mentioned gives an opportunity for that. I do not object to an arrestment where there is really an action in court—where there is a true case to try; but I do

John William Thomson.

object to that arrestment where it is merely put in as a *brutum fulmen*, and is not intended to be carried any further—where it is merely used as a threat.

3956. At present you can found upon an open account, or any kind of claim?—Yes, in any manner possible.

3957. And that the party may be served with a copy of the writ without any notice?—Yes.

3958. *The Chairman.*—I suppose the object of that is, that they may not steal away?—Yes.

3959. *Mr. Paterson.*—In your application to the Sheriff you are not obliged to define the nature of your claim specifically?—You just give a general statement of it.

3960. *Mr. Gordon.*—Would you consider it an improvement if a decree, obtained in virtue of jurisdiction so founded, were limited to the extent only of the funds which are found in this country, and arrested within the jurisdiction?—I don't know if there would be any advantage in that, because practically it is limited to that. If you exhaust all you have in this country, you must go abroad for the rest, and their laws will keep you right there.

3961. *Mr. Webster.*—Do you know that, under a recent statute, a judgment obtained in one part of the United Kingdom can be summarily enforced in another part of the United Kingdom?—Yes.

3962. Would you allow judgments against a foreigner arresting to found jurisdiction to have the privileges of that statute, or would you limit their effect merely to the assets that were attached within the jurisdiction?—Do you mean as between one part of the United Kingdom and another?

3963. Yes?—I don't know that I would limit it, if the case is to be tried. If the case gets a fair trial, I don't see why you should limit that.

3964. Is the principle of that not the reverse of the ordinary principle, which is that a man is answerable to the tribunal of the country where he is resident?—Yes.

3965. And the other makes him answerable to another tribunal, where his assets may happen to be seized?—It is quite so. That is done, I fancy, in England too, but I don't pretend to know.

3966. *The Chairman.*—You were asked about the place of business of a person being held as a domicile for citation and for presenting bills, whether his house be or be not within the jurisdiction. Do you apply that to a party who is the partner of a firm, or who is not in Scotland himself; and in this question I do not refer to bills just now, but only to citations?—I limited my answer at the beginning in this way, that the business place should be the business place of the defender himself, and not of his employer.

3967. But what do you say in the case of a partner?—I would be disposed to let that be a domicile. I think there would be no great risk if a citation were left at the place of business of a partnership; I think there is every chance that that would reach the principal. I would make no exception in that case. I would rather except only the case where the person is a servant working in an employer's place of business.

3968. *Mr. Webster.*—Would you do so even in a case where a partner was the pursuer and a partner was the defender?—You put me in a difficulty there. That just shows how, when one deals with generalities, particular cases start up. It would certainly be safer to make the place of business a domicile only in the case of an individual.

3969. *The Chairman.*—If he were a partner of a company, although he was not there at all, would you hold him to be subject to the jurisdiction, and subject to be cited there, and amenable to the citation?—I think that suggestion of Mr. Webster's is a very valuable one. It might perhaps be dangerous in the case he supposes, of the very partnership itself being the pursuer against an individual partner of the firm, to leave the principal citation in their own office. That would not be a desirable thing, but that must occur very seldom indeed; so that, I think, in practice almost every case would be met by allowing the individual dwelling-place or the individual place of business of an individual person to be his domicile, except in actions against partnerships or *inter socios*.

3970. What jurisdiction would you hold that citation to give?—I would say it should be equivalent to the ordinary jurisdiction of the dwelling-place.

3971. *Mr. Webster.*—You know that in Scotland it is competent for a firm or company to sue one of its own partners. We look upon a company or firm here as a separate person, differing in that respect from the English system?—Yes; there you must have the consent of all the partners.

3972. *Mr. Paterson.*—You see no difficulty in putting it this way, that the counting-house should be the domicile, except in questions among partners *inter se*?—No.

3973. In the west many of the people go to the coast for months, and their houses in town are shut up. Arrestments may be laid below the door of the dwelling-house, of which the people in the counting-house being ignorant, they may in good faith pay away the money. Would not your suggestion remedy that state of matters?—It might. These are keyhole arrestments.

3974. *Mr. Baxter.*—We had a suggestion made to us yesterday about process for perpetuating testimony. Have you ever thought about that?—Yes; that is one of the matters I was to have suggested. That is a process to which just now we have nothing similar. I think it might be a very useful addition to our practice, not only in the case of the service of heirs, but in maritime questions where we have a very fluctuating set of witnesses. They may leave the country before an action can be brought and their evidence taken. Of course that might not be the very best kind of evidence, but it might be the best you could get in the circumstances.

3975. It would secure evidence that you would lose at a future time?—Yes. I am a good deal connected with maritime matters. I happen to be solicitor for six Marine Insurance Offices, representing interests of the value of upwards of a million sterling, and cases frequently come before me where questions of collision have arisen. You have the seamen at hand, but all you can do just now is merely to take a precognition. The men go away, and you do not know where they have gone. Now, if we had some means whereby we could get their testimony preserved, it would be an advantage. It might not, as I say, be the very best evidence, because you cannot always get a contradictor; but still, if it is taken before a judge, it is certainly of some value; so that I would be in favour of the introduction of the English procedure, with probably an addition to it. If I remember rightly, the English statute only applies to parole evidence, and does not allow the recovery of written evidence; but if any such remedy were to be introduced here, it would probably be as well to make it apply to both written and oral evidence.

3976. *Mr. Webster.*—I presume that would only be made available if the party could not be brought forward at the proper time when the trial takes place?—Yes.

3977. *The Chairman.*—With regard to written evidence, might there not be some danger of its being abused, having no contradictor, or a contradictor not being forthcoming?—Of course it might be, but I think the benefits would counterbalance the disadvantages.

3978. With regard to the proceedings for the service of heirs, have you any observations to make? Are there many cases of that kind?—Of course we have a good few of them in our courts. I don't know that there is anything particular to be suggested with regard to them.

3979. Does the present system work satisfactorily?—So far as I have seen, it has done so. It has been thought that there might be an extension to heirs of provision of the combination of the general service with the special service of the same nature. Under the Service of Heirs Act, you can include a general service along with a special service as heir of line, although the lands may be in one jurisdiction and the deceased may have died in another; whereas, in other circumstances, you require to have your general service in the jurisdiction of the deceased, or before the Sheriff of Chancery. I was not instructed to put anything before the Commission on this subject; but a doubt was

started, although departed from, in one case that came under my notice, whether there was the power of combining the two together in the case of an heir of line. I am not, however, prepared to make any special suggestion.

3980. *Mr. Webster.*—Are you satisfied with the mode in which the evidence is taken under the Service of Heirs Act?—It is a little loose, but I have not seen any instance where it has been abused.

3981. In cases of special service, are the titles examined by the resident Sheriff or by one of the Sheriff-clerks?—Well, I am not behind the curtain. The only time or times on which I was called upon myself, acting as honorary substitute in the absence of the Sheriff, to do it, the whole papers were brought before me.

3982. *Mr. Baxter.*—Have they always been so in any cases which you have had yourself?—Of course I am not beside the Sheriff-substitute when he decides the cases.

3983. But you produce all the papers?—Yes. I am satisfied that in our case it is fully advised.

3984. *Mr. Webster.*—As to the mode of appointing executors in cases of intestacy, are you satisfied that the system of procedure there is a good one? In services of heirs there must always be evidence; in application for the appointment of executors there is no evidence if there is no opposition?—No, in the latter case there is none.

3985. Are you satisfied with both systems?—I see nothing in practice to find fault with.

3986. *The Chairman.*—Has anything occurred to you about the privileges of agents?—We think that one examination might allow agents in any part of the country to practise in any other part of the country. I believe that practically that would make very little difference in the position of the respective classes of agents; because, for instance, I would never think of going to Edinburgh to practise before the Supreme Court. We do not even think of going to our own county town except on very rare occasions. We much rather prefer to employ an agent on the spot, where that can be done—of course in Edinburgh especially, where the experience of the agents is of great use and help to us. So that, while I think one examination should be sufficient probably to admit in all cases throughout Scotland, I think that practically the effect would be, that country practitioners would remain country practitioners, and town practitioners would remain so also.

3987. *Mr. Baxter.*—Do you think that, after passing, they should be excluded from practising as agents in any town?—I do not think they should.

3988. *Mr. Webster.*—How would you deal with the exclusive privileges enjoyed by societies such as the Writers to the Signet here, the Faculty in Aberdeen, and the Faculty of Procurators in Glasgow?—I think these exclusive privileges would be taken away when the right to practise in the courts was admitted.

3989. *Mr. Shand.*—But if they have any privileges beyond that, do you not think these would be in a different position?—Yes; these should be reserved to the individuals.

3990. What do you assume would be the advantage to the public of the change you propose?—I do not see any great advantage it would be to the public, because, as I have said, I do not think there would be much change amongst the members of the profession. I do not think they would often go from one part of the country to another.

3991. *Mr. Webster.*—Upon the second point, as to abolishing exclusive privileges, does it not happen sometimes that a person trained in one part of the country ultimately settles in another part where there are exclusive privileges, such as Aberdeen or Glasgow, or here, and that although that person is found to be suited for carrying on business in that district, yet, from not having served his apprenticeship there in his earlier days, he cannot possibly get admitted?—Quite so. However, that is more a matter for the individual than for the public.

3992. But when the public cannot get the services of a man who has been found well qualified for the business, is the public not practically a loser?—Well, of course the public are entitled to have all the talent of the country at command.

3993. *Mr. Shand.*—It has been said that, under the present system, business is excluded from the Court of Session which would otherwise find its way there, and that if the changes you suggest were adopted, that would not be so. Do you concur in that opinion?—I don't think it would be so.

3994. Your own experience does not lead you to think that?—No.

3995. *Mr Paterson.*—Would it affect your view as to disregarding the exclusive privileges of chartered bodies, if their charter allowed the admission of any one, provided his qualifications were proved by a sufficient test?—I would of course have only one test, that is, admission through the proper channel to begin with; and I would say that that test should be sufficient for the kingdom at large.

3996. What is the test you refer to?—I say that if a procurator were to go before an examining council, for example, and to get the proper certificates of admission, that should give him admission in any county, and entitle him to be put upon the roll of the place where he is to practise. I think he should need no further test.

3997. Then, on being certified, do you think he should be qualified for admission into any body of procurators in Scotland, having more exclusive privileges?—Yes.

3998. Would you exclude him from participation in any funds which this body may have accumulated; and would you liberate him, on the other hand, from paying any entry fee?—Yes, unless he chooses to pay the fees.

3999. Would you make that voluntary?—Yes.

4000. Do you not consider that some evil might arise from that, if you take an exclusive county where a pretty severe test, at least a reasonable test, is applied, including attendance at so many classes at college, besides having served an apprenticeship? I suppose you approve of such tests as these?—I do to a certain extent. I have seen them applied rather early.

4001. Might not an inferior class of practitioners come and claim to be admitted, and thereby neutralize all this?—They should not have been admitted as practitioners.

4002. *Mr. Baxter.*—Are you not aware that, under the Procurators Act, every person who enters into an indenture after that Act goes through an examination in general knowledge?—Yes, I think sometimes a little too much.

4003. But that is necessary?—It is.

4004. *Mr. Paterson.*—Would you take all that upon a general certificate?—Yes.

4005. *Mr. Webster.*—Would you make that apply to practice in the Court of Session too?—I am not prepared to make any distinction.

4006. *The Chairman.*—Have you any observations to make upon the liability of country agents for expenses?—Yes. We think that is a very great hardship, because the country agent has very little pecuniary interest in the expenses of a Court of Session action—almost none. There is an alternative, but a very unpleasant one, left to the country agent; and that is, to stipulate with his Edinburgh friend that he is not to be responsible. At the same time, it is not fair to the country agent, that while he is without any proper share of the profit of the Edinburgh case, all the responsibility should be laid upon him by his own client in the country, and with all the feeling before him that if the case, however well managed by the Edinburgh agent and by the country agent, is unsuccessful, he gets most of the blame. The Edinburgh agent has there an advantage over the country agent in this respect, that he can get his responsibility shifted over so far upon the counsel, who again are not responsible, so that ultimately the greater part of the blame comes to be upon the country agent, who gets next to nothing. Therefore I think, if there is to be any change in that respect, we ought to be relieved from that.

John William Thomson.

4007. *Mr. Baxter.*—Don't you think that that deters country agents from encouraging clients to come to the Court of Session?—I think it has that effect.

4008. *Mr. Paterson.*—Would it be a remedy for that if the auditor of the Supreme Court allowed charges to the provincial agent in every instance where he thought these charges were necessary, or incident to the case, but did not involve a double agency?—Yes, if properly carried out.

4009. *Mr. Shand.*—Is not that the existing rule?—As it is worked out, it is all double agency. There is nothing left to the country agent at all. Some of our faculty think it might be possible to allow the country agent to prepare the summons in the Court of Session. Just now the course which is taken is this: The client instructs the country agent, and he prepares a memorial containing a statement of the case, which is sent over to the Edinburgh agent. The Edinburgh agent then communicates with counsel; but in many cases I understand the Edinburgh agent prepares the summons, and that is sent for revisal to counsel. The draft, when revised by counsel, comes back to the Edinburgh agent, who transmits it to his correspondent in the country for re-revisal. Now, some of our people think that if the country agent, instead of putting a statement of the case in the form of a memorial, were allowed at the outset to put it in the form of a summons, it would be better. It might not be absolutely correct; but still the facts would be there, and then let that go over as the summons in place of a memorial. That might then be revised by counsel, and so save a good deal of intermediate work and expense. That has been suggested.

4010. *Mr. Paterson.*—Do you think many provincial practitioners would avail themselves of that right, if they got it, to prepare Court of Session writs?—I don't know that they would; but they might have it in their power.

4011. *Mr. Baxter.*—Do you think that clients in the country are able to conduct a case without the intervention of a local agent?—I don't think they are.

4012. *Mr. Shand.*—If agents were found entitled to practise in all courts, as you propose, would that very much remedy all the evils you have spoken of?—I don't think it, because I don't think they would exercise the power. I don't think, for instance, they would come to Edinburgh.

4013. Don't you think it would lead to some arrangements between Edinburgh agents and agents in other parts of the country, which would counteract those evils?—Do you mean with regard to the division of expenses?

4014. Yes?—That has been suggested, that there should be a division of the costs of the action in a reasonable way between the Edinburgh and the country agent. How that can be done, of course we are not prepared here to say.

4015. *Mr. Paterson.*—That would be matter of arrangement between themselves, of course?—Yes.

4016. *Mr. Webster.*—Would there not require to be some increase of the fees, in order to admit of such a division?—I think there would.

4017. A considerable increase?—It would indeed.

4018. As to this matter of the responsibility of the country agent to the Edinburgh agent, is it at all usual for the local agent, in asking the Edinburgh agent to conduct a piece of business, to afford information as to the circumstances of the client, where he has any doubt about him being perfectly responsible, and intimating that, having made this frank communication, he will not expect the business to be undertaken by the Edinburgh agent unless he is quite satisfied to take the client as his sole debtor?—I know that is sometimes done, and I have done it myself. I think it is all that can fairly be required. If the country agent puts his Edinburgh correspondent in possession of a fair account of the circumstances, and of the means of the client, I think it is really then the case of the Edinburgh agent. He may refuse to take the employment. Of course it is incumbent on the country agent to keep his Edinburgh friend advised of everything which would have induced himself to give up the charge. That is only fair and right; but beyond that, I think there is nothing that should be of much consequence.

4019. *Mr. Paterson.*—Is it an uncommon thing in a commercial community, that a client is perfectly reputable and perfectly responsible at the commencement of a suit, and becomes insolvent long before it terminates?—That does happen sometimes.

4020. In that case, would the provincial agent be liable?—Unless he protected himself by an arrangement of that kind, he would be liable for the Edinburgh agent's expenses—expenses with no guarantee commission.

4021. *Mr. Baxter.*—As an honorary Sheriff-substitute, do you take the declarations of prisoners?—I do, and I invariably dictate them.

4022. Do you ever see any wish to entrap a prisoner?—No; I never saw that attempted, nor the least approach to it.

4023. Have you seen questions pressed upon him against his inclination?—No; certainly not.

4024. Has your experience been quite the reverse?—Yes.

4025. *Mr. Shand.*—Do you think these appointments of honorary Sheriff-substitutes are very necessary?—I should think they are very useful, because there are occasions when the Sheriff-substitute must necessarily be absent; and it is a great matter to get formal orders speedily pronounced. There is no interference with the general duties of the ordinary Sheriff-substitute.

4026. Do you regard such appointments as indispensable?—In a large town such as Dundee, they are indispensable.

4027. *Mr. Baxter.*—In Dundee there is no unprofessional gentleman who holds such an appointment?—No.

4028. *Mr. Webster.*—And these substitutes, of course, never act in matters where they are professionally employed?—Never.

4029. *The Chairman.*—Have you any further suggestions to make?—I observe in the paper furnished to me, that the second division is with regard to other local courts than those we have been referring to.

4030. What have you to say with reference to them?—I am speaking more now from what I have been told by others, than from my own personal experience. As to Small Debt Courts, it has been suggested that there should be some notice as to what the nature of a defence is to be in Small Debt cases; for the pursuer may have to bring all his body of witnesses, and there may be no evidence required. It is thought that probably this might be remedied by something like a notice to be given by the defender when he is cited, of the general nature of the defence that is to be stated, or by the alternative of a first and second diet: a mere appearance at the first; and if there is to be a defence stated, then an adjournment. But probably some notice, however general it might be, of the nature of the defence might be given beforehand. Whether that can be practically carried out I don't know; but it has been suggested, because there is a good deal of expense incurred where parties bring witnesses from the country, and a great deal of trouble also, when they come forward and find either that the defender is not prepared to go on with his case, and it is adjourned, or that the evidence, which has been brought together at a great expense and trouble, may not be required.

4031. That applies to the Small Debt Courts, whether before the Sheriff or the Justices?—It would do so in effect.

4032. *Mr. Paterson.*—Might there not be some difficulty in working that out, say in the case of an illiterate defender?—What you mean I suppose is, that the nature of the defence should be indicated by a written note sent to the pursuer. Well, in that case there might of course be some little difficulty; but if the course were followed, of the parties appearing at the time of the citation, and the defender telling his story, it could be seen then whether it would be necessary to have any witnesses present. The statement might be made, and the case adjourned; but just now the pursuer cannot

insist upon an adjournment. If the Sheriff says he must go on with his case, he must go on, and he must have his evidence present; whereas if he had the option of coming himself and telling his statement, and getting the defenders, and seeing the proof that would be necessary at the adjourned hearing, it might be a saving of expense, if the other plan could not be managed. There are some small points with regard to the Small Debt Act which I have been asked to mention. For instance, if the pursuer does not appear to support his case, it is not merely dismissed, but by the Act absolvitor takes place, and he must apply within a month to get a re-hearing. If he does not do that, it is not dismissal, but absolvitor. It is thought that is a defect which might be remedied, by letting the case stand simply upon a dismissal, and that no hardship could accrue. The pursuer would then have an opportunity afterwards of bringing a fresh action, instead of being put out of court altogether.

4033. *The Chairman.*—Would you never give a defender absolvitor if the pursuer did not appear?—No; that is what is suggested. It should be a dismissal.

4034. How long is it to stand as a dismissed case? When is the defender to have a *res judicata* or a judgment?—The usual prescriptions would of course come into play on the claim.

4035. Then dismissal and absolvitor would be practically the same thing, only the party would require to appear within a certain time?—Yes.

4036. Is a man none the worse for having a claim hanging over his head?—All men are exposed to that till prescription takes effect. Just now there are claims hanging over people for three years, and so it would be here.

4037. *Mr. Webster.*—Has he not to come to the court each time he is cited?—That is a matter of expense.

4038. *Mr. Paterson.*—But you do not mean that there should be a dismissal every week, although the pursuer should not appear? You would not go on dismissing it over the fifty-two weeks in the year?—No. There is a day on which the case must be called in court. If the pursuer does not appear, then the case would just be dismissed.

4039. Suppose that happens on the first occasion, what happens on the second?—The case is gone, and will not appear again unless the pursuer raises a fresh action.

4040. In the second action the same thing may take place again. It will be dismissed if the pursuer does not appear?—Yes.

4041. *Mr. Campbell.*—And if the defender asked for dismissal with expenses, the Sheriff, I suppose, would have it in his power to award such expenses as the circumstances of the case required?—That is what is suggested.

4042. *Mr. Baxter.*—Is that not what happens in the ordinary court, that he does not get an absolvitor?—That is the difference between the two. In the ordinary court there is a dismissal with expenses. In this case it is not merely a dismissal, but an absolvitor. The claim is gone for ever, unless the pursuer chooses within the month to ask for a re-hearing. That is one of the suggestions I have been asked to make. There is another suggestion that has been made,—that Small Debt sequestrations should apply to sequestrated effects liable to hypothec, whether upon the premises or not. If the effects are not on the premises at the time the sequestration is taken out in Small Debt form, the landlord requires to put in a separate and ordinary petition to the court. It has been suggested that that should have the effect of an ordinary sequestration; and that they should be at liberty to sequestrate effects, even although not on the premises.

4043. *Mr. Baxter.*—That is required from the peculiar expression of the schedule?—Yes. Then again, with regard to the prescription of arrestments, in small debt cases arrestments are prescribed in three months, whereas under the Debts Recovery Act they have the ordinary run of three years. It has been suggested that there should be no difference between the two.

4044. *The Chairman.*—Which way would they have it?—Three years; that the same length of time should apply in the one as in the other. Then defenders are allowed three months within which to apply for a re-hearing, if the decreet is not implemented. It has been suggested that there is no necessity for limiting that. If the pursuer chooses to press his case, he may get it brought to that; but the defender should be allowed to apply to get the case re-heard so long as it is open. That is in the case of decrees in absence. It has been further suggested, that some remedy should be applied in small *ad factum præstandum* cases, which are not admissible within the Small Debt Court,—whether some means could not be devised to allow them to be tried there. Suppose both parties were agreeable to it, they could not take it into the Small Debt Court just now; but if both parties are agreeable, it is suggested that there is no reason why small cases of that class should not be tried in the Small Debt Court. There is another subject which has come pretty prominently before us in our own locality, and that is the expense of working out provisional orders under the Police Act. I do not suggest any remedy; but I may state the fact. We have had one instance where about £1200 was found to be the value of the property which was to be valued under the provisions of the Act, and the expense of finding out that value was not less than £500 a side.

4045. *Mr. Webster.*—Was that by jury trial?—Yes, by jury trial under the provisional order, but settled, I understand, on the eve of trial. There was another case nearly about the same time, where there was a claim by a tenant whose property was taken away by the order, and it was referred to arbitration. The preparation, however, began under this provisional order; and the expense there was about £100 a side, the value found being £70. Then we have had similar cases under the same rule, under the Railway Acts. We have some very striking instances there. There was one in particular, where a piece of land, ultimately valued at about £4000, was sought by a railway. The expense on each side to get at that value of £4000 was upwards of £1500.

4046. Was that by a jury trial?—Yes, by a jury trial. I believe the expenses of the proprietors were restricted from £1500 to £800 by taxation, but still I believe they stood at £800.

4047. *The Chairman.*—How long did that trial last?—I think it was three or four days.

4048. How would you remedy that?—I can scarcely presume to suggest a remedy; but I think the principle of arbitration should be carried out in these cases if it is possible.

4049. *Mr. Shand.*—In the last case you have mentioned I believe there were three counsel a side taken to Dundee for the trial?—There were.

4050. *The Chairman.*—Have the parties not the option to arbitrate under these provisional orders?—The owner has. I do not know whether it might not be possible to reach these cases by the Sheriff enjoining the parties each to name an arbiter, and naming another himself, and let these persons of skill decide it.

4051. *Mr. Paterson.*—How was that extraordinary expense incurred? I have heard that six counsel were engaged. Were the other expenses incurred for witnesses and men of skill?—I have no doubt it was just by excessive evidence.

4052. Were these extra expenses inevitable, looking to the nature of the proceedings, or might they not have been greatly restrained by those conducting the case?—I was not in the case myself. The only possible answer I can give to that question is to ask you to look at the taxed costs. The taxed expenses allowed were £800, and that will furnish you with a test.

4053. *Mr. Webster.*—Do you think the agents who conducted the case deemed it necessary to incur that expense?—Surely they did. They thought the interests of their clients required it, and they were so far justified by that very large taxation.

4054. *The Chairman.*—Then the remedy you suggest is, that the Sheriff should have a power to compel them to arbitrate?—I do not suggest any remedy, for I do

John William Thomson.

not feel myself competent for that; but I think that might meet it.

4055. You think parties should not have a right to go before a jury?—Yes.

4056. *Mr. Paterson.*—Have you any instance in view of an arbitration where the parties agreed to limit their witnesses to a given number on each side?—No; but I should think that a very useful thing if it could be done. If persons of skill were there, and had some control of the case before them, it would be a very useful thing, so as to prevent that excessive overlaying of a case with evidence. There was incidental allusion made before to Sheriff-clerks. That was one of the points I was desired to bring under the notice of the Commission. We would very much desire that they attended personally to their duties. That matter was so far brought forward before.

4057. *The Chairman.*—Does the statute not require their residence?—I think it requires residence, and our clerk is resident in the county.

4058. Is there not a statute requiring personal performance of the duties?—I don't think it. I am not aware of any statute of that kind.

4059. *Mr. Baxter.*—The duties of the Sheriff-clerk's office in Dundee are performed by a young lad—a depute?—Yes.

4060. *Mr. Webster.*—Is it not the same at Forfar?—Yes. There is another point I was requested to bring under the notice of the Commission—that is, with regard to the appealing of judgments in cases *ad factum præstandum.*

4061. *Mr. Baxter.*—Appealing them where?—To the Supreme Court; whether an arrangement could not be made for arriving at the real value, or something like the value, in cases of that kind before they are removed into the Supreme Court.

4062. Have you known any instance?—There was a case reported lately—I think last year—where a single sheep was found to be a sufficient groundwork for an advocation. I think it had been bought for something like £3, 10s. That case was advocated on a dispute with regard to the delivery of the sheep.

4063. *The Chairman.*—Does that not fall under the class of cases to which the limit applies?—Some of the judges on the bench said it was impossible to tell what the value of a sheep might be. It might be a specimen sheep. In this case it had actually been bought for £3, 10s. or £3, 15s., and it was wished to apply that rule; but the court said they could not do that, because it might be of more value than the limit allowed. However, it might be desirable if some means could be fallen upon for remedying that. Perhaps the Sheriff, before allowing an advocation, should take proper means, by evidence or otherwise, to satisfy himself as to what might be the value; and that the court of appeal should, *ante omnia*, when the case comes before it, say ay or no to the accuracy of the Sheriff's judgment upon the value. If it is found that it should not have been brought there, then it may be stopped on the threshold.

4064. *Mr. Webster.*—Would there not be as great an expense in ascertaining that first point as in deciding the case?—I don't know that.

4065. *Mr. Shand.*—I suppose the certificate by the Sheriff of what was in his view the value of the case would practically serve the purpose?—I think so.

4066. Your suggestion is for the purpose of excluding from the court of review cases that should not be there, and cases that would not be there except that they are in the form applicable to cases *ad factum præstandum*?—Yes.

4067. *The Chairman.*—Is there a Justice of Peace Court held in Dundee?—There is.

4068. Is that a satisfactory court, on the whole?—I believe it is. I am told it is a popular court—that they have sometimes as many as 70 or 80 cases, sometimes more. They have an excellent assessor, which is one inducement to go to it. I think it is a good deal resorted to, and that it gives satisfaction.

4069. Are there any criminal cases brought before the Justices?—They have, of course, various statutory powers.

4070. But I mean in practice?—I am aware they have excise cases, also cases as to seamen's desertions, servants' desertions, and others.

4071. Have you a Dean of Guild Court?—Yes, we have. Before we go from the Justice of Peace Court, allow me to make one remark. It has been thought that if these courts are to be preserved, there is a sort of meaningless exclusion by the Justice of Peace Act which should be remedied. By that Act the Justices are not allowed to take up a case with regard to spirituous liquors—that is, where spirits are charged for in an account.

4072. Do you mean the Tippling Act?—No. It applies to cases where spirituous liquors are part of an account, whatever may be its amount. The Act constituting the Justice of Peace Court prevents them from taking up cases where spirituous liquors are involved.

4073. Do you think that is meaningless?—I think it is useless, if these courts are to be retained.

4074. *Mr. Webster.*—Do you approve of preserving the Justice of Peace jurisdiction in small debt cases, or would you merge the whole in the Sheriff?—I would be rather disposed, from what we see of it in Dundee, to let the public go to the Justice of Peace Courts if they like them. They seem to get cheap and satisfactory justice there.

4075. *Mr. Shand.*—What do you say as to the jurisdiction of the Justices in offences under the game laws? Do you think it is desirable it should remain, or should it be altered? Is there any public opinion on the subject?—I have had no experience on that, except in connection with the Inland Revenue. There is another thing that comes across my mind with regard to the Justice of Peace jurisdiction, and that is as to the Quarter Sessions. In our county they are held at the county town of Forfar. Now, were it possible, it would certainly be a convenience in many cases if they were held at the principal seat of population in the county. At present parties and witnesses are obliged to attend at Forfar when a quorum of Justices could easily be got at Dundee; but whether that can be remedied or not, I don't know.

4076. *Mr. Baxter.*—That happens mostly in the licensing of public-houses?—Yes, very much; and I have had to do with it in Inland Revenue cases.

4077. *Mr. Paterson.*—Would that not be remedied by dividing the county into wards for the Justice of Peace jurisdiction, as we do in Lanarkshire?—Well, I don't know how that would work, but it might be done.

4078. *The Chairman.*—Have you a Dean of Guild in Dundee?—Yes.

4079. Does he hold a court?—He does, when occasion requires.

4080. What do you mean by that—'when occasion requires?'—He does not hold a court at stated times. When an application is put in for a specific purpose, then of course he hears the parties.

4081. Is there much resort to the Dean of Guild Court?—Yes; it is generally applied to.

4082. *Mr. Baxter.*—That is, when you must go?—Yes; when you must go.

4083. *Mr. Paterson.*—Is it an heritable jurisdiction?—It is a very simple one, and we generally get justice done at it.

4084. Is it done satisfactorily?—Whenever I have had anything to do with it, it has been done satisfactorily.

4085. *Mr. Baxter.*—By the assessor?—Yes, by the assessor. You get your object very speedily accomplished. There is a visitation immediately; the parties are brought face to face, and the exchange of statements and views at the visitation generally settles the case. I think in almost every case.

4086. *Mr. Webster.*—Are the proceedings conducted before the Dean of Guild under the Act of 1825?—It is under the old Act.

4087. *Mr. Harrison.*—Does the jurisdiction of the Dean of Guild extend over the whole town?—Only over the royalty.

4088. *Mr. Paterson.*—By whom is he appointed?—By the Guildry.

4089. Is he a member of the Town Council?—Yes, *ex officio*.

4090. Who is the assessor?—He is a lawyer.

4091. He is not town-clerk?—No. It is a separate office.

4092. Does the Dean of Guild sit alone, or has he the assistance of 'liners,' as we call them?—He sits alone with his assessor.

4093. *The Chairman.*—Have you any burghs of barony or regality in your county?—We have. I think Kirriemuir is a burgh of that kind; but I am not familiar with them. We have a baron bailie in the Hilltown of Dundee.

4094. Does he do anything?—I sometimes hear about him, but I never was present at any of his proceedings. There are what are called 'birleymen' of the barony.

4095. Are they not valuators?—They are employed more in 'lining' out boundaries. I have heard of cases where neighbours were going to build; and instead of going through the formalities of an application elsewhere, they would just get the bailie of their suburb and his 'birleymen' to go along with them, and to point out the boundaries. I do not, however, speak from personal observation.

4096. *Mr. Baxter.*—Is not the Burgh Court in Dundee almost falling into abeyance in civil matters?—I have not been within its walls for many years.

4097. It used to be an important court?—Yes, and a very useful court, until the Sheriff Court swallowed it up.

4098. *The Chairman.*—Did it exercise a police jurisdiction in criminal matters?—Yes; and cases under the Forbes Mackenzie Act are still tried there. *John William Thomson.*

4099. Is there a special Act for Dundee, or is it under the General Police Act?—It is under the General Police Act.

4100. *Mr. Gordon.*—Is it the Act of 13 and 14 Vict.?—Yes, the old Police Act. The magistrates sit as judges in the Police Court.

4101. *Mr. Shand.*—Do you see any advantage in keeping the Commissary Court as a separate court from the Sheriff Court?—None.

4102. Do you think it should be merged in the Sheriff Court?—I think so, and more especially the fees should be changed.

4103. *Mr. Webster.*—Do you think the Commissary-clerk's fees are too high?—No, they are not out of the way; but the table of fees in the Commissary Court are perfectly ridiculous, and there is a note appended to the table saying we must charge no more. If you put the fees for an intestate estate alongside the fees for a testate estate of the same value, the one is ridiculous.

4104. *Mr Gordon.*—Which is the lower?—Those for an intestate estate are ridiculously small. The other is the Edinburgh table of fees, of which we do not complain.

4105. *Mr. Baxter.*—Who licenses the public-house keepers in Dundee?—The magistrates.

4106. Does that give satisfaction?—I would not like to enter into that. I don't want to interfere with them. I don't meddle with the licensing.

WEDNESDAY, 30TH DECEMBER 1868.

Members Present:—

LORD COLONSAY.	JAMES ADAM, Esq.
E. S. GORDON, Esq., Q.C.	A. B. SHAND, Esq.
DR. HUGH BARCLAY.	CHARLES MORTON, Esq.
JAMES CAMPBELL, Esq.	JAMES WEBSTER, Esq.
W. SMYTHE, Esq.	J. B. BAXTER, Esq.
GEORGE HARRISON, Esq.	ADAM PATERSON, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

JOHN GAIR, Esq., examined. *John Gair.*

4107. *The Chairman.*—You are a practitioner before the Sheriff Court of Stirlingshire?—I am.

4108. How long have you been so?—For twenty-five years and upwards.

4109. You are also Procurator-fiscal at Falkirk?—I am.

4110. Have you held that office long?—I have held it for upwards of twenty-five years.

4111. There are two Sheriff Court localities in Stirlingshire, one at Falkirk and one at Stirling?—Yes.

4112. Is the larger amount of business at Stirling or Falkirk?—The larger amount of civil business is at Stirling; the larger amount of criminal business is at Falkirk.

4113. Does it appear to you that, with a view to the convenience of parties, the maintenance of police, and economy to the public, one of these seats of a Sheriff-substitute might be dispensed with?—I do not think so at all.

4114. Have you any statement of the number of investigations you have made in criminal cases, and have you any classification of these investigations?—For the present year I have not classified them, but I shall state shortly what has been done in the Falkirk district during the present year. We have had, up till yesterday, 441 prosecutions and trials in summary cases during the year. The Sheriff-substitute has had to sit to try these cases 185 days; on several days diets of trial have occurred oftener than once, prisoners being brought in in the after part of the day, after the first business was over. In these summary prosecutions, fines have been imposed to the amount of £390 for fineable offences, and of these fines about £340 has been recovered for the public. These are the summary prosecutions tried before the Sheriff without a jury. We take, for public convenience, all our jury trials at Stirling, and the jury trials are diminishing in the county. Besides these summary cases in the district, we have had 40 investigations of cases of sudden death—deaths in coal-mines, by accidents from machinery, on railways, by drowning, and from other accidental causes. We have had about 6 or 8 investigations as to accidents in coal-mines, serious accidents, but not resulting in death. These investigations were directed from the Crown Office. We have only had a few jury trials last year, and not many Circuit Court cases, our higher classes of crime being diminishing, as they are generally, I believe, in the landward districts in Scotland.

4115. Can you tell us the number of sentences of imprisonment that were pronounced in these cases?—In all the cases of fines there is the alternative of imprisonment failing payment of the fines.

4116. That is, in the summary cases?—Yes; in all cases of theft, unless it be a trifling theft from gardens or fields, or the like, to which a small fine is appropriate, there is, as a matter of course, sentence of imprisonment without alternative of fine.

John Gair.

4117. Would you state the number of sentences of imprisonment without such alternative?—I shall give you the details of the whole criminal trials in the county, from classified lists made up for the year from 16th March 1867 to 15th March 1868 inclusive. In the Falkirk district during that year, there were 607 persons tried, of whom 110 were tried for theft, fraud, or other offences against property, and 108 convicted; 129 were tried for assaults and other offences against the person, and 124 convicted; 368 were tried for trifling assaults and breaches of the peace, etc., and 363 convicted—total, 607 persons tried, 595 convicted, and 12 acquitted. Of the 595 persons convicted, 70 were sentenced to imprisonment without fine, and 525 were sentenced to imprisonment with the alternative of a fine; and of this latter number 480 paid their fines, and 45 failed to pay, and suffered the alternative sentence of imprisonment. The amount of fines imposed and bails forfeited during the year in these Falkirk cases was £465, 6s. 6d., of which £421, 17s. was recovered and remitted to Exchequer. During the same year 40 cases of sudden death, 5 serious accidents in mines, and 3 serious fires, were investigated in the Falkirk district, and reported to Crown counsel. In the Stirling district of the county, during the same year, 29 cases of sudden death, and 10 serious accidents in mines, were investigated and reported to Crown counsel; 430 persons were tried, of whom 118 were for thefts, frauds, etc., and 312 for assaults, and other offences against the person, breaches of the peace, etc.; and of these 419 were convicted, and 11 acquitted. Of the 419 persons convicted, 130 were sentenced to imprisonment without fine, 18 were put under caution, etc., and 271 were sentenced to imprisonment with the alternative of a fine; and of these, 240 paid their fines, and 31 failed to pay, and suffered the alternative sentence of imprisonment; and the amount of fines imposed and bails forfeited in the Stirling cases was £141, 3s., of which £124, 5s. 6d. was recovered and remitted to Exchequer.

4118. Can you tell me the longest and the shortest period of imprisonment to which any party was sentenced last year?—The longest imprisonment in summary cases is 60 days; the shortest was about 8 days.

4119. Of those sentenced alternatively to imprisonment or fine, can you tell what number paid the fine?—The great majority have paid the fine. I should say that nine-tenths pay the fine. The precise numbers for 1867-68, were 796 persons fined, and of these 720 paid the fine.

4120. In what class of cases is the alternative punishment pronounced?—Assaults with the fist, or without weapons, breaches of the peace in colliers' villages at Saturday night pays, and so on. These are the prevailing cases of the district—assaults and breaches of the peace.

4121. What is the largest amount of fine that has been imposed?—I should say that £4, 4s. is the highest this last year.

4122. And the smallest may be very small?—It may be very small.

4123. A few shillings?—Yes.

4124. Are you in use to couple with the sentence of fine any obligation to keep the peace?—The Sheriff has that always in his power by the form of the complaint; and in cases where it seems advisable, he exercises it.

4125. In Falkirk is there any police separate from the county police?—There is the burgh police; and the cases which I have referred to are cases occurring beyond the burgh, except the cases of theft, which the magistrates of the burgh prefer that the Sheriff should try, although occurring within the burgh.

4126. *Mr. Gordon.*—These are more serious cases?—Yes. Where there is no alternative of fine, they think such a case is better to be disposed of by the Sheriff.

4127. *The Chairman.*—The magistrates exercise criminal jurisdiction within the burgh?—They do.

4128. Do they exercise that jurisdiction under the powers of their Police Act?—They do so under the powers of their Police Act, which amalgamates the General Police Act for Scotland.

4129. They have a special Act?—Yes; and it amalgamates the General Act for police purposes.

4130. *Mr. Gordon.*—Is that the Act of 1862, or the 13 & 14 Vict.?—The 13 & 14 Vict. Our special Police Act was got before the Act of 1862 was passed.

4131. *The Chairman.*—Can you tell me the number of cases tried before the Burgh Court?—In the burgh of Falkirk, during the same year, 231 persons were tried before the burgh magistrates for assaults, breaches of the peace, and other minor offences, and for being found 'drunk and incapable,' of whom 229 were convicted and 2 acquitted; the amount of fines imposed in these burgh cases being £87, 12s., and the amount recovered and paid into the burgh funds £57, 15s. The number is considerable, chiefly because Falkirk is the market town for a large district of miners. They come into Falkirk on Saturday nights, and generally drink what money they have, and end in quarrelling. A great many of them do that, and these are the cases that occur in Falkirk.

4132. Do you think it useful that the magistrates should have jurisdiction in these cases?—I think it useful that magistrates within burghs should have criminal jurisdiction in police offences committed within their burghs.

4133. Have you found any jarring or difficulty between the county and the burgh police?—Our county police and burgh police are one. The burgh police of Falkirk are combined with the county police.

4134. Do you think that an expedient arrangement?—I think it is. I may mention that, when the Falkirk burgh went to Parliament for a Police Bill, they asked power to have a local police. That provision passed the House of Commons, but in the House of Lords it was struck out, in the view that it would be better for a place of the size of Falkirk to be associated with the county for police purposes.

4135. *Mr. Smythe.*—What is the population of Falkirk?—From 9000 to 10,000.

4136. *Mr. Baxter.*—Have you found any collision or jarring with the county police in the discharge of your duties as Procurator-fiscal?—I, as Procurator-fiscal—and I can speak for my brother Procurator-fiscal at Stirling—have never found any jarring between our duties and the duties of the police. We have in each district a police officer attached to the Fiscal for criminal duty; and when we require the assistance of more than one, we get, as a matter of course, every assistance which we require from the police. The police act under our directions as criminal officers in all matters which we are engaged in investigating, the Sheriff being thoroughly recognised by the Chief Constable as the head magistrate of the county.

4137. *The Chairman.*—You have the authority of the Sheriff, expressed or implied, in what you direct to be done?—The Procurators-fiscal have that authority.

4138. Do you think it would be an expedient thing that Procurators-fiscal should be excluded from private practice?—I do not.

4139. Your reasons?—In the first place, I don't think the public would get the same class of men if the prohibition against private practice was applied generally. In the second place, except in very large counties, where the public will afford good remuneration to the Procurator-fiscal, it would be quite impracticable. The salaries of Procurators-fiscal, or rather the allowances made by Exchequer to Procurators-fiscal—for these allowances include more than the personal allowance to the Procurator-fiscal—vary from £50 to £100, £150, £200, £250, £500, and so on up to £1650. Now, in the small counties, where the allowances vary from £50 till you come to nearly £1000, unless the Procurator-fiscal were allowed to take private business, a man could not be got to take the office who was fit for it, or who could be trusted by the public.

4140. At all events, he would not be a person of the same stamp and class?—I think not, unless the salaries were largely increased, a retiring allowance provided, and the appointment to the office made permanent.

4141. *Mr. Gordon.*—For these allowances must the

Procurators-fiscal find clerks?—They must find all the clerks that are needed to carry on the duties of their office; they must also find stationery; and unless there are county buildings, they must pay office rent, and everything connected with the office.

4142. So that these payments are made not merely for the personal trouble of the Fiscal, but for necessary expenditure?—Yes, for the necessary expenditure of carrying on the duties of his office.

4143. *Mr. Smythe.*—Under the County Buildings Act the Procurators-fiscal have offices provided for them?—Yes. I myself have only had such an office within the last six weeks, and the Fiscal at Stirling has no such office provided. I have here a note of the allowances made to Procurators-fiscal, salaried and unsalaried, all through Scotland at the present time.

4144. *The Chairman.*—From what materials did you make it up?—I took it in the first place from the almanac, but I called at the Exchequer Office and verified it there. I may explain that up to 1858 all the Procurators-fiscal of Scotland were paid by fees, according to the work done, and by a table of fees, which was very moderate in its charges as compared with the professional fees allowed to procurators for work done in the country. In 1858 all Fiscals who had drawn an income of £500 and upwards on an average of the five previous years were salaried by Exchequer; and since that time all Fiscals, even with lower incomes, have been invited to arrange with the Exchequer for a salary. Many have availed themselves of this opportunity, and all the Fiscals of Scotland are now salaried except 11. There are 53 in Scotland—42 on salary, and 11 still on fees.

4145. *Mr. Gordon.*—When you speak of Fiscals having an income of £500, you mean that their accounts amounted to that?—Yes, their business charges.

4146. And these included clerks' work, and payments of that description?—Yes. I have endeavoured to make an estimate of the proportion of the allowance which the Fiscal gets for his own professional services; and while in some cases it may be a little more, and in some a little less, I think I am pretty accurate in stating that about one-fourth of his allowance is required to pay for his clerks and for stationery. In Edinburgh I believe it is more, and perhaps also in Glasgow, and in Dundee; but in the general case a fourth may be deducted from the allowance made to him as his average expenditure.

4147. *Mr. Smythe.*—What emoluments arise to the Fiscal, *qua* Fiscal, independent of the salary which he receives from the Exchequer?—There are no emoluments in Stirlingshire except a charge which I believe we are entitled to make against the county, but which the county has refused to recognise for the last twelve or fourteen years, and which we have never pressed against them. These charges are for criminal duties and investigations which do not result in trial, or committal for trial, and are not reported to Crown counsel. They are a small branch of the Fiscal's duty now; and while I think all Fiscals should be salaried, I think they should be salaried for all their duties. The proportion of the duties for which we are not salaried, and for which we consider we have a claim against the county, may be stated in my own case at £20 or £25 a year; and in the case of the Fiscal at Stirling, at a little more.

4148. How are investigations as to sudden deaths paid?—We hold that these are covered by the allowances made to us from Exchequer. They were not included in the average on which our salaries of 1858 were struck; but there was a clause in the Treasury minute authorizing our salaries, which provided that any additional duties thrown on the Procurator-fiscal by the Lord Advocate or the Treasury should be held as covered by the salary; and though some felt it a hardship to have these sudden death investigations added to their other duties, without additional remuneration, we have made no claim as to these.

4149. *Mr. Morton.*—Have these inquiries into sudden deaths been very numerous?—In some districts, especially mining districts, they are very numerous. I have had 40 this year.

4150. Have you to pay your own travelling expenses?—We are allowed our travelling expenses from the Exchequer.

4151. *Mr. Shand.*—These investigations involve a good deal of time and trouble?—Yes, some of them are very anxious.

4152. *The Chairman.*—Are they thoroughly made?—They are thoroughly and carefully prosecuted. Their origin is recent. They began about twenty years ago. They are conducted under directions of the Lord Advocate, communicated to the Fiscals from the Crown Office. I am not aware that the Lord Advocate has any common law or statutory authority to order such investigations, except in cases where criminality is suspected or alleged. I think it of great public importance that these investigations should be conducted under legal authority; and I would suggest to this Commission, if any Act of Parliament follows on its labours, whether some legislative provision should not be made authorizing the Lord Advocate to direct investigations of that kind. My observation applies not only to cases of sudden death, where no crime or suspicion of crime is alleged, but also to investigations in cases of fire. We have a recent instruction from the Crown Office to investigate all cases of fire occurring within our district. The instruction is, that the Procurator-fiscal is to investigate the origin and cause of all fires occurring within his district, wherever a fire has taken place under circumstances of suspicion, or wherever extensive destruction of property has taken place, or life has been endangered by fires. That I believe to be a most useful investigation.

4153. *Mr. Baxter.*—And it is rather an onerous one?—Yes; and it is looked on with great favour by the public.

4154. *The Chairman.*—Have you had any such investigations yet in your district?—I have had several.

4155. Are they reported to the Crown Office?—They are reported to the Crown Office. A careful precognition is taken; or if it is seen from the first that it is a mere accident, a formal report is made, with a note of the names of the witnesses examined.

4156. *Mr. Shand.*—Your investigations of sudden death are not confined to cases of accident?—Certainly not. I shall read our instructions upon that subject: The Procurator-fiscal is charged with the duty of investigating 'all cases of death within his district, in which there is any suspicion or reasonable ground for supposing that the death may have been occasioned by violence, or by culpability of any kind; also all cases of death from accident within his district, and all cases of sudden death from other than known natural causes; also all cases of suicide, and cases in which a person is found dead, and is not known to have died from natural causes.' These instructions are carefully fulfilled.

4157. *Mr. Smythe.*—Do you consider that the Procurator-fiscal fulfils all the duties that are done by a coroner, under the system of coroners' inquests in England?—We do all the duties under a Sheriff's warrant here. The Sheriff is probably in the position of the coroner, but the Procurator-fiscal practically does that work.

4158. You don't think there is any need of a coroner's inquest in this country?—I do not.

4159. *Mr. Shand.*—Your precognitions in these cases are forwarded to Crown counsel, by whom they are ultimately disposed of?—Quite so. They have the direction of the future disposal of the case. If on the face of the precognitions culpability appears, the party is apprehended and proceeded against, as if he had been originally charged with the crime. If, on the other hand, it is plain that no culpability attaches to any one, the case is closed by an order for no further proceedings.

4160. *Mr. Paterson.*—These inquiries are conducted privately; the results don't reach the public?—They are not conducted in open court.

4161. Do you consider that there would be any utility in making them public?—There would be no utility in that, so far as I see. So long as we have a public prosecutor in Scotland, who is charged with the

John Gair.

direction and control of such cases, and of all criminal cases, it would be useless, and of no practical effect, to have the investigation in public, because there is no one to conduct such investigations with power to acquit a party suspected, or to send a suspected party to trial, or to determine in any way what is to be the result of the investigation.

4162. *Mr. Baxter.*—Do you think the present system avoids injuring the feelings of relatives?—I think it does, in many cases.

4163. *The Chairman.*—Do you think that publicity would facilitate the escape of a guilty party?—It would do so more than facilitate his detection.

4164. *Mr. Baxter.*—Have you ever, in your experience, found any conflict to arise between the public duty and the private practice of a Procurator-fiscal?—I have never done so, and I have a pretty extensive private practice—as much as I can undertake consistently with the due discharge of my public duty.

4165. *Mr. Paterson.*—You are a banker also?—I am agent for the Royal Bank.

4166. You never found your position as agent for a bank in any way to conflict with your duty as Procurator-fiscal?—I never did. Perhaps I may be allowed to make a further remark as to the impolicy of restricting Procurators-fiscal from private practice. I think that, except in large counties, or large places like Edinburgh or Glasgow, every Procurator-fiscal at present has private practice. Crime does not come in a continuous flow, but often by fits and starts; so that, if a Fiscal in a place like Falkirk were devoting himself entirely to his public duties, he might occasionally be idle for a month or so at a time; and I don't think I need tell your Lordship how dangerous it is for a man actively inclined to be an idle man. He would have to be constantly hanging on, every hour prepared for public duty; and perhaps a week, or a fortnight, or a month, might pass without his being required to work. I think, therefore, it is better even for the man himself, and I believe it is also better for the public, that when he is not engrossed with his public duties he should be at liberty to follow his profession. I think it also improves a man's mind to come in contact with his brethren at the bar in matters other than the duties of his office, and makes him something better than a mere police prosecutor, which, if he were debarred from private practice in small places, he would undoubtedly dwindle down to.

4167. *The Chairman.*—In very large places, such as Glasgow, the amount of criminal business is such as to exclude private practice, I suppose?—Thoroughly to exclude it; and, as a matter of course, in every other jurisdiction where the criminal duty is large, the Fiscal's capability of conducting private business is proportionately limited.

4168. *Mr. Baxter.*—It will naturally accommodate itself?—It naturally accommodates itself to the public work which he has to do.

4169. *The Chairman.*—Do you consider that the Fiscal should give a preference in point of time to his duties as Fiscal, over the demands upon him as a private practitioner?—Most undoubtedly.

4170. It is a thing that won't bide time?—No. His public duties must be first attended to; and the clients of a Procurator-fiscal know that, and accept his services on that understanding.

4171. *Mr. Shand.*—For the conduct of criminal jury trials, which are not uncommon throughout Scotland, I suppose a man of considerable professional ability is required?—I think so. At all events, he has able men to contend with; and if you have an inexperienced Fiscal contending against an able man, the result would naturally be, that he would lose his jury cases.

4172. *Mr. Smythe.*—Would it add much to the duties of the Sheriff-substitute at Falkirk if he had to dispose of all the criminal cases that now come before the magistrates there?—I think he is quite capable of performing all the duty, and he did so until the burgh magistrates got a separate Police Act.

4173. What advantage do you consider arises from the burgh magistrates having criminal jurisdiction as well as the Sheriff-substitute in the same place?—The public like to see their own men sitting in judgment over the lawless part of the population, and it gives the magistrates experience and practice in public affairs. It is satisfactory to the public, and it is beneficial to the magistrates.

4174. *Mr. Baxter.*—It lifts up their office a little?—It does.

4175. *Mr. Paterson.*—Do they always act independent of their assessor?—I think they do, in police cases.

4176. *Mr. Shand.*—Is there not a want of uniformity of decision in that class of cases, from having the Sheriff disposing of one set of them, and the burgh magistrates of another?—I have not found it so. The tendency of the burgh magistrates is perhaps to impose smaller fines; but I think the Sheriff sets them an example, and they are inclined to follow it.

4177. *Mr. Gordon.*—Who provides for the expenses of these burgh prosecutions?—They are paid for by the burgh, out of the general police assessment.

4178. The burgh pays for the Fiscal and all other expenses?—Yes.

4179. *Mr. Campbell.*—The amount of the fines levied covers a large portion of the expense, I suppose?—Yes.

4180. *Mr. Gordon.*—And these fines go to the burgh?—Exclusively.

4181. *Mr. Baxter.*—Who is the burgh Fiscal?—Mr. Lewis Stirling is the present burgh Fiscal.

4182. Is he a professional man?—Yes.

4183. Is he Superintendent of Police?—No.

4184. *Mr. Gordon.*—Who pays for the summary cases which are disposed of by the Sheriff?—The Exchequer.

4185. They are covered by your salary?—Yes.

4186. These are not treated as unreported cases?—Yes, they are what we call unreported cases, that is, cases tried without having been reported to the Crown counsel.

4187. But you hold them to be covered by your allowance?—They are expressly covered by the allowance from Exchequer.

4188. What is it that is not covered by your Government allowance?—It is a very small portion of our work. For example, a housebreaking takes place, and it is necessary for the Procurator-fiscal to make more inquiry than the police have done—to correspond about the suspected party with other Fiscals, and to direct the police as to their proceedings, and perhaps to take a precognition; but the case ends without being reported to the Crown, and without any party being charged with the crime. These are the charges which are not exigible from the Exchequer; but they must be a very small class of cases. They are, shortly, investigations which do not result in the trial or committal of a party for trial. There are other duties performed by Procurators-fiscal in more remote counties, analogous to police duties, and I believe they are charged for in these remoter counties, but that is not the case with us.

4189. *Mr. Campbell.*—Some counties pay these charges?—Many counties do. They are paid in Perthshire, by a salary of from £50 to £60 at Perth, and about £30 at Dunblane; and they are recognised in almost all counties.

4190. *Mr. Shand.*—By whom is the appointment of Procurator-fiscal made?—By the Sheriff of the county.

4191. Can you say whether, generally speaking, throughout Scotland these offices have been filled by men well qualified for the appointment?—I think the duty of appointing Procurators-fiscal has been most satisfactorily and faithfully discharged by the Sheriffs.

4192. Are the offices throughout Scotland generally filled by men of experience and ability?—They are.

4193. And of standing in their profession?—Yes.

4194. Is it of great importance to the Sheriff that the Procurator-fiscal should be a man of that character?—No doubt of it. The Sheriff has the greatest interest in having a well qualified Procurator-fiscal appointed.

4195. Do you think it important that he should have a man with whom he can be on confidential rela-

tions?—I think so, and one in whose ability and faithfulness he can trust.

4196. *The Chairman.*—Have you any suggestions to make upon the forms of criminal procedure?—On the subject of the appointment of Procurators-fiscal I should like to make a suggestion. The appointment of Procurator-fiscal expires with the death of the Sheriff who appoints him, or with his resignation, or removal to a higher office. I think it would be beneficial to provide that it should not expire on the occurrence of any of these events. I may also observe, although I have no fault to find with the manner of the appointment of Fiscals, that it would be more satisfactory to the holder of the office if the appointment were made a permanent one, something like the present appointments of Sheriff-substitutes; and in that case I would suggest that the appointment should be made by the Sheriff, subject to the approval of the heads of the court.

4197. *Mr. Baxter.*—And the dismissal in the same way?—Yes; and, at all events, there should be a provision made, that on the death of the Sheriff the appointment should continue till the new Sheriff is appointed.

4198. *Mr. Gordon.*—I suppose that practically there is no case of a Sheriff not reappointing the Fiscal?—No. Practically the new Sheriff reappoints the Fiscal whom he finds in office.

4199. *Mr. Shand.*—Do you know a single case in which it has been otherwise?—I do not; and I think that says a great deal for the Sheriffs. I doubt whether the Sheriff-substitute has power to give a commission in the event of the Sheriff dying; and I think it would be wise to provide for that, even though there should be no other change in the tenure of the office.

4200. *The Chairman.*—Have you any suggestion to make as to the forms of criminal procedure?—We have at present two modes of proceeding, viz. summary trial, and trial by jury. I think the forms provided for summary trial are as nearly complete and perfect as may be. They are concise and simple, and they have been found to work uncommonly well. They are the forms which were provided by an Act passed so long ago as 9 Geo. IV. cap. 29.

4201. *Mr. Baxter.*—Sir William Rae's Act?—Yes.

4202. *Mr. Campbell.*—You still proceed under that Act, and not under the Summary Procedure Act?—We use the Summary Procedure Act; but the forms in that Act are taken nearly verbatim from Sir William Rae's Act. I think, however, that the form of the criminal libel in jury trials is cumbrous and unnecessarily long, and I have taken the liberty of framing a short form, which I think contains all the essential elements of a criminal libel.

4203. *Mr. Baxter.*—Do you think that the summary procedure should be extended in any way?—I think the summary jurisdiction may now be safely extended to cases in which the punishment concluded for does not exceed six months' imprisonment, in a certain class of cases, viz. cases of simple theft or simple assault, with previous convictions. These cases are proved by one or two witnesses. They require no jury to ascertain the truth of the charge; and the only reason why the case is now sent to a jury is, that it infers a punishment greater than sixty days' imprisonment. I think the Sheriff is quite competent to try such cases in a summary form, without a jury, where the punishment concluded for does not exceed six months.

4204. *Mr. Paterson.*—You are speaking of cases where the crime for which the prisoner is apprehended is simple, but where he is habit and repute?—Or rather where he has been previously convicted two or three times for the same offence. I have almost never libelled habit and repute for years.

4205. *Mr. Shand.*—Does the existence of the pleading diet not to a considerable extent render that suggestion of less consequence than it would otherwise have been?—It does; where the prisoner pleads guilty, it saves the expense of a trial. The reason for trying such a case in the summary form is, that it is more expeditious. I would still retain the power with the Lord Advocate to direct how the case is to be tried. The Fiscal would require to report the case, just as he does at present.

4206. He does not now report many summary cases?—No. There must be something peculiar in the case, as to which he wishes instructions.

4207. In the event of the extension which you suggest, giving the Sheriff power in summary cases to sentence to six months' imprisonment, would you leave it to the Procurator-fiscal to determine whether he should report the case to Crown counsel?—No. I think he should be bound to report all cases inferring a greater punishment than sixty days' imprisonment.

4208. Could any rule be defined?—There is no well-defined rule at present. It is left to the Procurator-fiscal advising with the Sheriff-substitute.

4209. *Mr. Baxter.*—Where there were two previous convictions, I suppose you would report such a case without doubt?—Most assuredly.

4210. *The Chairman.*—And if you had doubts as to what procedure should be adopted, you would report?—Assuredly. We are invited to do so by the Crown, and we find it a very useful means of relieving us of difficulty.

4211. You were suggesting an improvement in the form of criminal libels?—I think the criminal libel in jury cases, as I have mentioned, is unnecessarily lengthy. A long formal will is appended to it by statute, and that will contains a great deal of unnecessary matter. I think a simple form, following very much the complaint under Sir William Rae's Act, might be adopted in jury cases, and I have drawn out the form which I would suggest. It is: 'In the Sheriff Court of Stirlingshire, the Procurator-fiscal of court for the public interest complains against A. B. (design him), That on the 10th day of October 1868, or about that time, the accused did feloniously break into and enter (describe *locus* shortly, thus—the booking office of the South Alloa Station of the Caledonian Railway, situated in the shire of Stirling, and occupied by the Caledonian Railway Company), and did there steal seven bank-notes for £1 each, and £1, 5s. 7d. in coin, the property or in the possession of the said company. And there will be produced against the accused at his trial the writings and articles specified in the inventory annexed; and the trial of the accused will proceed in the Sheriff Court House at on the day of at o'clock, for the first diet; and at on the day of at o'clock for the second diet, if necessary.' This would be signed by the Procurator-fiscal; and an inventory of productions, a list of witnesses, and list of jury would be appended; and the Sheriff-clerk would issue a warrant in these terms:—'*Place and Date.* Warrant is granted to cite the accused to the diets of trial above mentioned; and to cite an assize, and also witnesses for both parties, to the second diet, if necessary.'

4212. *Mr. Gordon.*—You do not in that form specify the name of the crime?—No, I had thought of that; but on talking it over with several Fiscals, I found that they thought it unnecessary. If it was thought necessary to specify the crime, the form in the example which I have given would run, 'Complains against A. B. that he is guilty of the crime of theft, aggravated by its having been committed by means of housebreaking.' That was my original view, but others with whom I consulted thought it might be shortened. But if I were pressed, I would prefer setting forth in the libel the known name of the crime with which the accused party is charged.

4213. *Mr. Shand.*—Do you see any reason why a simple form of charge of that kind should not be extended to the Court of Justiciary?—I see none whatever.

4214. Are you of opinion that the indictment in that court is subject to the same objection of being cumbrous?—Yes, with this qualification, that it has no will.

4215. Do you know whether criminal indictments in England have anything equivalent to our major proposition?—They have not.

4216. *The Chairman.*—Is there any logic in an English indictment?—No, that is not attempted.

4217. *Mr. Gordon.*—Was the reason assigned by

John Gair.

those with whom you conversed on this subject, for avoiding the specification of the crime in the libel, that there was a difficulty sometimes found in regard to what are called 'Innominate' offences?—Yes.

4218. Is it not an advantage that the prosecutor should very carefully consider to what category he is to refer such charges?—I think it is. I think it also relieves the court of difficulty. They might have to determine whether, if there was no statement of the name of the offence, there was an offence at all stated in the indictment.

4219. *The Chairman.*—It also facilitates the arrangement of statistics?—No doubt it does.

4220. *Mr. Shand.*—Does the form under the Summary Procedure Act specify the offence?—Yes; it is that A. B. has been guilty of the crime of theft (or whatever the crime may be).

4221. *Mr. Baxter.*—Do you ever see an indictment with an undoubtedly good minor thrown out on the major?—I have seen a libel with an undoubtedly good minor, but not precisely conform to the major; and in that case the libel was thrown out.

4222. A major could not be got to fit it?—It had been misfitted in that case.

4223. *Mr. Gordon.*—I suppose that is a very rare case?—It is very rare.

4224. Have you known two cases of that kind?—I cannot say that I have.

4225. *Mr. Shand.*—Have you anything to suggest as to a power of amending the libel by the Procurator-fiscal?—I think it is important that the power of amending criminal libels, within certain limits, should be entrusted to the court during trial, even after the case has gone to a jury. I think that the provisions of the Summary Procedure Act, sec. 5, might be fairly applied to all criminal prosecutions. It provides that 'no objection shall be allowed by the court to any complaint under this Act, for any alleged defect therein, in substance or in form, or for any variance between any such complaint, and the evidence adduced on the part of the prosecutor at the hearing thereof, not changing the character of the offence charged; but if any such objection or variance shall appear to the court to be such that the respondent has been thereby deceived or misled, it shall be lawful for the court to adjourn the hearing to some future day, and at the same time, or at any stage of the proceedings, to direct such amendment to be made upon the complaint as may appear to be requisite, not changing the character of the offence; and such amendment shall be authenticated by the signature or initials of the judge or clerk of court.' I think that is a wholesome provision, which might be applied to all criminal indictments.

4226. In its terms that could scarcely be applied to a case in the hands of a jury, for it provides for adjournment?—There is an awkwardness there; but if the court saw that the panel was to be prejudiced, the amendment should be refused.

4227. If the amendment is such as is required for the ends of justice, and will not, in the opinion of the court, prejudice the panel in any way, do you see any reason why it should not be allowed?—I think it should be allowed.

4228. Under our procedure, is not notice given to the panel of the crime charged?—Yes.

4229. And a list of the witnesses?—Yes.

4230. And of the productions to be used against him?—Yes.

4231. Do all these give him full safeguards?—Ample safeguards.

4232. Do you think the Sheriff might be trusted with the discretion of allowing amendments in matters of description, taking care that no amendment was allowed which will prejudice the panel?—Yes.

4233. Have you seen the want of that power productive of injurious consequences?—I have.

4234. In many cases?—Not in many cases; but in some, and on very slight grounds.

4235. *Mr. Baxter.*—A misdescription of the *locus*, or a slight mistake in the name of the owner of the property?—Just so.

4236. *Mr. Shand.*—With however great care proceedings are taken, such errors will occur?—Such errors will occur, however carefully the preliminary proceedings have been got up. They may occur from a mistake made by a witness while under precognition.

4237. And therefore you think that there should be power to have such mistakes corrected where it appears clearly that that will not prejudice the prisoner?—I do.

4238. *The Chairman.*—Would you allow any review by the Court of Justiciary, in regard to such a proceeding on the part of the Sheriff?—I should. The panel, if he felt himself aggrieved, should be entitled to have the review of the Court of Justiciary.

4239. *Mr. Baxter.*—On a question reserved?—Yes.

4240. *The Chairman.*—Declarations are taken in presence of the Sheriff in your district?—They are invariably taken in his presence.

4241. Do you attend for the public interest?—I do.

4242. Who interrogates the party accused?—I do.

4243. Does the Sheriff exercise a control in the event of his being of opinion that a particular question ought not to be put?—I have no doubt he ought to do so, and would do so, if he saw occasion for it.

4244. I believe that, though not then a Procurator-fiscal, you were cognizant of what was going on in another district at one time?—Yes.

4245. Have you ever seen, I don't say in your own case, but in any case, any effort made to get the prisoner entrapped into admissions?—Never in my day. I have heard stories of that kind before my day; but I have now been connected with a Procurator-fiscal's business for thirty-five years, in Glasgow, in Perthshire, and in Falkirk, and I don't know of any instance within my own observation where a Procurator-fiscal has attempted to act unfairly by a prisoner. The prisoner is brought before the magistrate, and the charge is carefully read over to him from the Procurator-fiscal's petition. The Sheriff explains to him shortly what the charge is, and cautions him in the usual manner that he is not bound to answer any question unless he choose, because what he does say is to be taken down in writing, and may be used against him at his trial, but cannot be used in his favour. He is then asked if he has anything to say to the charge. If he chooses to make a statement, and states anything requiring explanation, he is asked as to that. I myself place little value on prisoners' declarations, except for the purpose of their explaining their view of the charge. Our declarations are generally short, and don't wander into minute details. After the prisoner exhausts his statement, or after the Procurator-fiscal has no more questions to put relating to any point in his statement upon which he thinks explanation necessary, the declaration is read carefully over to the prisoner, the Sheriff having dictated it all through; and he is then asked if he has anything more to say, or if he desires to make any correction on what has been taken down. If he says he has nothing more to say, he is asked to sign the declaration; and if he declines to do so, or if he says he cannot write, it is signed by the magistrate in his presence. A docquet is then written out and signed by the Procurator-fiscal, the Sheriff-clerk who has written it, or his clerk, and the officer who has been present, attesting that the declaration was truly and voluntarily emitted by the accused party while in his sound and sober senses, and was adhered to by him after being read over, and was signed by him or by the Sheriff, as the case may be.

4246. *Mr Baxter.*—Do you think that the system admits of questions being put for the purpose of entrapping a prisoner? Would you believe that?—I cannot believe it possible, if the parties there are doing their duty.

4247. Is the presence of these parties not a check upon such a thing?—A powerful check. I don't see how it is possible.

4248. *The Chairman.*—When the trial comes on, we shall suppose, in the Court of Justiciary, the prosecutor is under obligation to prove that the declaration was freely and voluntarily emitted?—He is.

4249. And unless the prisoner admits it, the prose-

cutor must put in the box witnesses who were present at the whole proceeding?—Yes.

4250. And the counsel for the accused has the opportunity of cross-examining these witnesses?—Yes, as to all that passed at the examination.

4251. *Mr. Campbell.*—In practice, the declaration is almost invariably admitted?—Almost invariably.

4252. Does that not seem to imply that prisoners generally have nothing to complain of in regard to the way in which it is taken down?—Quite so.

4253. *Mr. Shand.*—You say you think the chief value of the declaration is that it explains the prisoner's view of the charge?—Yes.

4254. Do you not think the prisoner should have the right to have the declaration laid before the jury as an element for their consideration?—I have heard it asked, and I have seen it refused by the prosecutor; the prosecutor holding that it is not evidence for the accused party, but evidence which he, the prosecutor, may or may not adduce as he thinks fit.

4255. Seeing that you consider its value to consist in its containing the accused's view of the charge, do you not think that he should be entitled to have it read to the jury as an element for their consideration in disposing of the case?—I should say so, if he and his counsel desire it.

4256. You think that privilege should be given to the accused?—I think so. I may say that I think in many cases, if it were done without the application of the prisoner's counsel, it would hamper him in his defence.

4257. But if he and his counsel desire it, do you think the privilege should be given?—I see no reason why it should not.

4258. As to the system itself, do you not think it would be better that the magistrate or Sheriff should simply ask the accused if he desires to make any statement in reference to the charge, without detailed questions being put?—I think it would. I see no reason why we should not follow that practice, which I believe to be the practice in England, where the charge is stated to the party, and he is asked if he desires to make any statement upon the subject.

4259. You think that no further question should be put to him?—Yes.

4260. And if he does make a statement, he should not thereafter be questioned in detail?—If the statement is intelligible in itself.

4261. Do you think that a better system than the system which at present exists?—Yes.

4262. *Mr. Baxter.*—Is that not the general practice?—It is becoming the general practice. There is far less value placed by prosecutors on prisoners' declarations than used to be the case in former days; and I think it would be a useful rule if it were universal, that the prisoner should just have the charge read to him, and be asked if he has any statement to make. That is becoming the general practice.

4263. *The Chairman.*—Does it ever happen that the statements which the accused makes in his declaration lead you to inquiries which result in your not proceeding with the case against him?—It does. He may, for instance, allege an *alibi;* and if that *alibi* is made out by immediate precognition, the case ends there.

4264. Or he may allege any of various things?—Yes. I have mentioned the *alibi* as one which I have had not infrequent experience of.

4265. May it not happen that an ignorant prisoner might not know what was meant by your asking him if he has anything to say, without your putting to him the salient points, and asking if he has any explanation to give upon these?—I think the judge might do that if he saw that the prisoner would not be prejudiced by such a course.

4266. *Mr. Campbell.*—In cases of assault, where a good many persons are engaged in the disturbance, it must frequently happen that a person who is not the most guilty is apprehended; and if he is stupid and confused, it may be an advantage to him to be interrogated as to the circumstances of the case, so as to absolve himself wholly, or in a great measure, from the charge made against him?—Such a case may occur; but unless the assaults are serious, the accused are tried summarily without examination. But cases may occur where it would be desirable, in the interest of the prisoner himself, that questions should be put, and I would leave that to the judge examinator.

4267. *Mr. Shand.*—Has the prisoner the protection of an agent in making such declarations?—That is strictly disallowed.

4268. If he asks to have a legal adviser present, that is not permitted?—It is not.

4269. Do you think that is right?—I don't see any good that it would do to have a legal adviser present. I have seen it reflected upon by the Court of Justiciary, that before a prisoner had been examined an agent had been allowed access to him. If the object is to get at the truth, and if the prisoner chooses voluntarily to make a statement, I don't see that it is for the public interest that he should be prevented from making it, or that he should be advised by his agent not to make it.

4270. But as the object is to protect the prisoner as well as to get at the truth, don't you think it a reasonable thing that he should be entitled to advise with those who are to conduct his defence before he should be called upon to emit any declaration?—In that case I should place no value whatever on his declaration as a production to be made thereafter. I would then say, that unless the prosecutor chose, the declaration should not be used at the trial.

4271. Do you think that the declaration would not have value, although emitted after the accused had had an opportunity of advising with his agent?—I don't think it. I think it would be the statement which his legal adviser thought most likely to get him off at the trial, whether truthful or not.

4272. Is it not the case in England daily, in criminal prosecutions, that after the witnesses are examined the party is allowed to make a statement, but that during these examinations he has the protection and advice of an agent?—I know it is. At the same time, I know that before the prisoner sees an agent at all in England, if he chooses to make a statement to the policeman who apprehends him, it is good evidence against him; and I believe the policeman is obliged to tell him that he need not say anything unless he likes. I would look on a declaration made by a prisoner, after getting the advice of his agent, as of no value.

4273. *Mr. Smythe.*—Does the declaration, as at present emitted, ever operate in favour of the prisoner?—It does.

4274. Your proceedings would have been different if there had been no declaration?—In cases where the prisoner is able to allege at once a defence which exculpates him, and that is found to be true, there is no trial; and even at the trial it may operate in his favour, as explaining circumstances which witnesses have proved or may prove.

4275. *Mr. Shand.*—The same result might be brought about by the prisoner giving information to the Procurator-fiscal, accounting for the circumstances in which he was placed, even without the formality of a declaration?—Yes.

4276. *Mr. Paterson.*—Have you known cases where the prisoner's declaration got its favourable character for him very much through the interrogation of the Procurator-fiscal?—I cannot say so.

4277. In the case of an illiterate accused person, where you see from the context that there is something more which, if brought out and explained by him, would be in his favour, have you not known that done?—In my practice, the prisoner is allowed every opportunity of making any statement he chooses; and if he has not explained himself sufficiently, he is asked further about it.

4278. In that case, do you consider that the interrogation is beneficial to the prisoner himself?—No doubt of it.

4279. If an agent were allowed to attend at the taking of the prisoner's declaration, might that not lead to his interfering and asking questions?—Of course it must, otherwise he is of no use there.

John Gair.

4280. Do you think that would be of any utility?—I don't think it.

4281. *Mr. Campbell.*—It is the special duty of the Sheriff to take care that the prisoner has made himself fully intelligible, especially where his own interest seems involved?—Quite so, if the prisoner chooses to make any statement at all.

4282. *Mr. Shand.*—Might the prisoner not have an agent present for the simple purpose of giving him advice, and of asking the judge to clear up any point on which he thought the examination defective?—I would consider that equivalent to cross-examination.

4283. Even though he does so for the protection of the prisoner?—Yes; of course he would not suggest any question unless it was for the benefit of his client.

4284. *Mr. Baxter.*—Do you always examine witnesses in exculpation where they are suggested?—Invariably.

4285. *Mr. Campbell.*—Do you think the Sheriff ought to have the power of sentencing to penal servitude?—I think so, in the same limited class of cases to which his summary jurisdiction might be extended,—namely, cases of simple theft or assault, with numerous previous convictions, where the substantive fact can be easily investigated. For the speedy trial of such cases, it would be an advantage that the Sheriff should have the power of sentencing to penal servitude.

4286. *The Chairman.*—Would you give him that power in cases tried without a jury?—No; only in those cases where the prisoner, having already suffered a long imprisonment, commits a trifling offence of the same kind, and the prosecutor has these numerous convictions to fall back on. These cases should be tried before a jury.

4287. *Mr. Shand.*—Would you confine that to any particular class of cases, and would you limit the Sheriff's power of sentencing to penal servitude?—I would confine it to a particular class of cases, and I would limit the Sheriff's power to sentences of seven years' penal servitude. I think the class of cases should be crimes simple in themselves, and aggravated by previous convictions, which is the only reason why such cases are at present taken to the Court of Justiciary.

4288. What class of cases?—Chiefly theft.

4289. Assault?—I am not aware that they come to be cases where, upon previous conviction, a sentence of penal servitude is pronounced.

4290. *Mr. Baxter.*—Have you seen cases in which the distinction between robbery and theft was very slight?—I have.

4291. Do you see any objection to allowing the Sheriff to try cases of robbery, where Crown counsel thought that advisable?—I think wherever Crown counsel think it right to remit a case to the Sheriff, especially for robbery of small amount, and with little violence, there is no reason why such cases should not be tried by the Sheriff and a jury.

4292. *Mr. Campbell.*—I suppose, in your experience, cases are frequently tried before the Sheriff, and punished with sentences of pretty protracted imprisonment, which cases, if they had been tried at the Circuit, would have been, almost as a matter of course, visited with sentences of penal servitude?—That is so.

4293. And the mere convenience of speedy jail delivery has probably been the only motive which induced the Lord Advocate to send these cases to the Sheriff for trial?—That is so, and especially where such crimes occur shortly after a Circuit Court.

4294. *Mr. Shand.*—Are you in the habit of having the libel read in court before the trial?—It is read at the first diet.

4295. Do you think that should be done away with?—I think it would be an improvement to do away with that.

4296. *Mr. Baxter.*—Do you not think that the long interlocutors which we have at present in criminal cases before the Sheriff might be very much abbreviated?—I think so.

4297. *Mr. Paterson.*—In cases where accused parties are liberated on bail, can you tell us the number of those who forfeit their bail-bond, as compared with those who appear at the trial?—I would not like to state the proportion, but a very small number forfeit their bail-bond, and the class of men who do so are chiefly men of position who have committed a violent crime, it may be suddenly, or men in business who have been defrauding their creditors.

4298. The more common class of offenders generally come to trial?—Yes.

4299. What is the range of the penalty in the bail-bond on the average number of offences in your district?—From £10 to £50.

4300. In determining the amount of the penalty in the bail-bond, what elements do you take into consideration?—The man's position, and his ability to find a reasonable amount of security for his appearance.

4301. And in cases of theft, the amount of the stolen property?—That is an element.

4302. *Mr. Baxter.*—There is a maximum?—Yes, a maximum fixed by the Act 1701.

4303. Are you satisfied with the law of bail as it stands?—No; I think it is capable of considerable improvement. At present the prisoner's right to be liberated on bail is limited to that class of cases which in former times were not capital. In all such cases the Crown counsel have to give their consent before the accused is admitted to bail; but in other cases which were not formerly capital, the prisoner, as a matter of right, gets out on bail. Now, such a man may have defrauded his creditors to a very large amount, and it may not be expedient to allow him to be liberated on bail. I think in all cases, except cases of murder, rape, and fire-raising, which are still pleas of the Crown, and also robbery, the committing magistrate should have the power of admitting to bail, and should take into consideration the nature of the crime with which the party is charged, and also fix the amount; and that if the committing magistrate has fixed the bail too high, or has refused bail, the accused party should have the power of appeal to the Court of Justiciary.

4304. *The Chairman.*—Do you think the committing magistrate should have the power either to admit to bail or to refuse?—I think so.

4305. And if he admits to bail, to fix the amount?—Yes.

4306. With an appeal to the Court of Justiciary?—Yes.

4307. Would you give such an appeal to the prosecutor also?—No; I think that unnecessary. I think the magistrate, in fixing the amount, will have the public interest in view.

4308. *Mr. Shand.*—Are there any existing regulations as to the amount of bail?—Yes, the regulations contained in the Act 1701.

4309. Do you not find, in practice, that in many cases these regulations prescribe an amount which is too low?—Yes.

4310. What cases do you specially refer to?—The cases to which I refer are principally cases of breach of trust and frauds of large amount, and cases of forgery.

4311. The result of the bail being fixed too low, is that the party does not appear at the trial?—That is so, especially in cases of fraud and forgery.

4312. *Mr. Paterson.*—In cases of theft, or fraud, or embezzlement, should the penalty in the bail-bond ever be less than the amount involved in the charge?—I think there are cases where that would be an extreme penalty.

4313. Such as?—Such as where there is no possibility of the party finding the money. There are cases where a man is in custody accused of large frauds, extending over a number of years, and who is known to have spent all his money, and it would be a great hardship to detain him long in jail before trial, while it would be impossible for him to get out if the bail was fixed at the sum of which he was alleged to have defrauded his employer.

4314. *Mr. Shand.*—The amount of the fines and forfeited bail-bonds goes to Exchequer?—Yes.

4315. How much in a year may go to Exchequer in that way from Stirlingshire?—The amount in 1867–68

was about £525, composed chiefly of fines; but this, I think, is above the average.

4316. *The Chairman.*—Does anything occur to you as to the privilege of prisoners, under the Act of 1701, to run their letters?—No; I think that Act works well in its present form.

4317. Do you think it would be expedient or not expedient to make a simple notice to the prosecutor enough, without the necessity of taking out letters formally, and paying fees for them?—I think that would be an improvement, and the simpler and less expensive such a form could be made the better.

4318. Have you any other observations to make in regard to matters criminal?—No.

4319. In regard to matters civil, have you any observations to make as to the constitution of the Sheriff Court, as consisting of Sheriffs and their substitutes?—I approve very cordially of the constitution of the Sheriff Court, consisting of a resident Sheriff constantly at his duty, with a review by a barrister practising in Edinburgh; but I guard myself against being held to approve of the present system of one Sheriff reviewing his substitute's decisions, and I should like to reserve what I have to say as to that until we come to speak of the courts of review.

4320. Have you any other remark to make upon the constitution of the court?—None. I think it is a most valuable institution—a local Sheriff performing duty on the spot, with a review within the court in some shape.

4321. Have you any observation to make on the jurisdiction of the Sheriff in civil matters, as to whether it should be extended?—I think it may now with benefit to the public be extended to cases from which it is at present excluded. I think, putting it generally, the Sheriff might have something very like the jurisdiction that a Lord Ordinary has at present, subject to certain limitations which I shall explain. I think it is not expedient that in the Sheriff Court cases of legitimacy or marriage should be tried; but the analogous case of divorce is, I think, a fair case for the Sheriff Court, for the sake of parties in poor circumstances; for I know cases of individual hardship arising from the utter want of means of parties to bring their cases in the Supreme Court. As to questions of heritage, and generally suspensions, declarators, and reductions, which are now only competent in the Supreme Court, I think they may now with perfect propriety be permitted to litigants in the Sheriff Court, the pursuer having the power of commencing his case in the Sheriff Court, and the defender being at liberty, if he chooses, to allow it to be ended there. But I think also it might be better, in the meantime, that the defender, if he desires it, should have the right of asking its removal at a very early stage of the case from the Sheriff Court to the Court of Session; and in heritage, if there is to be a limit at all, I think that heritage of the annual value of £50, as appearing in the valuation roll, should be the amount which would entitle the defender to require the removal of such a case to the Court of Session, and perhaps a value of £500 in other matters, leaving the Sheriff to satisfy himself in any way he chooses as to the alleged value of the subject under litigation.

4322. *Mr. Baxter.*—You mean that you would give the defender a right to have it removed above that limit?—Yes.

4323. *Mr. Paterson.*—Is it £50 of rental?—Yes. I think the pursuer should have the power of bringing the case before the judge ordinary if he chooses. If it be such a case as would not naturally end there, in all likelihood it would not be brought there; but I think the pursuer should have the right to bring his case in the Sheriff Court in the first instance, and that, the defender not objecting, the Sheriff should have the right to determine it.

4324. *The Chairman.*—If, after proceeding a short way, the case should appear to be one which would not naturally terminate there, would you allow the pursuer to remove it?—I would allow either party to do so.

4325. *Mr. Shand.*—You are aware that there is a power at present to remove to the Court of Session cases of the value of £40, on an order for proof being pronounced in the Sheriff Court?—Yes.

4326. Do you not think it is making too great a difference to substitute £500 for £40?—I don't think so.

4327. Would you give the pursuer bringing an action in the Sheriff Court involving £500 the absolute right to keep it in the Sheriff Court?—I would, except in the extended jurisdiction which I have suggested. In all matters of jurisdiction now competent to the Sheriff, I think the pursuer should have the right to have judgment in his action, let the amount be what it may.

4328. *Mr. Baxter.*—Subject to appeal?—Yes.

4329. *Mr. Shand.*—Are there not many cases in which the sum in dispute is below £500, where the defender might very reasonably desire to have the decision of the Supreme Court without going through the Sheriff Court?—If he reasonably desires it, he will get it in the end. I think the pursuer has as good a right to have a reasonable desire in the matter as the defender; and if he brings the case in the Sheriff Court, I think he should have a right, except in the extended class of cases to which I have referred, to have the Sheriff's decision. The defender has the privilege of ultimate appeal to the Supreme Court.

4330. Might the defender not reasonably desire to have the case taken to the Supreme Court at an early stage, without incurring the intermediate expense in the Sheriff Court?—I think the pursuer has as good a right to his judgment in that matter as the defender.

4331. The pursuer, however, thereby adds to the expense if the case is to go to the Supreme Court?—The expense of any unnecessary intermediate proceedings in the Sheriff Court is added.

4332. Don't you think that would be a disadvantage, where the sum involved is nearly £500, and where the defender is resolved to have the decision of the Supreme Court?—I don't think the disadvantage is so great as to entitle the defender to take the case at once to the Supreme Court.

4333. *Mr. Paterson.*—Would there be any difficulty in adopting the rent as appearing in the valuation roll as conclusive of the real value of the subject involved in the action? I mean more particularly that a case of this kind might occur, that for the sake of trying an heritable question involving property of a very large rental indeed, you might bring a multiplepoinding, and take the rent of one tenant, which is under £50?—Yes.

4334. Does that present any difficulty to your mind, as to taking the sum in the valuation roll as the value of the particular subject mentioned in the action as the test of the real value involved in the action?—I think the party should have the power of showing to the Sheriff that it involves a value of more than £50.

4335. *Mr. Webster.*—The entry in the valuation roll might apply to an entire farm, whereas the subject in dispute might be only one field of that farm?—Yes. I have a case like that just now, where a footpath goes through one field, and does not affect the rest of the property.

4336. *Mr. Paterson.*—In a question of considerable magnitude, where it is reasonable to infer that a case brought before the Sheriff is not likely to end there, do you see any great use of submitting the question to the Sheriff Court in the first instance?—It often depends on the opinion of the parties after they get the Sheriff's judgment whether that will not settle the case. I don't think any one can say of a case beforehand that he will not be satisfied with the Sheriff's judgment; and unless the pursuer changes his mind, there will be no occasion for his having an opportunity of taking it to the Supreme Court; while if the defender desires it, and shows the Sheriff that it involves a sum above what could be reasonably settled in the Sheriff Court, I think it should go to the Supreme Court at once.

4337. *Mr. Webster.*—The expense of the case before the Sheriff is not entirely thrown away, because the records and the evidence are still preserved?—Yes, and are used in the Supreme Court.

4338. *Mr. Paterson.*—You think there is no disadvantage in the case going on in the Sheriff Court?—That depends on the care with which the record is

John Gair.

made up, and the skill of the judge before whom it is made up.

4339. Would there be no disadvantage in questions of a feudal character?—I should not say so. The day has been when country practitioners knew little of conveyancing or of legal titles, but their education has improved, and the position of the resident Sheriff is better than it was in those days. I am therefore of opinion that in many questions of heritage the Sheriff's jurisdiction might be extended.

4340. *Dr. Barclay.*—Is not the subject to be studied very much simplified?—Most assuredly.

4341. *Mr. Paterson.*—On what ground do you draw the distinction between actions of legitimacy and of marriage, and actions of divorce, in making the one competent before the Sheriff, and not the other?—In actions of divorce the parties may be poor people, having no means to try their case in the Supreme Court. The consequence of that is, that they form improper connections, and live in an improper manner; and the husband, it may be, is exposed to claims during his whole lifetime, by an abandoned woman who had been his wife. A case occurred within my own knowledge which I shall take the liberty of mentioning. A working man was deserted by his wife seventeen or eighteen years ago. She has led an abandoned life since. She is now getting old and infirm, and she has gone on the parish, he conscientiously refusing to support her after her long abandoned life. Many years ago he applied to an agent in order to get a divorce; but on being told that it must go to the Court of Session, and that the expense would be £25 or £30 at the least, he said it was impossible for him to raise that amount. The parish from which the woman is getting relief is now threatening him with a prosecution because he does not comply with what is still, unfortunately for him, a legal obligation. If that man had the option—and there are many other cases of the same kind—of bringing his case before the Sheriff Court, he would probably have got a divorce for £5 or £10.

4342. *Dr. Barclay.*—Would you not be content with having the action of divorce *a mensa et thoro* competent in the Sheriff Court?—No.

4343. Are you not of opinion that it would tend to immorality to make divorce too easy?—I don't think it would. If a rich man is entitled to divorce in the Supreme Court, a poor man should be entitled to it on the same ground in the inferior court.

4344. *Mr. Baxter.*—That lesser remedy would not meet the case which you have mentioned?—No.

4345. *Mr. Paterson.*—You have a large mining population in your district, and you indicated something of their habits and character by saying that they come into Falkirk on Saturday evenings, and drink, and quarrel, and give occasion to criminal cases. In that view, do you think that a cheap and easy divorce would be an unqualified advantage?—I know no state of society in which a man, if entitled to a divorce, should not be entitled to have it in the cheapest way consistent with public policy.

4346. Do you say the same of a woman?—Yes.

4347. *Mr. Shand.*—Assuming that good grounds of divorce exist, you don't think that it should be made a question of money whether a man is to obtain decree of divorce or not?—That is exactly my view.

4348. *Mr. Paterson.*—As to a mining or other population, in which morality is a little lax, don't you think a cheap and easy divorce might induce persons to resort to that remedy, who in other circumstances might live together all their lives?—I don't see where you can draw the line.

4349. *Mr. Gordon.*—If the consequences were so serious, that might have a contrary effect?—Yes.

4350. *Mr. Adam.*—Would you approve of any safeguard against collusion, such as giving information to the Procurator-fiscal in these cases?—I have considered that, but I don't see that it could work well. I think, however, that the judge should satisfy himself by every means that there is no collusion. I would give him power to remit to a public officer of some kind whenever he thought it necessary on public grounds.

4351. *Dr. Barclay.*—You don't think the oath of calumny sufficient?—Not at all sufficient. The judge, wherever he suspects collusion, should have the power of ordering an investigation, and in all cases should satisfy himself that there is no collusion.

4352. Have you formed any opinion, from your long experience as a Fiscal, as to the propriety of having in Scotland the verdict of not proven?—I see little benefit from it, but it often satisfies the mind of a jury.

4353. Does it not give them an easy mode of getting out of the performance of their duty?—Yes.

4354. *Mr. Adam.*—Do you think there might be more verdicts of guilty if the verdict of not proven were abolished?—I think there would, if the issue was between guilty and not guilty.

4355. *Dr. Barclay.*—Don't you think it a disadvantage that a man should go out of court tainted with a verdict of not proven?—No doubt.

4356. *Mr. Baxter.*—Why do you think there would be more verdicts of guilty if there was no verdict of not proven?—Because juries shelter themselves under this, that the matter is not proven to their satisfaction.

4357. They never do that unless they have doubts?—Perhaps not.

4358. If they have doubts, should not the panel get the benefit of the doubt?—Then it should be a verdict of not guilty. The only good that a verdict of not proven does, is that it relieves the mind of a jury.

4359. *The Chairman.*—It reflects the mind of the jury upon the case?—Quite so.

4360. *Dr. Barclay.*—Have you formed any opinion as to the propriety of requiring unanimity from the jury in criminal cases?—I think the opinion of the majority is preferable. I don't know how it works in England; but in Scotland it is exceedingly difficult to get 15 men or 12 men to agree.

4361. *Mr. Webster.*—What is your view as to the number of jurors?—I think in criminal trials we might reduce the number greatly. I think 9 would be fully as useful a number as 15.

4362. *Dr. Barclay.*—What proportion would you have of special and common jurors?—6 common and 3 special.

4363. *Mr. Shand.*—What advantage would you expect from the change?—The great advantage would be, that the public would not be called so often as jurymen.

4364. *Mr. Baxter.*—Can you suggest any plan by which it should not be necessary to summon 45 jurymen, in the event of there being only one case for trial?—I would suggest that at the pleading diet, the prosecutor and the panel should in all cases exhaust their challenges; and that if, after the pleading was over, only one case remained for trial, only one half of the jury panel should be summoned, instead of 45, as at present.

4365. *Mr. Gordon.*—How would you exhaust the challenges? At present the prisoner may challenge 5 of the 15 called?—He has 5 challenges out of the first 20, and I would give him that power still. The jury roll might be called after he had pleaded, and then he would exhaust his challenges.

4366. *Mr. Shand.*—But if you allow more than that number of jurymen to come at the next diet, he would have more challenges?—Supposing 22 jurymen were brought instead of 45, he should have additional challenges corresponding to that number.

4367. *Mr. Baxter.*—Could you not make the Crown challenge at the first diet?—The Crown very seldom challenge.

4368. *Dr. Barclay.*—You might reduce the number of the challenges?—The number of jurors might be reduced to 27, or probably even to 21, if there was a panel of 9.

4369. Have you formed any opinion as to the line of demarcation between common and special jurors?—I see very little difference between them now-a-days.

4370. How is that ascertained?—The person who takes up the jury list satisfies himself.

4371. Have you not observed that many men are

special jurors whom you would have expected to see as common jurors?—Yes.

4372. And some common who ought to have been special?—Yes; and very likely that arises from the parties asking to be put in as common or as special jurors.

4373. Have you discovered any reason for the distinction between special and common jurors?—No; I have not. I think the duty of taking up the jury list is rather loosely conducted at present. The Sheriff-clerk and his deputes ought to be the parties to do it. At present it is done by men out of the department of the Sheriff, and therefore it is not so accurately or so carefully done as if it were under the exclusive charge of the Sheriff-clerk, and suitable remuneration allowed for the work.

4374. Who does it in your county?—The Sheriff-clerk is charged with compiling the lists; he is authorized to employ parties throughout the county, for a small fee paid by Exchequer, to make up the lists in their localities; and he usually employs inspectors of poor, collectors, and persons of that kind, to do this part of the duty.

4375. And schoolmasters?—Collectors, and inspectors, and schoolmasters throughout the country, who know the people round about. But we have now the valuation roll, and I think the Sheriff-clerk might do it in a more deliberate manner than it is done at present.

4376. *Mr. Webster.*—How could the Sheriff-clerk in a large county manage the work?—He should do it by his responsible deputes and clerks. It should be worked within the office of the Sheriff-clerk.

4377. *Dr. Barclay.*—Do you think the pleading diet is an improvement?—No doubt of it.

4378. Do you see any necessity for the panel appearing at the first diet to enter a plea of not guilty, coming perhaps 40 or 50 miles for that purpose? Do you see any objection to a plea of not guilty being entered by an authorized agent?—I think that would be an improvement; and a prisoner out on bail appearing by his agent at the first diet should be held as present.

4379. *Mr. Baxter.*—Do you know how the office of Sheriff-clerk is conducted at present?—I know that it is held by gentlemen appointed by the Crown, and that they employ deputies. I think that they now live generally at the county town, and to a certain extent perform their duties in person; but they employ deputies under them at the county town, and also at the other towns where Sheriff Courts are held.

4380. In some places they don't do much?—I believe not. In Stirlingshire the duties are uncommonly well and carefully done by Mr. Galbraith. He attends constantly in his office, and he has competent deputes at Stirling and at Falkirk.

4381. *Dr. Barclay.*—Is he not also city-clerk?—He is town-clerk of Stirling.

4382. *The Chairman.*—In regard to jurymen, do you think that the distinction of special jurors might be more easily dispensed with by reason of the late removal of exemptions from jurymen?—Yes, I think that is a material element in the consideration of the matter.

4383. With regard to challenges and diminishing the number of jurymen, would you proceed in this way at the first diet, and only in the event of the accused pleading not guilty, that you would then in the first instance strike off a certain number of the jurymen who were last on the list?—Yes.

4384. And then from the remaining names alone the panel must exhaust his challenges?—I think that would meet all the difficulties, and it would retain the last on the list for service at the next court.

4385. Do you think it expedient that jury trials should be introduced before the Sheriff in matters civil?—I do not think so.

4386. What are your objections to that?—I think that, so far as I have seen of jury trials in the Supreme Court, the verdicts are not so satisfactory as to warrant the extension of jury trial to the inferior courts. Even in the Supreme Court, with a judge of the highest ability to direct and guide them, and with a practised bar, you find jurymen going astray often. I don't think we are at all prepared for jury trial in the Sheriff Court. I have not such confidence in the verdict of a jury, that I would ask them to judge in any matter in which I had much at stake.

4387. You would prefer the judgment of the Sheriff?—I would.

4388. *Mr. Campbell.*—Do you think that the public generally are disposed to place more confidence in the judgment of the Sheriff than in the verdict of any ordinary jury which could be got to sit in the Sheriff Court?—That is my observation of public feeling. They trust more to the Sheriff's judgment, even on matters of fact, than to the judgment of a jury.

4389. *Dr. Barclay.*—How would it answer to make jury trials optional, as it is in the County Courts in England?—We would require to adapt our system to a new state of things, which I don't think we, as a local bar, are prepared for. I hold the opinion that it is not beneficial to the public to have matters of fact settled by a jury in small cases, and therefore I don't think they need have the option of it.

4390. *Mr. Campbell.*—Do you think they are asking for any such option?—I don't think so.

4391. *The Chairman.*—Have you any observations to make on the forms of pleading in the inferior court, or as to the mode of investigating facts?—Perhaps your Lordship will allow me to refer to the extending of the Sheriff's jurisdiction in other matters. From the Legislature having passed the Debts Recovery Act of last session, public opinion has come to the conclusion that a debt of £50 may be safely recovered in a summary form before the Sheriff. I think the provisions of the Debts Recovery Act ought to be applied to all classes of debts, so that merchants' accounts, servants' wages, and so on, need not have a privilege which is denied to other debts. But I think also that there need not be two sets of forms under the Debts Recovery Act and the Small Debt Act; and that the forms under the Small Debt Act may be practically applied to all claims amounting to £50, giving to litigants the right of appeal, with the consent of the judge, even down to a very low amount, in matters of law; and giving them the right of appeal, without the consent of the judge, in all claims above £12, both in law and in fact. To try the appeal in the smaller cases, I think it should be sufficient that the judge should state a case for the opinion of the court of appeal. That case may be prepared by the parties or by the judge, but at all events it should be settled by the judge; and the decision may be given without a hearing by the court of appeal, unless both parties or either party ask for a hearing. In the larger class of cases, from £12 to £50, I think there should be a right of appeal to the court of review, both in fact and law; and to get at proper elements for such an appeal, the Sheriff would require to preserve notes of the evidence, in some shape or other, either by his own notes or by the notes of a shorthand writer.

4392. *Dr. Barclay.*—Although the parties dispensed with it?—No, not if the parties dispensed with it.

4393. Under the Debts Recovery Act the Sheriff only takes notes if he is required to do so?—I think that is a wise provision; and where he is not required to do it, the parties must be held to have dispensed with it.

4394. *Mr. Shand.*—And thereby to acquiesce in the decision of the Sheriff-substitute?—In matters of fact; but there would still be the appeal in matters of law.

4395. In cases between £12 and £50 would it not be necessary that, in addition to notes of the evidence, some record of the pleas should be made?—Yes; I think it would be desirable for the defender to put in a short plea, or for the Sheriff to note a short plea for the defender; so that there should be a short minute made by the judge or lodged by the party, in order to preserve a record of what his defence is.

4396. *Mr. Gordon.*—Would you make provision for a reply?—Yes; I think that would follow. If the defender desired it, the pursuer should state his reply, because I think it is for the advantage of the defender to make the pursuer state a reply to his defence.

John Gair.

4397. *Mr. Adam.*—Do you think it is a good form of process to bring the parties before the judge to state their pleas in his presence. Does that bring them more to the point?—In small cases I think it is exceedingly useful to have the parties before the judge; and with an intelligent judge, who gives his mind to the duty, it is really very satisfactory work.

4398. *Mr. Baxter.*—You would not have an appeal without an oral hearing, where parties wished it?—No.

4399. *The Chairman.*—Do you think that the various forms in the Sheriff Court procedure might be assimilated more than they are, by a short form of writ and statement of pleas?—I think the original writ bringing parties into court might be made a very short document—an order on the party to appear to answer to the claim, with a short statement of the claim annexed to the order of the judge.

4400. That in all cases?—That in all cases, the great object being to get decree in absence without much cost at the first. The shorter the writ by which parties are brought to the court, I think, the better.

4401. *Dr. Barclay.*—Have you had much experience in cases of filiation and aliment?—No, I have not.

4402. Have you had any cases of perjury arising from the law allowing the defender to be examined?—I have only had one information of perjury in a bastardy case, but I rather think they are more frequent.

4403. *Mr. Adam.*—Would you object to give the right of appeal below £12 with consent of the judge?—No; I think the judge should have power to give his consent below £12.

4404. Take the case of liability to a rate or toll, or any general question involving a small amount?—I think the judge would like that that should be appealed.

4405. *Dr. Barclay.*—I suppose the judge would only refuse his consent where he was satisfied that the appeal was taken for the purpose of delay?—Of delay, or for causing unnecessary expense.

4406. Should the Sheriff not have power to refuse his consent even above £12?—I think that a party should have the right of appealing, and that that right should not be lightly controlled. I think it is exceedingly useful for all judges to know that there is an appeal against their decisions. It makes them careful in the first place, and it gives the public more confidence in their judgment.

4407. *The Chairman.*—Have you anything further to say on the subject of pleadings?—I think that the original summons, being of a short and clear description, might be met by a short minute in defence; and that minute should state simply what is admitted by the party, or what is denied—perhaps what is admitted is enough; and should state any plea the defender has, or any counter claim he has against the action, as shortly and simply as can be done, and that the pursuer should be required to reply to that defence; and the record ought to be closed on that, if it can be done. There may be cases, and there often are cases, where it is impossible, within the limits of such a short paper as I have in my mind, to state the case of the parties fairly or fully, so that each knows what the other has to say against him, or in support of his case; and I think, therefore, it should be in the option of the judge to permit a condescendence where he sees it is necessary for the fair statement of the case on either side; but that the judge shall exercise that option discreetly, and with due attention to the case before him, and not grant it as matter of course when asked by the agents.

4408. You think that should be an exceptional matter?—Yes; and that the condescendence should be as concise as possible, without going into minute details.

4409. How would you enforce that?—By the Sheriff striking out and disallowing what he thinks irrelevant and unnecessary. I don't think that is a duty which is sufficiently exercised by Sheriffs at present. On the contrary, I think they are rather indulgent towards the practitioners, and allow too much of what is written to remain, and the agent who has written too much to get payment for it, where he ought not to get it, either from his client or from the opposite party.

4410. Is there not some difficulty in the judge knowing at that stage whether the matter alleged by the pursuer is or is not relevant and important to his cause?—I think there is difficulty, and it requires that the right of striking out should be carefully exercised. All quotations from documents should be disallowed. The document should be mentioned, and parties allowed to open it. Many minute details also should be disallowed, they being merely facts in support of a general statement. No doubt it will require care and discretion on the part of the judge, and he will wisely allow statements to remain on the record even though they may be such as to the relevancy of which he has a doubt.

4411. *Mr. Paterson.*—In the Sheriff Court at Falkirk, is the record made up by condescendence and answers in the majority or in the minority of cases?—In the majority of cases there is a condescendence.

4412. Is it ever followed by a revisal?—Yes, I have seen that done, and I entirely disapprove of it. I think the original paper is one which ought to remain, because I have seen a new case presented to the Sheriff after the pursuer had seen the defence. I think the original condescendence should remain, and there need not be any revisal unless new matter is stated by the defender, requiring an answer from the pursuer.

4413. Would it not be well, in cases of that character, that those papers should be ordered at once at the pleading diet?—I think it would.

4414. That would supersede the necessity for a short defence, and then a reply?—Yes; whenever it is obvious, from the statement of the parties, that the defender has a separate case to make out, the original order should be for condescendence and defences, and reply by the pursuer.

4415. You would still give the reply?—To new matter raised by the defender.

4416. Would there not be some risk of that practice degenerating into the old defences and replies, and condescendence and answers afterwards?—That should be guarded against.

4417. But that would be a difficulty to be guarded against?—I think there should be an order authorizing the pursuer to state his case in a condescendence, with an order on the defender to answer that, and to state any separate case he has to set up; the pursuer being in like manner entitled to answer that case, and nothing more. I think that might be done without any risk of extended pleadings, and there the record would be closed.

4418. But seeing that in the majority of cases in your court the record is so made up, would it not avoid delay and expense if the revised defences and answers were ordered at the pleading diet?—I think so. Wherever a condescendence is necessary, there need be no minute of defence at the pleading diet.

4419. *Mr. Baxter.*—Are there many cases in which a long record is made up where the short record might suit?—I think there are. I think the long condescendence is allowed in too many cases.

4420. *Dr. Barclay.*—The award of expenses contemplates a check for that?—Yes.

4421. *Mr. Baxter.*—But is that carried out?—No, not sufficiently.

4422. *Mr. Paterson.*—Is it not a difficulty in the way of imposing a fine, that the question is raised whether the procurator or his client has to pay it?—I think an honourable procurator would have to pay it out of his own pocket; but some procurators might not be of that mind, and would debit their clients with it.

4423.—Do you ever find difficulties in adducing your evidence where the record is in the short form?—No; it is a great advantage to parties who want to manage a case without letting the other party know what is in it, to do it in the short form.

4424. Would your opponent not consider that a difficulty?—He has the advantage, on the other hand, of not having disclosed his case too much. The disadvantage

of the minute is, that the pursuer is not required to reply to it. He should be required to reply to it.

4425. *The Chairman.*—Do you consider it an advantage, that at the earliest possible stage, the case of each party should be disclosed to the other?—I think so; and in practice in the Small Debt Court that is the case where it is well worked. The judge hears what the pursuer has to say; he asks the defender what he has to say against it; and if it is a simple case, it is settled very quickly.

4426. When there are written pleadings, do you think it should be an object, in settling the style of these pleadings, to bring out the case of each party at the earliest possible stage?—I think so.

4427. In regard to cases in which condescendence and revised defences are allowed, and you say a reply by the pursuer on new matter, would that not be in answer to the defender's statement of facts?—That is what I mean. The reply would be limited to that.

4428. Is not that the present system?—We get into long statements.

4429. That is the mode of working the present system. The difficulty arises from the verbosity of parties, or those who act for them?—Yes, that is the practical difficulty.

4430. Prolixity in the statement?—Yes. We are all over-anxious to state our case so as to omit nothing. And if the practice were acquired of stating the case in general terms, leaving the details for proof, that would meet my view as to what the record ought to be.

4431. Does it occur to you that the prolixity of the statement is in any degree attributable to the want of a careful consideration at the early stage of what is the real issue in the case?—Most undoubtedly. I think that agents who study their case before they serve their summons can far more easily and clearly state their case at the first meeting before the Sheriff, than if they bring a haphazard action without having ascertained the facts beforehand.

4432. They would confine it to what was pertinent to the real issue?—Yes.

4433. But if they don't do so, it is a precautionary matter with them to state everything out of which the issue may probably arise?—Just so.

4434. *Dr. Barclay.*—In a case depending on matter of fact, you would take the precognitions before closing the record?—All cautious agents should do so.

4435. But at present they take the case from their clients?—Yes; and they often get a coloured, distorted view of the facts.

4436. *Mr. Webster.*—Would it not lead to cost to have an investigation of that kind, where the action is ultimately not defended?—There is a difficulty there; but every agent who wishes to prepare a summons carefully ought to satisfy himself by some means that he has got at the whole case; and perhaps in the table of fees there ought to be an allowance to the agent for an inquiry beforehand, provided he satisfies the auditor that it has been made. That should be a small thing, and in decrees in absence it need not be allowed.

4437. *The Chairman.*—Such previous study would tend to make the future proceedings simpler and cheaper?—Yes.

4438. It would save trouble, expense, and time to all parties?—No doubt of it.

4439. *Mr. Paterson.*—As to the incurring of expense in taking precognitions which may never be required, from the cause being undefended, I suppose you have a pretty correct notion beforehand of those cases that are to be defended, and those that are not?—Generally. I think there is hardly any action brought now without an intimation having been made by the agent to the opposite party that such a thing is to be done.

4440. You could be guided by that in taking precognitions?—Yes; I have heard of cases where an unscrupulous agent comes down on a man with an action without giving him notice, but that is rare.

4441. *Dr. Barclay.*—I suppose that is done in actions of damages?—Yes, generally in such actions.

4442. *Mr. Campbell.*—The benefits you desiderate would scarcely be attained by legislation?—No.

4443. *Dr. Barclay.*—The plan you suggested is very much the Act of Sederunt of 1839?—It is; and if the Act of Sederunt had been worked out, the system would have been in operation by this time, and little fault would have been found with it.

4444. *Mr. Campbell.*—Probably the fault found is very much attributable to the Sheriff Court?—I have no doubt of it.

4445. *Mr. Shand.*—Have you any suggestions to make as to power to amend?—I find that the Court of Session Act of last year, sec. 29, gives a power of amendment of the record in defended actions, rendering competent at any stage of the cause all amendments necessary for the purpose of determining in the existing action the real question in controversy between the parties. I think that is an admirable provision, and it ought to be extended to the Sheriff Courts.

4446. So that amendments may be made at any stage of the case?—Yes.

4447. *Dr. Barclay.*—Subject always to an award of expenses?—Yes, in the discretion of the court.

4448. *Mr. Campbell.*—Assuming that the constitution of the Sheriff Court remained unchanged, consisting of Sheriff-substitute and Sheriff, do you think the Sheriff-substitute should be entrusted with the power of making such amendments without the party going to the Sheriff?—I think the Sheriff-substitute ought to be allowed to amend while the case is in his hands. There are several other provisions in the Court of Session Act which I think might be advantageously applied to the Sheriff Court, viz. sec. 20, for amendment of the summons and pleadings in undefended cases. That is in cases pointed out in the Act itself; sec. 23, decree in absence to pass without attendance of the agent; sec. 24, certain decrees in absence following on personal service, to have the effect of decrees *in foro;* sec. 40, that actions of damages, where the verdict is for less than £5, are not to carry more than small debt expenses, under the exceptions provided in the statute; and sec. 41, authorizing the stamping of unstamped deeds tendered in evidence. I think all these are provisions of great utility, and they might very safely and properly be applied to Sheriff Court procedure.

4449. *Mr. Baxter.*—Would you approve of a rule similar to what obtains in reference to the County Courts in England, that where a decree is pronounced in an action originally brought in the Supreme Court for a sum less than £50, the pursuer should only be entitled to Sheriff Court expenses, unless the judge in the Supreme Court should certify that there was something peculiar in the case which made it one proper to be brought in the Supreme Court in the first instance?—I think that qualification is very necessary. There are many cases where decree is got under £40, which yet are very proper cases for trial in the Supreme Court; while the general power ought to be given to limit the expense, if it should have been originally brought in the Sheriff Court. Yet the court should have power to give expenses where they think it is a case which might fairly be brought in the Supreme Court.

4450. *Mr. Adam.*—Would you apply the same rule to cases appealed from the Sheriff Court?—No; in such cases a decision has been given in the Sheriff Court, and the party dissatisfied is entitled to go to the court of appeal. If he succeeds in his appeal, he is right, and is entitled to all his expenses; if he fails in his appeal, he has dragged the respondent unnecessarily to the superior court, and the respondent is entitled to the expenses thus incurred.

4451. *Mr. Gordon.*—And the appeal is the only mode of getting justice in that case?—Yes.

4452. Whereas in the other case you have a more expensive court?—Yes.

4453. There is a provision in the Debts Recovery Act to that effect?—There is a provision in the Small Debt Act.

4454. Are there any other matters which you think might tend to expedite procedure in the Sheriff Court?—No; I think I have said all I have to say on that subject.

4455. *Dr. Barclay.*—Do you know anything of lock-

John Gair.

hole citations in your district?—Yes; I think that a very dangerous system. I have known cases where Sheriff-officers have returned false executions of such citations.

4456. Both citation and charge?—Yes. I think it might be an improvement, especially in executing small debt summonses, that they might be served as registered letters through the Post Office,—that instead of sending an officer twenty miles with the summons, it should be sent as an open letter through the post, and that the agent or his clerk should certify that, and produce the receipt of the Post Office for it.

4457. Supposing it came back without the party being found?—Then it should be the duty of the post-master to hand it to the Sheriff-clerk.

4458. *Mr. Gordon.*—A certificate is returned that it has been delivered at the house?—All registered letters are only delivered to the party to whom they are addressed, and on the receipt of that party. I think some provision of that kind should be made, to secure evidence of the receipt of the writ.

4459. It would save expense?—It would save great expense especially in small debt cases.

4460. *Dr. Barclay.*—The same plan might be adopted as to jurors?—Yes. It is already in practice as to jurors and witnesses in criminal cases.

4461. *Mr. Paterson.*—In the greater number of small debt cases, would there be any difficulty in having the charges and the arrestments served personally?—There might be difficulty, but in most cases I think that might be done, and cases of personal service might get an earlier hearing.

4462. *Dr. Barclay.*—In the Small Debt Act is there not a higher fee to the officer?—Yes, sixpence higher; but I have known officers return personal citations which had been served at the house merely.

4463. Where the party was not got personally, might not application be made to the court to substitute another sort of service?—That would lead to expense in these small cases.

4464. *Mr. Paterson.*—Where an arrestment in a small debt case is served, especially on the dependence, would it not be an expedient thing that a duplicate should be served on the defender?—Yes, that would be a most useful proceeding.

4465. I suppose you have known many instances of an artisan going for his wages on a Saturday afternoon and finding them locked up?—Yes. I had two parties with me on Monday complaining of that very thing.

4466. *Dr. Barclay.*—Do you think it would be a good thing in small debt cases to abolish the arrestment on the dependence?—I think it should be abolished in small debt cases.

4467. Seeing that they are so soon adjudicated?—Yes, except in special cases where the people are running away.

4468. *The Chairman.*—How would you deal with such cases?—By a special application to the court.

4469. That is, cases under £12?—Yes.

4470. *Mr. Shand.*—To be granted on cause shown?—Yes, such as when a man is going off with his furniture.

4471. *Mr. Paterson.*—Do you know that a certain class of shopkeepers are in the habit of supplying work-people very much on the faith of being able to tie up their wages?—Yes, they supply them on credit expecting to recover payment in that way.

4472. Do you think that an evil?—Yes.

4473. Is it not an evil to the workman?—Yes, and it is an evil to the general class of shopkeepers.

4474. Have you known it lead to great improvidence on the part of the workpeople?—Most undoubtedly. I see that every day in our district, where a miner is allowed to run up an account of £10 or £12. Because he is getting goods on credit, the shopkeeper gets a much higher price for them, or gives worse goods, and the man is loaded for years with the debt.

4475. *Mr. Campbell.*—He becomes thirled to that shopkeeper?—Yes; if he leaves him, there are pains and penalties which are usually enforced.

4476. *Mr Paterson.*—Do you think, if the system of arrestments for small debts were entirely abolished, it might reasonably be expected that workmen might apply their wages in making cash purchases for their families?—Yes, I have no doubt that would have a most beneficial effect. There is one thing which I omitted to say about applying the provisions of the Court of Session Act to the Sheriff Court. In the original writ or summons a warrant of inhibition might be given in cases competent to the Sheriff Court; and I would suggest that the present mode of discharging inhibitions is unnecessarily expensive. The registrar will not mark the discharge of an inhibition without a formal discharge on a deed stamp being presented to him. I think it should be sufficient to entitle him to mark it that a decree of absolvitor in the action should be presented, or an attested receipt for the debt inhibited upon, instead of the discharge on the £1, 15s. stamp.

4477. *The Chairman.*—Would you have publication of the inhibition?—Yes, I think so.

4478. *Dr. Barclay.*—Not at the market cross?—No.

4479. *The Chairman.*—In the records?—Yes, I think that is sufficient publication.

4480. *Mr. Webster.*—In the case of an inhibition on a Court of Session summons, where there was decree of absolvitor, and where there is a right of appeal for two or five years after the decree may have been extracted, would your suggestion not deprive the pursuer of the benefit of the diligence?—I think it might take effect if there is no appeal within a year after the decree. I know cases at present where inhibitions are standing for many years, and they will some day come up, and require a great deal of money to put matters right. That arises from the expensive manner of discharging the inhibitions.

4481. Should not a longer period be allowed for appealing, in the case of parties out of the country, or in minority?—Well, there may be special cases in which, by notice to the registrar, he should be required not to record the discharge on a decree of absolvitor without the leave of the court; but these are exceptional cases.

4482. *The Chairman.*—Do you not think that extending the inhibitions in the way you propose would multiply inhibitions very much?—I don't think it would do so unduly; but it would cheapen them.

4483. If it multiplies them, and cheapens them, might they not be used oppressively?—I don't think it would have that effect.

4484. You don't think they would be vindictively used?—I don't think so.

4485. The mere publication of them might be injurious?—No doubt, if unduly or oppressively used, it would be injurious.

4486. *Mr. Webster.*—Is it your opinion that the pursuer should have the uncontrolled right of inhibiting and arresting on the dependence of an action?—I think that cases of great hardship may be conceived to arise from that; but it is very difficult to find a remedy, especially where despatch is required.

4487. Would you not think it necessary that he should obtain the sanction of the court, upon an affidavit showing cause why that should be permitted?—I think it would be desirable that a scheme should be devised which would enable the creditor wishing at once to attach a debtor's effects, to do that without notice to the debtor; but I think it would be an improvement on the present system, under which a creditor may arrest at any moment, and without any authority from the court, if letters of arrestment were given after consideration by the court.

4488. *Mr. Adam.*—Do you think it would be right to allow a defender who had suffered loss in that way, to recover it without proving malice and want of probable cause in the use of the arrestments?—That goes into a very deep question. I think that would be limiting the right of the pursuer or creditor too much. It would open a door to oppressive litigation, which might prevent people from asking their proper remedy in court. It is a debateable question, and I have not considered it.

4489. *The Chairman.*—Are there any other matters which you think would tend to economize time and

money in Sheriff Court proceedings?—Nothing that occurs to me.

4490. What do you say as to prorogations?—I think they are often given too loosely; but it is very difficult to restrain parties from concurring in these prorogations, or to restrain the court from granting them if parties concur. There are many cases brought in the outset which it is better for the parties should not be hurried through. Therefore I cannot see how the Legislature can restrict a judge from granting prorogations, if parties concur in asking them.

4491. It has been suggested that the consent of the parties themselves should be given to such prorogations. Do you think that is practicable?—I don't think it is. I think that a man who employs an agent has generally that confidence in him that he may trust to his doing what he considers best for his interests.

4492. He would probably take his agent's advice as to whether he should consent?—Yes, most probably.

4493. *Mr. Baxter.*—With reference to the investigation of facts, are you satisfied with the present mode of the Sheriff-substitute taking down notes of the evidence, without the agents knowing what is being taken down?—No. I would prefer that the Sheriff should dictate the evidence to a clerk in the hearing of the parties. No doubt there are Sheriff-substitutes who take down the evidence most accurately, and whose notes are found to be little short of shorthand writers' notes in their accuracy and fidelity; but others have not that quality at all, and I don't think they take the notes fully enough or accurately enough.

4494. Do you think the agents should have an opportunity of knowing what is being taken down?—Yes.

4495. And the opportunity of putting questions?—Yes. I don't think it necessary to take down the evidence at full length, but the Sheriff should dictate his notes aloud to a clerk, or read them aloud as he writes them down himself.

4496. Have you any suggestion to make as to taking it by a shorthand writer?—I think in all cases where the parties concur in asking for a shorthand writer, or where either of them asks for it, and offers to pay the expense in the meantime, it would be desirable to provide that, if the Sheriff sees fit, a shorthand writer should take down the notes of the evidence; and in that case the evidence, I think, should be taken down in the shape of question and answer.

4497. And dictated by the Sheriff?—No. I think the question as coming from the party asking it, and the answer as coming from the witness, should be recorded by the shorthand writer; and in order to get an accurate report which will satisfy all parties, I think the shorthand writer should be required as soon as possible to send his extended notes to the party whose proof it is. These notes should be examined by the parties; and if they are satisfied as to their accuracy, let them be the notes of evidence in the cause. If there is any inaccuracy, in the correction of which they cannot agree, let them go to the judge, and let him correct it, as his short notes taken for his own satisfaction, or his memory of the facts, may enable him to do.

4498. *The Chairman.* — Would not question and answer all taken down make a most voluminous record?—In heavy cases it would.

4499. And in some cases, where the examination goes on a long way, and results in nothing at all, would it not create considerable difficulty in finding where the essence of it lay?—It would involve more writing than is necessary.

4500. You have perhaps observed in cases tried before juries in the Supreme Court, where the evidence was very accurately taken down by a shorthand writer, that that was the state of the matter?—I have.

4501. *Mr. Baxter.*—Have you ever seen an instance of revising the shorthand writer's notes?—I have seen that, with consent of parties.

4502. Where?—In a case tried before Vice-Chancellor Stuart in the Court of Chancery.

4503. *The Chairman.*—Was it the case of Young's patent?—Yes.

4504. The evidence was taken down question and answer?—Yes; and revised by the agents in the manner I have mentioned, and any inaccuracy was corrected by the judge. *John Gair.*

4505. The judge must have had his recollection very perfect?—He took short notes. In that case I believe much use was made of the notes of a judge who had previously tried a similar question in the court here.

4506. That case before Vice-Chancellor Stuart lasted upwards of 30 days?—It lasted 33 days.

4507. Was the evidence ever printed?—It is printed, and forms a volume of enormous size.

4508. Can you give any idea of the size of it?—It is a quarto volume, of about 1500 pages, in large type.

4509. The evidence taken in the court here was taken a great deal more shortly?—The notes of evidence taken by the judge who tried the case here were remarkable for their clearness, and their usefulness afterwards through a long course of litigation.

4510. *Dr. Barclay.*—If the Sheriff were to dictate the evidence to a clerk, the time taken up would be a great deal longer?—I am not sure of that. I don't want the whole evidence taken down; but just such evidence as the Sheriff takes at present. The difficulty I want to get over is that the agent should know, as the evidence is being recorded, what is being written; and if the judge would read out what he is writing, that would be sufficient.

4511. *Mr. Campbell.*—You are aware that a competent shorthand writer can read with perfect facility the notes which he has taken?—Yes.

4512. Would it not be the most convenient plan, in the event of a shorthand writer being employed, that the Sheriff should dictate to the shorthand writer that which he would have dictated to the clerk, and that the shorthand writer, after the evidence of the witness had been completed, should read his shorthand notes to the witness in presence of the judge and parties, and obtain his attestation to its accuracy?—That might obviate the difficulty in many cases; the shortening of the evidence would be attained in that way.

4513. *Mr. Shand.*—Do you think any improvement might be effected in the Sheriff Court, by lessening the number of times at which it is competent to appeal?—Yes, I do. I don't think any appeal is necessary, or ought to be allowed, except upon the interlocutor allowing a proof after the record is closed, and on the final judgment.

4514. *Dr. Barclay.*—Would you not allow it on a preliminary defence?—If the preliminary defence was such as to involve the decision of the case, I think it would be desirable.

4515. *Mr. Shand.*—Do you think it might be left to the discretion of the Sheriff-substitute to allow such appeal on a preliminary defence?—I think so; but in the other two cases the parties should have the right to appeal.

4516. There is at present an appeal before the Sheriff-substitute has decided the case on the merits, but after the proof is closed?—Yes.

4517. Do you think that might be dispensed with?—I think it might.

4518. Suppose the Sheriff, after the case had been disposed of on the merits, should think that further proof ought to have been allowed?—There would be an awkwardness there. If the evidence disallowed was such as to affect the question, the Sheriff should have power to open up the case, and allow further evidence.

4519. In that view, the process might come back to him, and he might himself finally dispose of it?—Yes.

4520. That would be better than the system of allowing an appeal in every case at the close of a proof?—Yes, that is a practice taken advantage of to cause delay.

4521. In the way you propose, appeals might be practically reduced to two in the course of a case?—Yes, in all cases of ordinary occurrence.

4522. Would you allow an appeal in the case of a decree granted for an interim payment of money?—Yes; that might be useful.

4523. *Mr. Baxter.*—Have you many prorogations of

John Gair.

proofs, or are they generally taken at one diet?—The proof for each party is generally taken in one day.

4524. The pursuer's on one day and the defender's on another?—Yes.

4525. Not both on the same day?—No, not generally.

4526. *Dr. Barclay.*—Are they taken on consecutive days?—No.

4527. Is not that pernicious?—It is not the best course. I think a proof once begun should go on till it is finished, unless it is shown to the satisfaction of the judge that delay is necessary.

4528. *The Chairman.*—You said something about the Sheriff being enabled to admit evidence after it had been excluded. I suppose you are also of opinion that if evidence had been improperly admitted, he could exclude it from his consideration when deciding the case?—Exactly so.

4529. What have you to say with reference to review?—I think it essential for the due administration of justice in the Sheriff Courts, that there should be a review within the court itself,—a review that may be conducted by the agents who have had the management of the case from its commencement, and a review that can be carried out with little expense to the parties. But I am not satisfied with the present system of review by one judge of the judgment pronounced by another, the appeal judge having only the record of the evidence before him, while the inferior judge has had the advantage of having the witnesses before him. I think that the appeal court within the Sheriff Court itself might be improved by having a second Sheriff attached to the Sheriff of the first jurisdiction for appeal purposes.

4530. *Mr. Baxter.*—You mean that the appeal should be to two minds instead of one?—Yes.

4531. *The Chairman.*—Would you allow an appeal from them to the Supreme Court?—Most certainly; in all cases above £50, at any rate.

4532. You would have them final under £50?—Yes.

4533. *Mr. Campbell.*—In cases above £50, would you make it optional to the parties to have recourse either to the appellate court or to the Supreme Court?—I should. I think that no man who has a decision against him in matters above £50 should be required to go on with the case in the inferior court, if he chooses to take it at once to the Supreme Court.

4534. *Mr. Baxter.*—Both parties?—Both parties. That is, the party having the decision against him should be entitled to appeal at once to the Supreme Court.

4535. *Mr. Gordon.*—Of course these two judges of appeal, or any other judge of appeal, would be liable to the disadvantage which you say at present exists of not having seen the witnesses?—No doubt of it. But my objection to the single judge is, that it is an appeal from one man to another; the one having had a better opportunity of forming a correct judgment on the case. With two appeal judges, there would be two minds applied to the review of the judgment.

4536. *Mr. Baxter.*—You think that would strengthen the court of appeal?—I think so.

4537. *Mr. Paterson.*—Do you contemplate the appointment of an additional Sheriff-principal, or would you call in a Sheriff from the adjoining county?—I don't think Parliament will give us any more Sheriffs-principal; and therefore my view is, that the second appeal judge should be taken from the existing Sheriffs.

4538. *Mr. Shand.*—Does it occur to you that there is any advantage in your proposed arrangement beyond that of having two minds instead of one?—I think the only other advantage is, that it would be more satisfactory to litigants, and would probably end litigation in the appeal court in many cases.

4539. That is because you think it would be a more satisfactory tribunal?—Yes.

4540. The present system of review is as cheap a one as you could devise?—Yes.

4541. Have you any suggestion to make for improving the present system, other than that which you have stated?—I don't know how the present system could be improved, except that the Sheriff, if there is to be only one, should be required to hear the parties in open court.

4542. How often would you propose that the court of two should sit in such a district as your own?—I think once in two months would be quite sufficient.

4543. And if there was an enactment to that effect in regard to the Sheriff under the existing system, that would be a desirable improvement?—Yes, decidedly.

4544. And it would secure the oral hearing which you desire to have in these cases?—Yes; and I would make provision as to the despatch of appeals, that the review Sheriffs should hear the appeals every two months—every appeal taken up to within six days of that court—and should be required to give their decision before the next appeal court.

4545. Do you contemplate a system of two judges sitting all over Scotland, or only in populous districts?—What I want is, to have a good court of review helping to educate the local bar, hearing their appeals in open court, and showing the public that they attend to their duties; and I think if the Legislature can devise the means by which two Sheriffs should join with one another in their respective jurisdictions, perhaps extending the jurisdictions somewhat, though I am not prepared to give any scheme as to that, these two Sheriffs sitting in open court, hearing appeals in presence of the local bar, would be of great assistance to the local bar, and would give confidence to the public in their judgments.

4546. Do you contemplate that two judges should sit in that way all over Scotland?—I think so, except in very remote places.

4547. Would you have these Sheriffs to go to all the towns to which the Sheriff now goes?—In our own county, unless to suit the convenience of the Sheriff, who would necessarily live in Edinburgh, and might prefer hearing cases in Falkirk, I think the county town would be sufficient.

4548. You would have them to sit in the county town of every county in Scotland?—Yes.

4549. Would it not frequently happen in some of the northern counties, that there was only a single filiation case, or the like, ready to be disposed of?—We are speaking of what would be an improvement on the present system, and there may be exceptions to all arrangements of that kind. If there were only a single affiliation case, or if there was little to be done by the Sheriff, that might be provided for by his hearing it in an adjoining county. If there were such a small amount of business as not to justify a judge in going, I don't know that he should be expected to go; but I have not worked out the scheme.

4550. *Mr. Baxter.*—You would require to have statistical information to enable you to do so?—I would require information which I have not got.

4551. *Mr. Shand.*—A difficulty has been suggested as necessarily arising in summary cases, such as questions of interim interdict, sequestrations, and questions of diligence requiring despatch: has it occurred to you how that difficulty could be obviated if there was an appeal court of two judges?—We have these cases under the present system; and the present system has this additional disadvantage, that the Sheriff of appeal may keep the case as long as he likes. My scheme would require him to settle them all within two months.

4552. Under the present system, has a party not the power within three or four days, or even twenty-four hours, to put in a petition, and bring the matter under review?—I don't see why that should not take place under the new system. Every facility given to a litigant at present for the speedy despatch of his case ought to be retained.

4553. To whom would you propose that such a petition should be sent?—I think that, to carry out the system which I have in view, it would require a clerk of the Sheriff Court settled in Edinburgh, with an office in Edinburgh, to receive all appeals, and transmit them to the proper quarter.

4554. To be disposed of by two judges resident in Edinburgh?—Yes.

4555. *Mr. Baxter.*—You contemplate that they should all be resident in Edinburgh?—I do; I think there is great advantage to the public in the appeal Sheriff not

being resident in his district. He is removed from local influences and local prejudices, and from the society among whom his decisions are to circulate; and I believe the public have more confidence in such a judge, than they would if he were long resident in the district.

4556. *Mr. Shand.*—Do you think it would be satisfactory to the public if there were no appeal within the Sheriff Court, and if all appeals must go to the Court of Session?—I don't think that would be satisfactory; on the contrary, from anything I have heard or observed, it would be highly unsatisfactory. It would be giving the resident judge the sole power of deciding finally in probably nine-tenths of the litigation before him.

4556*a*. You don't think that desirable?—No, certainly not.

4557. Supposing the expense of an appeal to the Court of Session could be reduced in ordinary cases to £10 a side, would that make any difference in your opinion?—No doubt it would make a material difference in the consideration of the question whether there should be only an appeal direct to the Court of Session from the local Sheriff; but my objection to the system of an appeal direct from the resident Sheriff to the Court of Session goes deeper. I think that litigants in the Sheriff Court ought to have a cheap and speedy review within the court itself, in the first instance, so that the agents who have had charge of the case from the first should be enabled to plead it to the end, in a first court of review, and before it reaches the Supreme Court. If the Legislature could devise a scheme by which agents practising in the country should have the right of pleading their appeal cases before the Supreme Court, that would meet a great difficulty; but we will never get that.

4558. Taking the public interest as the only guide, and supposing that the expense of an appeal to the Court of Session could be reduced to £10 a side, would you still say that it is desirable to have a cheaper appeal in the meantime?—I don't think that the public interest is different from the view I take. On the contrary, I have tried to make my view such as would meet the public view, apart altogether from the benefit it would be to the local profession, or the disadvantage to the Supreme Court. I don't think an appeal against a resident Sheriff's judgment direct from the Sheriff Court to the Supreme Court is desirable, if you can devise a good and cheap court of review by the Sheriffs.

4559. You would expect that that court of review would be cheaper than the sum I have mentioned?—Yes. At present we have the appeal for a small sum, and the hearing for not an unreasonable sum to the agents who conduct it. Under any other system, there would be fees to counsel and to new agents, which might be avoided in the court of review composed of Sheriffs, as I have suggested.

4560. *Dr. Barclay.*—Where the two appeal judges differed, I suppose the judgment of the resident Sheriff would stand?—Yes.

4561. *Mr. Webster.*—Where the two appeal judges did differ, would that not tend to dissatisfaction on the part of the losing party, and to a greater number of appeals?—No, I don't think so.

4562. *Mr. Baxter.*—At present you have only one to one, but on the other system you would have two to one?—Yes.

4563. *Mr. Paterson.*—Is the number of appeals from the Sheriff of Stirling's judgment to the Court of Session large?—It is not at all large.

4564. Can you give me any idea of the proportion of the judgments acquiesced in?—The proportion of cases taken to the Supreme Court is not 1 in 20 or 1 in 30 of those acquiesced in.

4565. Do you not accept that as evidence that the present system of appeal to one Sheriff is working well?—No, I am sorry to say I cannot. I know many a case that would have been appealed but for the enormous expense of the Court of Session.

4566. *Mr. Shand.*—Under the system you propose, there is no remedy for that?—There is this remedy in my mind, that the opinion of two judges is better than the opinion of one, and would be more readily acquiesced in.

4567. *Mr. Paterson.*—You think the Sheriff-principal's judgment would be strengthened if he had another Sheriff sitting with him and determining the case?—Just so.

4568. Is the Sheriff-principal, as matters now stand, excluded from having assistance of that character, though in a different way? He must, by statute, be a practising advocate. Is it not reasonable to suppose that, in cases of difficulty, he would consult with his brother Sheriffs in the Parliament House?—I don't approve of that system. I hear of Sheriffs who, when they cannot make up their own minds, run about asking the opinion of everybody. But I want a judge to decide the case who hears the parties, and is responsible for his decision. I don't care anything for a Parliament House opinion given to a Sheriff, privately and without responsibility, on his own statement of a case.

4569. *Mr. Campbell.*—I suppose, in your experience, the larger proportion of final interlocutors appealed are adhered to?—Yes, a great many.

4570. Do you think that where an appeal is very cheap, the mere fact of the appeal court being often resorted to, can afford any test of the satisfaction which it gives? Suppose an appeal were got for one shilling, does the fact that an unsuccessful litigant has recourse to it, give any indication as to the satisfactory nature of the judgments it pronounces?—I don't care how cheap the appeal may be. The litigant has the right to appeal if he chooses, and the cheaper the better for litigants.

4571. *Mr. Baxter.*—I suppose you have known appeals taken for delay?—Yes; and I would guard against that, by limiting the cases in which appeal should be allowed.

4572. *Mr. Campbell.*—A litigant has two reasons for appealing,—either the obtaining of another chance, or to get delay?—Yes.

4573. If he can get his appeal cheaply, the fact that he does appeal doesn't indicate that he has any particular confidence in the court of appeal?—That depends on the motive with which he is actuated in appealing. I think that if a man loses a case, and believes he is in the right, he is entitled to have his appeal heard. His confidence in the court of appeal may be little or great. Unfortunately we have judges whose judgments are not at all times satisfactory in the court of appeal; but a man is entitled to appeal whether he has confidence in the court of appeal or not.

4574. *Mr. Paterson.*—In regard to your suggested appeal court of two judges, have you considered whether there would be any benefit in causing a Sheriff-substitute to sit as a member of that court, so as to make the number of the judges three?—I think that might, in some cases, be useful; but it has its drawbacks, because if he is a man of strong feeling, and apt to take the side of the decision which he has pronounced, there is a danger of his influencing the appeal judges. All of us at times are in danger of taking a wrong view; and I am not sure that the advantage of having three sitting together, the third being the judge whose judgment is under appeal, would be so great as simply letting the two sit and deliberate by themselves. I think the danger would be, that the Sheriff-substitute might maintain his own view indiscreetly with the other judges.

4575. Assuming that he was a man of only average obstinacy, would there be any harm in giving him an opportunity of reviewing his own judgment?—I have such a feeling about that, that when I form a judgment myself, I like to stand by it afterwards. Most men have that failing; and I would rather limit the cases to those in which the two judges required the Sheriff-substitute to sit with them.

4576. *Mr. Baxter.*—You would like two unbiassed judges?—Yes; and it should be only in cases where they desire the resident Sheriff to sit with them that he should do so.

4577. *Mr. Paterson.*—Would not the circumstance

John Cair.

of the resident Sheriff sitting as one of the court of appeal obviate the difficulty of the two differing?—The difficulty is got over by holding that where the two differ, the original judgment stands.

4578. You prefer that to giving the resident Sheriff a voice in the appeal court?—Yes.

4579. *Mr. Shand.*—Do you think it would be any advantage that the appeal Sheriffs should be in daily practice at the bar?—I think that would be an advantage if it were practicable.

4580. In the scheme which you propose, do you think it is practicable?—That I do not like to give an opinion upon, till I know more as to the work which would come before the appeal judges. I think it is a great advantage to litigants that non-resident Sheriffs or Sheriffs-principal are practising advocates at the bar.

4581. *Mr. Campbell.*—Assuming that a court of two judges of appeal were constituted, would you still retain as chief magistrate of the county a non-resident Sheriff, or would you make the resident Sheriff the chief magistrate of the county?—If you deprive the non-resident Sheriff of his magisterial duties and responsibility, you change the office very materially. If you take away from him his magisterial duties, you must relieve him of the responsibility of the office to a great extent; and you create a difficulty where there are three or four resident judges within the jurisdiction. In such a case there must be one superior to the others, otherwise there would be no subordination or order preserved; but so far as my observation has gone, I have no hesitation in saying that the resident Sheriffs are well qualified for the discharge of the administrative duties pertaining to the office of Sheriff; so that if the Legislature should resolve to make such a change in the office, the duties of the principal Sheriff could be competently discharged in the counties by the resident Sheriffs. But it would change the office more than I would like to see, if the principal Sheriff were deprived of his magisterial duties.

4582. *The Chairman.*—He would then cease to be a Sheriff, and would be an appeal judge of a different character?—Exactly so. He would cease to be the Sheriff, and to be responsible as between the Crown and the public.

4583. *Mr. Campbell.*—That is not a change that you would recommend?—No.

4584. *Mr. Shand.*—Why do you deprecate a change to that extent?—Because I am much attached to the present system, and it works well on the whole.

4585. *Mr. Gordon.*—You think it has worked well?—It has worked well.

4586. And where there is more than one Sheriff-substitute, it is an advantage to have a Sheriff to whom they can appeal?—Yes, and to direct the general business of the county.

4587. *Mr. Shand.*—In what respect do you think it has worked well, so far as the administrative duties are concerned?—As regards the administrative duties, I don't know that they have been more advantageously discharged by a Sheriff resident in Edinburgh than they could have been by a well-informed resident Sheriff. I don't think his ministerial duties are so important as to require that he alone should discharge them; but what I would deprecate is the total change of the office, which must occur if you take away his magisterial duties from the Sheriff-principal.

4588. *Mr. Baxter.*—Still you think the resident Sheriff quite competent to discharge them?—Quite.

4589. *Mr. Shand.*—Have you frequently found great advantage from having recourse to the Sheriff?—I would not say frequently, but I have found it occasionally, and the knowledge that I have the privilege is a great comfort. I have found it not unfrequently a great advantage in matters of administration; and where the Sheriff takes an active share of the work in his county, no doubt it is an advantage to have a man coming from outside. We are all the better, I think, of knowing that there is a superior officer of the county who can come into it at any time he likes, with the right of inquiring into what has been or is going on.

4590. *Mr Harrison.*—Where the judgment of the resident Sheriff is confirmed by the court of review, would you propose to make that judgment final?—In all cases up to £50.

4591. Not beyond £50?—No; I think £50 is a fair limit to the right of a party to have the decision of a higher court on his claims.

4592. Don't you think that would encourage litigious people to carry their cases further?—I don't think it would. It does not do so at present. It would not encourage them, but it would not prevent them. The difficulty is to prevent them.

4593. Does it not put too much power in the hands of obstinate or wealthy people to oppress the poorer classes?—No, I don't think so. If a man has a claim in court which he thinks it right to go with to the superior court for decision, no Legislature ought to prevent that, if the amount is sufficient, according to public policy, to justify his going there. So much is that my opinion, that I hold that a man who has a claim of £50 is entitled not only to go to the Court of Session, but to the House of Lords, for a final judgment.

4594. Does that not make it almost a necessity that a poor man should give in at the very first, seeing that he may gain the case before the resident Sheriff and before the Sheriff of appeal, and then be glad to abandon it rather than go further?—No. If your principle were right, there would be no litigation between rich and poor men. The present system has not so worked; it has not prevented cases between rich and poor going even to the House of Lords.

4595. *Mr. Gordon.*—Is it your experience that there is more oppression on the part of the poor against the rich, than on the part of the rich against the poor?—I think the poor are far more unreasonable in their views.

4596. And they have less to lose?—Yes; and I never knew a poor man who had a good pecuniary case to try who did not get agents to conduct it.

4597. *Mr. Paterson.*—Have not wealthy men conceded claims of people in an inferior position rather than go into court with them?—Yes; I have known many cases of that sort. If it is a case not involving character, but merely money, it is often settled out of court.

4598. *Mr. Gordon.*—The sacrifice is rather made by the rich man than by the poor man?—That is my experience.

4599. *Dr. Barclay.*—You would not require caution in appealing cases above £50?—No.

4600. Do you not think that would be a check?—I think it is rather an unreasonable check.

4601. Would you ever allow an appeal where the resident Sheriff and the two appeal Sheriffs were unanimous?—I think so.

4602. *Mr. Shand.*—Without caution?—Perhaps in such a case caution might obviate any objection,—caution to a reasonable amount.

4603. Caution for future expenses?—Yes. Perhaps that would remedy it. I don't see any objection to that.

4604. *Mr. Baxter.*—Or any hardship?—No.

4605. *Dr. Barclay.*—There would be a *prima facie* case against the appellant there?—Yes; and if he has such a sense of the injustice of the decision as to warrant him appealing against the decision of three judges, no doubt he would have the means of finding security for expenses. I think that would be a very wholesome provision.

4606. *The Chairman.*—Have you anything to suggest as to costs?—The costs allowed under the Sheriff Court Act are very fair and reasonable, I think. I don't think the litigants themselves can find fault with the amount, and I am not aware that any of my brethren have complained of their being too low, except in Commissary Court proceedings, and there they are decidedly too low. I think in Commissary Court proceedings, where inventories are of large amount, the fees to the practitioners should be increased.

4607. *Mr. Shand.*—Does that apply to cases of both testate and intestate succession?—Yes.

4608. There is a distinction, is there not?—Not in regard to the fees. There is a distinction as to the stamps.

4609. The fees in your county are the same?—They are the same all over Scotland, except in Edinburgh, where Writers to the Signet have higher fees.

4610. *Dr. Barclay.*—There is very little litigation in the Commissary Court?—Very little.

4611. *Mr. Baxter.*—What is your opinion of the Debts Recovery Act?—I have had little experience of it; but the feeling among procurators in our district is that the fees are not nearly sufficient for the work. The consequence is, that unless one has plenty of these cases in his hands, he rather declines to take charge of them.

4612. *The Chairman.*—Do you think the principle on which the fees are regulated is a sound principle?—No; I like the principle better which pays a man according to his work, for the time and labour he bestows on it. In the Debts Recovery Act there is an unwise provision that no fees are allowed to the agent for managing the appeal after the case goes to the Sheriff. The consequence is, that an agent may discourage appeals even in cases where there is a reasonable prospect of success.

4613. *Mr. Baxter.*—There is an inducement to do that?—Yes. I don't say it is done.

4614. *The Chairman.*—Have you anything to say as to the privilege of agents?—I think that all agents throughout Scotland should be admitted under the same rules, and have the same rights and privileges.

4615. Both in the local courts and in the Supreme Court?—Yes.

4616. *Mr. Baxter.*—You are aware that all procurators are now admitted in the same way?—In the inferior court; but we are restricted in our right of practice throughout Scotland.

4617. Should that limitation continue?—No; I think it would be better that it should not.

4618. When a person is admitted to practise in a local court, do you think he should have a right to practise in all local courts?—Yes. Of course there are privileges pertaining to certain faculties, which will not go as a matter of course to a person passing as procurator. If he wants the privileges of the faculty, he must be admitted to it.

4619. But he should not be excluded from practising in Glasgow, or anywhere else?—No.

4620. *Mr. Shand.*—Do you think any benefit to the public would result from a change of that kind?—I think so. A client has his general agent in one jurisdiction, meets him in consultation in his affairs every time he requires to consult an agent, and the agent knows all about the case. The present practice in the Sheriff Courts is for the local agent to send instructions to his correspondent in another town; but I think that the general advising agent of the client should be at liberty himself to plead the case in that other jurisdiction.

4621. *Dr. Barclay.*—The present system leads to double agency?—Yes. There is an understanding among procurators in the country by which the fees are divided; but the better plan would be to give the option to an agent in one jurisdiction to plead in another, if his client wished him to do so.

4622. *The Chairman.*—That would very often result in such an arrangement as you have spoken of—viz. a division of the fees?—Yes, except in special cases.

4623. Do you think that what you propose would lead to a similar result in regard to cases in the Supreme Court?—I think it would, and I think that would be an advantage to the public. There would then be no reason for charging the client more than one agent's fees. At present a client who is anxious to have the services of a country agent must pay for two agents. The country agent must be paid for his work which cannot be charged against the opposite party, and the Edinburgh agent has to be paid in addition.

4624. It has been said that, under the present system, business does not reach the Court of Session which otherwise would have done so. Do you concur in that opinion?—I do.

4625. Do you think that has been the case to any large extent?—I think it has.

4626. *Mr. Baxter.*—What do you think has been the case?—That the country agent advises his client not to send cases to Edinburgh, in consequence of the undue expense caused by double agency.

4627. And the country agent feels that he is liable for the Edinburgh agent's account?—I don't know that that has much influence. I don't know any case where an Edinburgh agent has made an unreasonable demand on his country correspondent. On the contrary, everything I have seen of the feeling of Edinburgh agents is quite the opposite, and that if you cannot recover from your client, they don't hold you liable.

4628. *Dr. Barclay.*—Is it not often made matter of agreement that the country agent is not to be held personally liable?—There are many cases in which no stipulation can well be made with a respectable agent in Edinburgh. You want to have a good agent, and you cannot stipulate that with him; but at the close of the case, if there has been much expense, he says if you don't recover from the client, he will not hold you liable.

4629. *The Chairman.*—At present the town agent has to correspond with the country agent to obtain information, to examine witnesses for him, and as to other matters of that kind. Do you say that if the case is gained, that expense is not allowed?—The country agent is not allowed for the work he does.

4630. The town agent is allowed for all the work he does?—Yes.

4631. The client has to pay the country agent?—The hardship is on the client.

4632. In what way would you relieve the client of that expense?—I think that if we had a system sanctioned of agents in the country and agents in the town sharing the fees in the case, there would only be one fee legitimately chargeable against the client by both agents as it were. At present the client wishes the services of a country agent; but the country agent is not allowed anything in Edinburgh when the account is taxed. The Edinburgh agent is allowed all the fees, and he retains all the fees.

4633. Would you reduce the profits of the Edinburgh agent?—As the system is worked in England, I believe it is this, that the London agent gets a proportion of the fees earned by the country agent, and the country agent gets a proportion of the fees earned by the London agent.

4634. The client pays for both?—The client pays only one fee, but that includes both.

4635. Both accounts are paid out of the client's pocket?—Yes; but where a litigant gains, they form costs in the cause against the opposite party.

4636. That does not cheapen litigation?—No.

4637. And it does not improve the condition of a party who has lost his cause?—No.

4638. It makes him worse?—No; but it makes a fairer division between the agents who have done the work.

4639. It makes a party who has lost his cause worse to this extent, that at present the country agent's account on the other side cannot be charged against him; but if your system was adopted, it would all go into the Edinburgh agent's account, and the whole would be charged against the losing party?—And so I think it ought to be.

4640. That is no advantage to that party?—It is no advantage to the losing party.

4641. And calling it double agency is merely giving it another name?—Yes.

4642. *Mr. Webster.*—Is there not double agency to this extent, that the Edinburgh agent writes to the country agent, and the country agent writes to the client, stating what has been done, or what is wanted?—Yes.

4643. On the other hand, where the country agent prepares a paper which goes to counsel, or precognosces witnesses, or furnishes their precognitions, the Edinburgh agent does not do that work over again; he sends the precognitions or memorial to counsel, and that is charged for, and is allowed, whether it be

John Gair.

stated in the country agent's account or in the Edinburgh agent's account?—I believe it is by the present Auditor.

4644. The work actually done in the case, so far as not arising from double agency, is allowed against the losing party?—Yes. I have understood that it was necessary that the account should be charged as if the work had been done by the Edinburgh agent.

4645. *Mr. Baxter.*—I suppose most clients are not able to conduct their own causes?—No.

4646. *Mr. Shand.*—The change you propose would not in any way lead to increased expense by the allowance in future of charges which have not been allowed hitherto by the Auditor?—No; not against the opposite party; but the fees might be more equitably divided.

4647. So far as the country agent had trouble, he would share his profits with his correspondent in the metropolis, and the correspondent in the metropolis would in like manner share his profits with the country agent?—Yes.

4648. *Mr. Webster.*—Would that be so fair as the present system, where each gets the full fees for the work that he does?—I think it would lead to an agent in the country being more willing to advise his client to take a case to the Court of Session. There are many charges which the Auditor will not allow, but which it is necessary for a person anxious about his case to incur. He sends his country agent to town to advise with counsel and with the town agent, and that cannot be charged against the opposite party; but it is an expense that the client is willing to bear. Such an arrangement as I have suggested would enable the fees earned in the case by two agents working together to be fairly divided.

4649. *Mr. Shand.*—You think the remuneration of the agents in the metropolis would in that way be diminished, but that there would be a much larger number of cases brought to Edinburgh than there are?—Yes, I think it would lead to that.

4650. *Mr. Gordon.*—Might there not be power given to the Auditor to allow the expense of a country agent coming to Edinburgh in a special case, where he thought the presence of the country agent was really necessary?—I think so.

4651. *Mr. Baxter.*—Does the Auditor allow correspondence with the country agent?—No.

4652. He thinks the client should write himself?—Yes.

4653. Is he capable of doing so?—In many cases he is not. If he were, he need have no country agent.

4654. *Mr. Harrison.*—Do you think permission to make such an arrangement would be beneficial to clients?—I think so.

4655. *The Chairman.*—Have you anything else to state?—I think it may be worth while to direct the attention of this Commission to the practical advantages of a public prosecutor, as shown by the comparative results of criminal prosecutions in England and Scotland. Taking the criminal returns for the year 1867, there were in England 18,032 criminals tried, which trials, in no fewer than 3802 cases, resulted in acquittal. In Scotland 2811 were tried, and of these 277 were acquitted. It would thus appear that about 21 per cent. of the trials in England resulted in acquittal, and about 9 per cent. in Scotland; and assuming this year's return to be a fair average of the result of prosecutions in England, either the machinery of the law in nearly 4000 cases a year fails to convict when conviction ought to have been obtained, or this vast number of innocent persons are annually put to trial without sufficient cause, through the want of a public prosecutor to direct and control the proceedings.

4656. You are aware that in Scotland, if the public prosecutor does not choose to prosecute, a private party may do so?—Yes.

4657. Have any cases come under your cognizance in which private parties availed themselves of that power after the public prosecutor had declined to prosecute?—No; I have not had a single instance of that in my experience, and I don't recollect a single instance of it for twenty-five years anywhere. I have often had to tell complainers that if they were not satisfied it was open to themselves to prosecute, but I know no instance of their having done so.

4658. In cases where theft has been committed, or assault, and parties have suffered in the one case in their purses, and in the other in their persons, do you think it would be a hardship to compel these parties to become the prosecutors?—I think it would.

4659. Do you think the Commissary Court ought to have a separate staff from the Sheriff Court?—I don't think the public advantage requires it. At the same time, although I have no personal interest in the matter, I think it necessary to make this explanation, that there are now very few offices in the country which can be given to procurators, and I state it quite openly that in the interest of the procurators there is some advantage in having public offices into which deserving parties may be put.

4660. With a view to the status of the parties?—Yes; and I don't know that the public would save anything in fees by having the Commissary Court transferred to the Sheriff Court.

4661. *Mr. Shand.*—Is not the office of Commissary-clerk frequently held by the Sheriff-clerk?—It is quite an independent office. The deputes often hold the offices of Sheriff-clerk depute and Commissary-clerk depute; but, as a rule, the principals are separate. It is one of those offices often given for a man's services to his political party.

4662. *The Chairman.*—Have you anything to say as to Deans of Guild?—Deans of Guild have police duties to perform as well as their ordinary duties. I see no harm in making the Sheriff's jurisdiction co-ordinate with that of the Dean of Guild, except in certain police matters.

4663. *Dr. Barclay.*—You have no Dean of Guild in Falkirk?—No.

4664. And there is none in Stirling?—No; the Sheriff does the duty.

4665. *Mr. Shand.*—I suppose you would not propose that that should be done in large cities?—No.

4666. You would treat them quite exceptionally?—I think so.

4667. *The Chairman.*—Are there any burghs of barony or regality in your county?—They have all gone into disuse in our county, and they ought to be abolished.

4668. *Dr. Barclay.*—Is there not Kilsyth?—Yes, I had forgotten Kilsyth. The last I recollected of was Denny.

4669. *The Chairman.*—There are burgh courts held for civil purposes?—Yes; that also is going out, and I think might with public advantage be done away with. There are very few burghs where the power of trying civil causes is exercised by the Burgh Courts; and I think it is not for the advantage of the public that it should be continued.

4670. You never knew them trying cases with a jury?—No.

4671. Either civil or criminal cases?—No.

4672. What as to Justice of Peace Courts?—I think it important that there should be Justices of the Peace acting in many capacities throughout the county. I think it does a country gentleman, who sits as a Justice of the Peace, a great deal of good to meet people and hear their views in open court, and to express his own views; and therefore I think, except in matters of civil right, and perhaps in game cases, the Justice of Peace Courts ought to be continued as they are.

4673. *Dr. Barclay.*—Would you abolish their jurisdiction as to cases of debt up to £5?—No.

4674. You mean you would abolish it in cases of masters and servants, and of illegitimacy?—Yes; I think that might be taken away. But I think it is useful to the public to have such a jurisdiction as the Justice of Peace small debt jurisdiction. I think it is also useful that the magistrates of a county should have the regulation of the licences. The feeling about game prosecutions is rather against their being continued in the hands of the Justices; and I know many of them would be willing to be relieved of these cases. At

present it is not competent to try day poaching before the Sheriff.

4675. *Mr. Shand.*—I believe a great many county gentlemen have expressed a desire to be relieved of cases under the game laws?—Yes.

John Gair.

4676. *Dr. Barclay.*—Is there a Fiscal for the Justices at Falkirk?—Yes.

4677. There is no collision with him?—No.

4678. Do the Justices try criminals, except under their statutory jurisdiction?—No, not in our county.

THURSDAY, 31st DECEMBER 1868.

Members Present:—

Lord Colonsay.	George Harrison, Esq.
E. S. Gordon, Esq., Q.C.	James Adam, Esq.
A. R. Clark, Esq.	A. B. Shand, Esq.
Dr. Barclay.	James Webster, Esq.
James Campbell, Esq.	J. B. Baxter, Esq.

The Right Hon. LORD COLONSAY in the Chair.

William M'Clure, Esq., examined.

William M'Clure.

4679. *The Chairman.*—You are a practitioner in the Sheriff Court of Renfrewshire at Greenock?—Yes.

4680. There are two seats of the Sheriff Court in Renfrewshire, one at Greenock and one at Paisley?—Yes.

4681. There are two wards in the county?—Yes.

4682. How long have you been a practitioner?—I passed as procurator in the year 1837.

4683. In Renfrewshire?—In Greenock.

4684. Do you hold any official appointments?—None.

4685. Have you any suggestions to offer to the Commission as to the constitution of the Sheriff Court, as consisting of a Sheriff and his substitutes?—The principal thing that I have to suggest is with regard to the court of appeal, and as to taking evidence in disputed questions of fact.

4686. What is your suggestion as to the court of appeal?—I think it ought to consist of two Sheriffs, and that the appeal should be heard orally before these two Sheriffs.

4687. How often should these courts of appeal for oral hearing be held?—As often as possible; but it would depend very much upon the business. I don't think they should be less than once a month, at any rate.

4688. Do you think they ought to sit at Greenock, or at Paisley?—I think they ought to sit at the seat of each court.

4689. Would you apply that to all the places in Scotland where there are substitutes and a Sheriff Court?—I think so.

4690. Such as Hamilton and Lanark?—Yes.

4691. Have you formed any opinion as to the class of cases that should be appealed to these Sheriffs?—I think all cases above the value of £50. I think the Debts Recovery Act should be extended, so as to embrace all classes of cases under £50.

4692. If it is so extended, you think there should be no appeal from the judgment of the Sheriff-substitute to the appeal Sheriffs?—Not where there is no principle involved, and if it is merely a question of amount.

4693. Do you think that any alteration should be made upon the mode of taking evidence, or upon the necessity of taking evidence in cases under £50?—Unless there is a principle involved, I think the Sheriff should just take notes himself for his own satisfaction, in the same way as he does in the Small Debt Court; but if there is a principle involved, he should take these notes at greater length, so that they might be brought under the notice of the court of review.

4694. Would you have any interposition of the parties as to his taking or not taking notes, or would you leave that entirely to himself?—I think evidence, when taken, should always be dictated so that the parties should hear what the evidence is.

4695. But should the parties have a right to require notes to be taken, or would you leave it to the discretion of the Sheriff whether he should take notes or not?—I think if any of the parties is of opinion that a material point has been overlooked, or should be noted, the judge should take it down.

4696. But at the commencement, do you think it should be left to the discretion of the judge, or do you think that the parties should fix whether or not notes of the evidence are to be taken?—As I have said already, I think notes should not be taken unless there is a principle involved. If there is a principle involved, I think notes should be taken if either of the parties ask it.

4697. How are you to determine whether there is a principle involved?—I suppose the thing would be self-apparent; I mean if it involved a principle that was to regulate other cases, and was not merely to settle that particular case.

4698. You mean that it should be done in a representative cause?—Yes, something of that kind.

4699. *Mr. Harrison.*—Would you make the Sheriff-substitute the sole judge as to whether it was a representative cause?—I think he might almost be allowed to be the judge of that. I don't think he would go far astray upon that point.

4700. *The Chairman.*—Whether it is a representative cause or not is very much a question of fact?—To some extent; but I think it would be better, if it is a representative cause, to have that fixed before the proof begins.

4701. If either party says it is a representative cause, and states why, you think the Sheriff should decide whether it is a representative cause or not?—Yes; and that point might be appealed.

4702. But suppose he was of opinion that it was not a representative cause, what as to taking notes?—I think in that case the appeal should be heard first and determined, and let it come back to him.

4703. You think the cause should be delayed until that point was determined on appeal?—Yes.

4704. *Mr. Baxter.*—I suppose you don't think that there would be a necessity for that in many cases?—I don't think it.

4705. *The Chairman.*—You would not give either party a right to require at the outset, as matter of right, that the Sheriff should take notes?—I don't think that would be necessary.

4706. Is there any right of that kind in the Debts Recovery Act?—The parties have a right to ask the Sheriff to take notes.

4707. You don't think that necessary?—I don't think it, except in the cases I have mentioned.

4708. If it should turn out, in the course of a cause,

William M'Clure.

that an important question of law was emerging, what course would be followed?—Supposing it were brought out by the facts on the proof, I think an appeal should lie, provided either of the parties ask it.

4709. Whenever the point of law arises?—If it is an important point.

4710. You think that the decision of the Sheriff should be appealable upon the matter of law?—Yes.

4711. Upon his statement of what the facts were?—Yes. If he once begins to take down the facts, it should be on his statement, with this addition, that if any of the parties ask him to take notes on a particular point, he should do so.

4712. You would confine the notes to that point?—He would take his own notes; but any additional notes would be confined to that point.

4713. You think that the Debts Recovery Act ought to be extended to all classes of debts?—I think so.

4714. And what you have now stated as your view of the course of procedure, would apply when it is so extended?—Yes.

4715. The appeal would lie to two Sheriffs?—Yes.

4716. They would sit once a month at the seat of the Sheriff Court?—Yes; not less than once a month.

4717. Would you have any appeal from their judgment to the Supreme Court?—I think not under £50.

4718. Under £50 the judgment should be final?—Yes.

4719. Would you extend these rapid forms of procedure to cases above £50?—Not the Debts Recovery Act procedure.

4720. In ordinary cases, would you retain the present form of procedure in the ordinary court?—No. I think the way in which proofs are taken is very unsatisfactory. I have thought a good deal about that, and I have had great difficulty in making up my mind about it. It is not satisfactory to have the judge taking notes himself without reading them over; and I think it is also unsatisfactory to have them taken by a shorthand writer, because what is taken down is not heard, so that corrections could be made. The idea that I have formed, as the best plan possible, is to have the two Sheriffs sitting to try these cases along with the Sheriff-substitute.

4721. I am talking of the original court of the Sheriff-substitute?—Well, I am speaking of that in cases where proofs are to be taken on disputed matters of fact.

4722. You think these ought not to proceed before the Sheriff-substitute?—I think it would be much better that they should proceed in presence of the three judges, that they should hear the evidence taken, and take notes each for his own satisfaction; and immediately upon the evidence being closed, that they should come to a conclusion in findings upon fact, and that their judgment upon that should be final.

4723. *Mr. Baxter.*—You mean them to sit as a jury?—Yes.

4724. *The Chairman.*—Upon all questions of disputed fact above £50?—Yes.

4725. *Dr. Barclay.*—Then the resident Sheriff would not take any proof in cases above £50?—He would sit with the other judges.

4726. But never by himself?—Never by himself. It should just be a trial in point of fact, and the judgment in point of law would be reviewable.

4727. *The Chairman.*—You think their findings in point of fact should be conclusive?—Yes.

4728. *Mr. Webster.*—Similar to the Court of Session findings, where there has been proof in the Sheriff Court?—Yes.

4729. *Dr. Barclay.*—Have you thought how much time that would take?—They would be gone over very rapidly.

4730. Perhaps too rapidly?—I don't think so.

4731. *The Chairman.*—Have you any idea of the number of proofs that are taken by the Sheriff-substitute at Greenock?—I have not made an estimate of them, but my own impression is that they would not be very numerous. I don't think he takes above three in a week in Greenock; but of course I am merely guessing.

4732. Do you know what time these proofs occupy the Sheriff-substitute?—They do occupy his time a good deal at present; but he takes notes not for his own satisfaction merely. He takes them much more lengthily than would be done if the judges sat in the way I am suggesting. They would only take notes of the most important points, for their own satisfaction—short notes.

4733. *Mr. Baxter.*—The Sheriff-substitute takes down all the evidence just now as a record for review?—Yes.

4734. *The Chairman.*—Have you thought how the system you have suggested would work in such a place as Glasgow, where there would be a great many proofs?—Glasgow is quite an exceptional case, and it would perhaps require to have a greater staff of judges, or they would require to sit more constantly; in fact, they would almost require to sit permanently.

4735. What qualification would you require for these judges of appeal?—A qualification similar to the principal Sheriff at present.

4736. You mean that they should be members of the bar, of a certain number of years' standing?—I don't think they should ever be under ten years' standing; and I think also they should be in good practice before they are appointed.

4737. Should they abandon practice when they are appointed?—They should at least abandon all practice both directly and indirectly connected with the places where they sit as a court of review.

4738. Do you think they should retire from the bar?—It would be as well.

4739. Those that you say would require to be permanently resident in Glasgow must of course retire from the bar?—Yes.

4740. How many places do you think that two of these Sheriffs ought to visit?—That would depend on the amount of business to occupy their time, if they were retiring altogether from the bar.

4741. How many of such lawyers do you think should be appointed Sheriffs in appeal?—That would depend on the amount of business to come before them. You would require to have as many as could easily transact the whole business.

4742. You have formed an opinion upon that subject, have you?—No; I have not formed an opinion upon that.

4743. Have you considered what kind of remuneration these gentlemen should get?—I don't think they should have less than £1500 a year each, and perhaps £2000. Indeed I don't think that either a Sheriff or a Sheriff-substitute should have less than £1500 a year in any populous place, where they require to keep up a position.

4744. Would you have these gentlemen to travel through more counties than one?—Yes.

4745. How many counties?—That would depend on the amount of business.

4746. *Mr. Baxter.*—You contemplate them holding circuits?—Yes.

4747. *The Chairman.*—Would you extend the jurisdiction of the Sheriff Court in any respect?—Yes; I think it should be extended to causes generally; but there is one thing in particular which I think has been a great grievance in our maritime ports, I mean the proviso which was added to a clause in the 1st and 2d Vict. cap. 119; I think that proviso should be cancelled. By that Act the Sheriffs were held to have all the powers of the Court of Admiralty; but the proviso is, that they are only to have that in the event of the parties being amenable to the Sheriff's jurisdiction on some legal ground. We find in practice that that proviso is productive of great mischief. I suppose the intention of it was to have cases of that class brought to the Court of Session; but in our practice we find that the cases emerge on a sudden, and unless a sudden remedy is provided, they do not go forward at all, and the remedy is lost.

4748. *Mr. Shand.*—The parties escape from the jurisdiction even of the Court of Session?—They are ready to go to sea, and there is no time to apply to the Court of Session to have a case prepared and the vessel stopped.

4749. *Mr. Webster.*—That proviso led to a serious litigation in the Court of Session?—Yes. In point of fact it does not bring business to the Court of Session, and yet it is a great mischief to people who are to recover debts from persons who are on the eve of escaping from the kingdom altogether.

4750. *Dr. Barclay.*—Of course you would still have the party within the jurisdiction of the Sheriff?—No. He may be a foreigner and off altogether.

4751. *The Chairman.*—But would you have the Sheriff to exercise his jurisdiction beyond the range of his own territory?—Within his own territory, if the subject is there. Suppose a ship there, and suppose furnishings have been made to it by a party in Glasgow, an order comes from Glasgow at the last moment to get the master to pay his account, which he has gone off without paying. The party in Glasgow has been expecting payment of his account till the last moment, but the vessel goes off, towed by a steamer to the Tail of the Bank, and she is ready to put off to sea. There is no time to communicate with Edinburgh to get a case prepared, or to get an arrestment. You might arrest to found jurisdiction, but the foreigner would care nothing for that.

4752. Unless you could arrest the vessel?—Unless you could arrest the vessel, and take her into port, and dismantle her.

4753. *Dr. Barclay.*—Can you not do that to found jurisdiction?—No.

4754. *The Chairman.*—Have you any other suggestion to make?—I think that where owners of ships live in different jurisdictions, they should be amenable to one Sheriff Court,—that in which the case first originated. The whole of the owners should be capable of being convened in one Sheriff Court, if one of them is resident in the jurisdiction.

4755. *Mr. Baxter.*—Would you apply that to other cases of contract, where there are several defenders?—Yes. I would apply that rule generally.

4756. You would not confine it to maritime cases?—No.

4757. *Mr. Webster.*—Would you give the pursuer the choice of the Sheriffdom in which to bring his action?—I don't see that there would be any alternative.

4758. *The Chairman.*—Would you suggest any further extension of the Sheriff's jurisdiction, either as to territory or subject?—I think there ought to be an extension in the case of heritable rights.

4759. Would you put any limit to that?—I don't see that there should be a limit. I think if the Sheriff is capable of judging in cases of £100,000 in moveables, it is not a bit more important to try a question of heritable right. The value is the same.

4760. *Mr. Clark.*—Does it occur to you that there should be any limitation of the jurisdiction of the Sheriff?—I don't think it. I think his jurisdiction should be universal.

4761. As absolute as the Court of Session's?—Yes.

5762. *Mr. Baxter.*—Under the power of appeal?—Yes. I have stated that.

4763. *The Chairman.*—Would you extend the Sheriff's jurisdiction to all questions of status, including declarators of marriage?—Yes, I think so. These just involve a question of proof in my view, though of course they are very important in their consequences.

4764. *Mr. Baxter.*—Have you known bad effects to arise from persons not being able to prosecute actions of divorce?—I have known many cases of that sort. It has led both to immorality and violence.

4765. *Mr. Clark.*—Do you think there is the same advantage in an appeal that there is in having the case begun and ended in the Court of Session?—I think so.

4766. Is there nothing important to the cause in the manner in which the record is prepared, and the evidence taken?—I should suppose so; but I don't think there should be any difficulty in preparing the record in the country.

4767. And in taking the evidence?—And in taking the evidence.

4768. Do you propose that the defender shall have power to remove his case from the Sheriff Court for progress, or must he submit to the judgment of the Sheriff Court in the first instance?—I think he should submit to it in the first instance.

4769. So that if the pursuer brings an action, and chooses the Sheriff Court as the tribunal, the defender must submit to that judgment without any other redress than what is to be found by way of appeal?—Yes.

4770. *Mr. Webster.*—And that only on points of law?—Yes.

4771. *Mr. Baxter.*—Do you think that in regard to very large estates, the actions would be brought originally in the Court of Session?—That is what I would do myself.

4772. *Mr. Clark.*—Then what is the use of giving the Sheriff jurisdiction?—Because in a great many cases they would be tried there, and they would be tried cheaply. At present, if a question arises regarding a house of very trifling value, it must go to the Court of Session, the expense of which would utterly ruin many people. In that way very many persons cannot afford to get their rights vindicated, because of the expense.

4773. If you only want to try the smaller class of cases in the Sheriff Court, why make the jurisdiction of the Sheriff absolute?—My opinion is that the judges would be taken from the same class who would judge in the Court of Session, and the only thing to contend with would be the local bar. I think the local bar is quite getting up now to the mark of being able to take charge of any case in the first instance.

4774. *Mr. Baxter.*—Are you not in the habit of preparing deeds and conveyances of large properties?—We do that in the country to a large amount; and if we are able to prepare the titles to the rights that are in dispute, why should we not be capable of giving advice to the Sheriff upon these very points? Are we incapable of conducting a cause, or shaping a record to try a question of right, if we are capable of preparing these rights themselves? It seems to me quite anomalous.

4775. *Mr. Webster.*—Take such a case as recently occurred about the Breadalbane estates. Suppose the whole of these to have been in one Sheriffdom, and that either of the parties had originated the cause there, the whole succession would have depended upon the opinion of the court of appeal taking evidence on the matter of fact—viz. legitimacy or not?—Yes.

4776. And there would have been no power such as now exists, of appeal from the Court of Session to the House of Lords, to review that matter?—Not upon fact.

4777. There it was simply a question of fact,—legitimacy or not, and the decision of the Court of Session upon the evidence was open to appeal to the House of Lords, and was reviewed there. You would abolish that power of review if the case originated in the Sheriff Court?—The power of review would be abolished so far as fact is concerned.

4778. I am assuming that in that case there was nothing but the simple fact of legitimacy?—If I don't mistake, there were questions involved there as to the evidence which should be led, and as to what was evidence.

4779. Would you allow an appeal from the Court of Sheriffs to another court upon all matters affecting the quality or competency of evidence?—I think these are pure questions of law.

4780. How could they be raised?—By taking a note of them.

4781. I understood that you were to have no notes taken?—The Sheriffs would take a note if they were refusing evidence, or admitting evidence which was considered incompetent.

4782. Then you would allow exceptions about evidence?—Yes; but not on the judgment formed on the evidence itself when taken.

4783. *Mr. Clark.*—How would the court of appeal dispose of the exception if they had no notion of what the evidence was that was being taken?—That would be pointed out by a statement on the record as to the line of evidence. It would be a pure question of competency.

William M'Clure.

4784. *Dr. Barclay.*—You would raise that by a bill of exceptions, as is done in the jury court?—Quite so.

4785. Would you have no motion for a new trial in such a case as has been referred to?—I have not the slightest doubt that such a case would be originated in the Court of Session.

4786. *Mr. Shand.*—But you would leave it to the pursuer to determine that?—Yes.

4787. *Mr. Clark.*—And if a pursuer thought he had a *quisquis* case, he might select a *quisquis* tribunal?—I don't assume that it would be a *quisquis* tribunal.

4788. *Mr. Shand.*—Do not these considerations, and the fact that entail cases and cases involving large heritable questions of great nicety might be raised, lead you to modify your opinion, and to think that it would be desirable to leave the defender the power, which he at present has, to advocate a cause before the proof is taken?—Well there might be such a power left in the very large class of cases.

4789. In cases of large value?—Yes.

4790. *Mr. Clark.*—In a small class of cases, but of large amount?—Yes.

4791. *The Chairman.*—In cases affecting heritable right where the party was claiming in various counties or districts, would you apply the rule you have laid down as to defenders in different counties?—Unless the estate was very large, I don't think the rule should be altered; but if it was a large estate, involving a stake of some consequence in different counties, I think it would be proper to bring it in the Court of Session.

4792. *Mr. Webster.*—Only if it were in different counties?—Yes.

4793. Would your views as to the qualifications of procurators before the Sheriff to prepare records and plead cases lead you to make any change in the Supreme Court, or would you still maintain the distinction of counsel and agent?—I think there should still be counsel and agent; but I think that all agents should have the power of practising over the whole country.

4794. *Mr. Shand.*—As agents?—Yes; or if they had a case which originated with themselves, I don't see why they should not plead it. I don't think we should be peripatetic at all; I think we should stick to our own court.

4795. *Mr. Webster.*—Would you carry your view this length, that the agent who has conducted the case in the inferior court should have the right not only to 'agent' but to plead the case in a higher court?—If it was in a small case, and if there was any appeal; but I have cut that off in regard to matters of fact. Perhaps it would be as well that counsel should have the exclusive privilege of conducting these cases; but the agent should go to the Court of Session and be his own agent.

4796. *The Chairman.*—Do you think counsel should be permitted to practise in the court of appeal that you have suggested?—Certainly. I think counsel should be entitled to practise everywhere, as they do just now.

4797. In any court?—In any court.

4798. *Mr. Adam.*—Would you allow the expenses of counsel as against the opposite party in that court of appeal?—I think counsel's expenses should be allowed.

4799. *Dr. Barclay.*—Supposing one side took counsel, but the other did not, would you allow it without the consent of the judge?—I think the consent of the judge should be given.

4800. *The Chairman.*—Do you mean consent to the counsel to plead, or consent to charging for counsel in the account against the opposite party?—To charging it in the account. The Sheriff should judge of the necessity of bringing counsel from Edinburgh in such a case.

4801. *Mr. Shand.*—Is it your experience that the great expense in causes appealed to the Court of Session now arises upon questions of fact, rendering printing necessary, and long discussions on the import of the proof?—The printing is certainly a very considerable item in the expense.

4802. And the fact of having the proof printed leads to long discussions, and adds to the expense of the appeal?—Yes; sometimes.

4803. Is that the consideration which has induced you to look for a remedy whereby a final conclusion upon matters of fact should be reached in the court below?—My principal reason is this, that you take the evidence in the county at the doors of the witnesses and the agents, and you don't require to bring witnesses to Edinburgh and keep them in a hotel for a length of time till their evidence is taken.

4804. That is a reason for taking it in the country; but what is your reason for desiring that it should be final there?—Because I think it would be perhaps better than a jury of experts, and certainly greatly better than a jury as presently constituted; and I think it would also be better than a single judge sitting and trying a case in place of a jury.

4805. You think it may be taken less expensively in that way; because time would be saved in taking the notes, and it would be more summarily done?—Yes.

4806. And if it were final, it would save the expense which occurs in review, both in the printing and in the argument on the proof?—Yes.

4807. But you would still propose to leave a review on matters of law?—Yes.

4808. How would the Court of Session reach the questions of law coming up from that court of three, in the absence of evidence?—The questions of law would arise in the record; and any other question of law that might arise would be as to the competency of evidence.

4809. May not questions of law frequently arise with special reference to the evidence as it comes out? Suppose the record to be a short and somewhat meagre statement, do you not find that questions of law arise out of the evidence?—But you have specific findings of fact by the judges, which show all that could arise in point of law.

4810. Then do you contemplate that it should be the duty of the appeal judges, in the interlocutor containing the findings in fact, to raise the law for consideration of the court above?—They would have to make specific findings of fact as proved, and these would necessarily disclose any plea that could be raised on them.

4811. And they would be followed by findings in law?—Yes.

4812. Would not that be a very expensive tribunal in rural districts, where cases are comparatively few, and which are at a distance from the great centres of this country?—I don't think it, because the judges would sit a very short time in questions of that sort.

4813. *Dr. Barclay.*—If the three Sheriffs should differ in opinion, two to one, would you still make their findings on the facts final?—I would.

4814. Suppose that witnesses are absent from sickness or contumacy, and are brought up at a future diet, do you not see some difficulty in the judges being able to grasp the evidence, having no notes?—I have said that each is to take notes for his own satisfaction—short notes of the important points; and I don't see any difficulty about that; because, if either party was not prepared to go on with his case, because of some important witness being absent, he would move an adjournment, and there would perhaps be other cases to dispose of, which might enable them to take that one up at a later period of the same sitting.

4815. You have stated that at present the evidence is not read by the resident Sheriff: is it not always read at the end of the witness's examination?—Yes.

4816. You desire that it should be read as it goes along?—Yes; because, not hearing the evidence taken as the witness gives it, some very important point may escape your notice altogether; whereas, if you are hearing it as it goes on, the point is before your mind at the time.

4817. Don't you hear it from the witness's lips?—Yes; but you don't know what is taken down.

4818. Have you ever found, when it was read over, that you had cause to complain of the resident Sheriff not taking down the *res gestæ*?—I have.

4819. *Mr. Baxter.*—Have you often heard that complained of?—Yes.

4820. *The Chairman.*—When it was read over, you observed the omission; was it corrected?—It was as well corrected as it could be; but on hearing evidence hastily read over, you are not alive to the importance of the points as you would be during the examination.

4821. *Mr. Baxter.*—And you have been disappointed frequently, on reading over the Sheriff's notes, at not getting a true representation of the evidence as it came out?—Not exactly as I expected to see it, and that sometimes on very important points.

4822. *Dr. Barclay.*—Have you found the agents differing as to what should be taken down?—I don't recollect of hearing much dispute about that.

4823. *Mr. Adam.*—Do you think that sometimes the judge, at the beginning of a proof, does not know the points on which the case is to turn, and may unwittingly fail to give them prominence?—Sometimes he is not aware of the record at all.

4824. *Mr. Baxter.*—He cannot be aware of the proof to be led?—No.

4825. *Dr. Barclay.*—You would have the appeal court constituted of Sheriffs-principal of the different counties: you don't bring in any new class?—No.

4826. Have you turned your attention to how you would arrange Scotland?—That would depend entirely on the number of judges that might be necessary.

4827. Would all the Sheriffs be necessary to form members of the court, or would you have more, or fewer?—I think that there would be fewer; but that would depend a good deal on what was done for Glasgow. Even with Glasgow, however, my impression is that there would be fewer. I think those left out should enjoy their present emoluments during their lives.

4828. *Mr. Adam.*—Do you contemplate that the Sheriff-substitute should sit with the appeal judges in any case except for the purpose of taking proofs?—No. It would be necessary, in some degree, to have him sitting with them, to make a majority; otherwise, if they differed, there would be no decision.

4829. *Dr. Barclay.*—In cases of pure law, the two Sheriffs are to decide?—Yes, if it is appealed.

4830. Supposing they differ, would the judgment of the local Sheriff be set up?—It should stand, unless they reverse it, as there would, in that case, be two judges against one.

4831. And no appeal?—No appeal.

4832. You have said they should sit once a month at least. There is a number of summary cases—cases of ejection, aliment, and interim interdict; how would you deal with these? Must they wait till the appeal Sheriffs hold their sittings?—Yes, unless there is some immediate cause for haste, and then it ought to be sent on to the judges.

4833. Would there be oral or written pleadings?—I think the agents should attend the judges where they happen to be, or have a written pleading.

4834. *Mr. Shand.*—You have many cases in Greenock where summary despatch is of importance?—Yes.

4835. Where maritime questions arise, it is important to have an immediate appeal?—Yes.

4836. And an immediate decision?—We seldom get an immediate decision in a case like that.

4837. You have it in your power to put in a reclaiming petition within 24 hours?—I have pointed to that just now as being a remedy for any sudden case.

4838. To whom should that be sent?—To the two judges.

4839. Where do you contemplate that they should reside?—That is for them to arrange. They might be on circuit at the time. I am supposing that they are going circuit, and fully employed.

4840. When not on circuit, where do you contemplate that they should reside?—I don't know. I suppose they would fix their own residence.

4841. If they resided in different parts of Scotland?—They would have to arrange a meeting to discuss these cases as they came up, if they were very important and could not wait.

4842. *Mr. Webster.*—I think you stated that one reason for preferring this new mode of ascertaining the facts was that it would be more satisfactory than that by jury?—Certainly. According to my view, trial by jury is the most unsatisfactory mode of disposing of a question.

4843. Is that the general feeling of the mercantile and professional classes with whom you associate?—I think so. I think trial by jury should be abolished for many reasons.

4844. You mean in civil cases?—Yes.

4845. *The Chairman.*—What are your reasons?—A jury, selected as it is at present, is a body that comes to the consideration of circumstances very often with which they are not at all familiar; perhaps technical terms are used, and they sit during a protracted period, hearing conflicting evidence, and endeavouring to form an opinion upon it, a great part of the terms and of the matter brought up being quite novel to them. They hear very highly coloured speeches from the counsel, which are apt to take them, and then they get a charge by the judge, which attempts to put the case fairly before them. I think that a jury, as at present constituted, is apt to get quite bewildered, and to act more upon impulse than upon anything like satisfactory reasons.

4846. *Mr. Clark.*—Then your objection is not the expense?—That is a main point.

4847. You object not only to the expense, but to the unsatisfactory constitution of the tribunal?—Yes; that is my reason for falling back on an intelligent body like the Sheriffs to hear the cases.

4848. *Mr. Shand.*—Suppose a system could be devised by which the expense was very much reduced, what would you say to jury trial?—I would still have the objection to the constitution of the court.

4849. *Mr. Adam.*—Suppose, along with your system, it were still thought desirable to have review as to matters of fact, might that not be effected by one of the judges taking full notes of the evidence?—That would delay the court, and it would still be that judge's notes and not the notes of the court.

4850. You would not recommend that?—No, I don't think so.

4851. *Dr. Barclay.*—Supposing the whole of the present staff of Sheriffs not to be required to form the ambulatory courts, would you still retain the principal Sheriffs of the counties that might not be required, and what would their duties be?—They would have no duties at all; but they would be entitled to get their salary during life.

4852. *Mr. Baxter.*—You mean they should get a superannuation allowance?—Yes. Or I could suppose that an experiment might be made to try them with the interim interdict cases.

4853. *The Chairman.*—You would utilise their services in that way?—Yes, in the meantime.

4854. *Dr. Barclay.*—The principal Sheriff has very important administrative powers; would you vest these in the resident Sheriff?—They would naturally fall into the hands of the resident Sheriffs.

4855. *The Chairman.*—I understand your suggestions to amount practically to this: in the first place, you would extend the jurisdiction of the Sheriffs to all classes of cases; in reference to cases under £50, you would have an appeal, upon matter of law only, to the court of two; and in cases above £50, you would have the judgment of these judges final upon fact, and have the evidence taken before them, and not before the Sheriff-substitutes as at present?—Yes.

4856. Their judgment final in fact, and appealable in law to the Supreme Court?—Yes.

4857. Your object is twofold, as I understand: first, to have the judgment of two persons instead of one; and secondly, to have a tribunal of three lawyers for investigating the facts, their judgment upon these facts being final?—Yes.

4858. These are your views?—Yes.

4859. *Mr. Clark.*—In a case above £50, if it required proof, the only judgment to be pronounced would be a judgment of the court of three?—Upon the facts.

4860. And law?—No; it is reviewable in law.

4861. But the only judgment pronounced in the inferior court would be by that court?—Yes.

William M'Clure.

4862. *The Chairman.*—Would you have power given to a party to have a new trial, if he could show cause for it to these appellate judges; or to whom must he apply for that new trial?—If there was a miscarriage.

4863. What do you call miscarriage?—If it could be shown that a party was taken by surprise in any way, or that there was a miscarriage, pretty much as a new trial can be moved for now.

4864. Where would you move for that new trial; in the court of Sheriffs or in the Supreme Court?—I think it should be before the three Sheriffs.

4865. That would be the redress supposing you were to consider that the judgment arrived at was an erroneous judgment in point of fact?—Yes, even supposing it were.

4866. You think a party would have an equal chance of redress in that case as he has at present, in the event of there being an erroneous judgment in point of fact?—I think so. I think the court could have no interest in debarring a person from having a review of the case, if there was anything like surprise or any acknowledged miscarriage of justice.

4867. Suppose he says they have arrived at an erroneous conclusion upon the evidence?—It is impossible to say that the Court of Session could review a judgment on a question of fact, with no evidence before them.

4868. But I want to know why you should not allow some appeal to the Court of Session. Perhaps the three judges in the Sheriff Court might differ two to one upon the question of fact; and if one of the parties thinks they have gone wrong in the inference which they have deduced from the facts, is he to have an appeal to no mind but the minds of those who have already given their decision?—If they have erred in point of fact, to err is human, and I don't see how you could get it settled better in any way. All the members of the court might differ as to their inference from the fact; but I think these three judges would be more capable of drawing an intelligent inference from facts than a jury would, and therefore I think their judgment should be final.

4869. If a jury goes wrong in point of fact, a new trial can be granted?—Yes; but how is it to be ascertained that they are wrong, if these three judges have given their judgment, and there are no notes of the evidence?

4870. If you exclude notes of the evidence, so as to make it impossible for anybody to look at them, you arrive at that result?—And if they are very short notes they would be of no use to the reviewing court.

4871. You in that way exclude the remedy of a new trial where there is an error in point of fact?—I don't see why there should be any difficulty about that, more than if a man enters into an arbitration by which he agrees to abide by the judgment of arbiters. This is setting up a court which is a better court than arbiters could be; and if an arbitration is to be final, I see no reason why that court should not be final.

4872. When two parties go to an arbiter, they agree to abide by his decision; but in this case it would be one party compelling the other to abide by a decision?—But these would be judges of the land; and I hold that it would be a much better court than arbiters, or a jury, or any means we have of determining a case at this moment.

4873. *Dr. Barclay.*—And although these three judges should not be unanimous, you would still have finality?—Yes.

4874. *Mr. Baxter.*—You would have such confidence in these three men as jurymen that you would trust them with making findings of fact?—Yes.

4875. *The Chairman.*—When they have made up their minds on the fact, they decide the law applicable to the fact?—Yes.

4876. Do the three judges decide the law, or do two of them decide the law?—Two, that is the majority, of them would decide the law; but their judgment would be subject to review.

4877. *Mr. Clark.*—And you could not raise any question of law except what you could induce these judges to raise by their interlocutor?—No.

4878. *Mr. Shand.*—Would there not be some difficulty, from the circumstance that two of these judges were moving about from place to place, and that questions of law might involve more than one consultation in order to reach distinct findings in law?—I don't think it.

4879. You must expect that in many cases where questions of law are involved, the judges could not determine them at the time?—Granted. They must have some time to consider and look up the authorities.

4880. When and where would the consultations occur between the local judge and the other two judges upon these matters?—I suppose they could very easily get the local judge to go to them; or, if it was a question of such importance that it required long consideration, it could wait for the next visit.

4881. Would that not be productive of some evil in the way of delay?—I don't think the delay would be much, compared with what we have in conducting cases now.

4882. Is there any reason why the delay that there is now should not be much diminished?—I don't think it is likely to be diminished.

4883. What is the chief cause of delay in the Sheriff Court at present?—The chief cause of delay with us is in endeavouring to make the parties meet and agree to compromise.

4884. But, speaking of the machinery of the court, what is the chief cause of delay in Sheriff Court cases now?—It is what it has always been—to suit the convenience of the procurators or the Sheriff in getting a debate or a proof led. Sometimes an engagement may come in the way of one or other of them, and then it is postponed for some time.

4885. You propose that the courts of appeal should sit once a month. Supposing the Sheriff came to the county once a month, would that not entirely remove any objection on the ground of delay in the present system?—So far as delay is concerned, but it would not remove this difficulty, that he is just one judge reviewing another judge's judgment, the other judge having taken the proof; so that the facts must have a more permanent impression on his mind, and having been throughout at the preparation of the record, and so being perhaps in a more favourable position than the appeal judge for forming an opinion.

4886. You think the quality of the judgment is not so valuable?—They are very much the same. Sometimes very good judgments are given—some that I approve of overturning the substitute's judgment,—and sometimes I think they are not quite so good.

4887. *Mr. Baxter.*—You think the present appeal court requires to be strengthened?—Yes, I think so.

4888. *Mr. Shand.*—Do you not think the present appeal court might be weakened by adding, it might be, a judge who had not the same legal accomplishments, to the present appeal judge, where you have, as at present, a judge who is a sound lawyer?—But suppose we have a judge who is not a sound lawyer.

4889. There is the risk of either weakening or strengthening the court?—I don't think there is any chance of weakening it. Where there are three judges sitting together, the probability is that they will give a strong judgment.

4890. But in the case I put, of two judges sitting, would you not be weakening the court?—Two judges, one a good lawyer, and the other an inferior one—that would not be worse, certainly, than having one weak judge.

4891. *Mr. Baxter.*—You would like two minds better than one?—Yes.

4892. *The Chairman.*—Should the three judges sit to receive documentary evidence?—Where there is documentary evidence, the two appeal judges could consider it themselves.

4893. You would have the resident Sheriff to decide upon that in the first instance?—I think he might in the first instance judge, if it is merely documentary.

4894. Or if it is a mere question of law?—Yes.

4895. And then there would be an appeal to the two judges?—Yes.

4896. In that class of cases, would the resident Sheriff sit with the others?—Not if he judged in the first instance.

4897. *Mr. Clark.*—And he judges in the first instance in every case in which there is not oral proof?—Yes.

4898. *Dr. Barclay.*—In the case of a reference to oath, would you have that taken before the resident judge or the three judges?—In that case, where the evidence would be taken at length, I see no great inconvenience in the resident Sheriff taking it. The object I had in view was to lessen the expense of trying cases where witnesses were to be brought forward.

4899. *The Chairman.*—Where the resident Sheriff does not sit with the appeal judges, if they differ in opinion upon an appeal from his judgment, the judgment stands?—Yes; practically that would be two against one giving the decision.

4900. But there would be an appeal?—Yes.

4901. *Dr. Barclay.*—You spoke of miscarriage and surprise. Suppose you were managing a case, and were perfectly satisfied that the conclusion come to by the judges was erroneous, and that you could convince them of that, would you have a motion for a new trial?—I don't think that a miscarriage of that kind would be listened to, because that is presupposing that the court is not going to be a satisfactory court. I think a party must take his chance of that court on questions of fact. What I was referring to was, that there might be miscarriage, by palpable misapplication of the law to their findings. There might also be review, if important evidence, not known to exist at the time, was afterwards discovered.

4902. *Mr. Clark.*—But you don't give a right of re-hearing?—No; it would come more to be one of those cases where there might be a reduction on the ground of substantial error.

4903. *Dr. Barclay.*—Would you give that to the Supreme Court?—Yes.

4904. Supposing you gave a right to move the three judges for a new trial, don't you think that parties would frequently avail themselves of that for the purpose of getting another month's delay?—I think that likely if it were allowed.

4905. But you do allow it?—No.

4906. You allow it in the case of surprise or miscarriage?—If there was surprise, that would naturally be stated before the case went to trial; and if a party did not complain of surprise at the time, I don't think that he should be heard again.

4907. Can he find out the surprise till the surprise occurs on the evidence?—You mean if the party was bringing forward evidence which was quite new to him. If there was surprise of that kind, the three judges should be entitled to re-hear it.

4908. Don't you think that would be often taken advantage of?—I don't think the Sheriffs would allow it.

4909. *Mr. Clark.*—If there was a right to be heard on the question of surprise, how could you avoid that?—You could not avoid it. It would only be another month's delay, but that would be pretty quick justice compared with what we have.

4910. *Dr. Barclay.*—A foreigner might have gone away in that time?—I am supposing that the property is attached in the case of a foreigner.

4911. *Mr. Webster.*—What is your opinion as to the present system of supporting appeals by written argument?—I think that is never so satisfactory as an oral hearing.

4912. And it is much more expensive?—It is.

4913. *Dr. Barclay.*—In a case of count and reckoning, where there is a number of figures, would you say it is more satisfactory?—I would. You generally draw certain conclusions from the figures, and you can make that intelligible in argument quite well.

4914. Are you favourable to caution being found where an appeal is allowed to the Court of Session?—I think, where there is an appeal to the Court of Session, security should be given.

4915. Would that not prevent a poor man from having his case heard?—I think the evil is much greater the other way, where the poor man tries to evade paying his debt.

4916. *The Chairman.*—You think he has too much facility for review?—I think so.

4917. *Mr. Adam.*—Do you think it would be a sufficient check to that facility, if he were only allowed to appeal with the consent of the judge?—I would not object to its being done in that way. If the judge should say that there is reasonable ground for appealing, I think the party might be allowed to appeal without finding security.

4918. *Mr. Baxter.*—You said you would not allow an appeal to the Court of Session in cases below £50. Suppose a case of that sort brought into the Court of Session in the first instance, do you think there should be any regulation as to expenses, suppose the pursuer to succeed?—I think, if the pursuer takes a case into the Court of Session, and incurs very heavy expense, he should just get Sheriff Court expenses up to that point. He selects the court himself, and he should not select the most expensive court.

4919. *Mr. Shand.*—Do you think that the number of appeals competent in the course of a Sheriff Court process might be usefully diminished?—I don't think there are too many appeals at present.

4920. Do you not think that, whether there is to be a change in the court of review or not, appeals on preliminary pleas should be done away with, except with the leave of the judge at all events?—I think it is rather dangerous to go on with a case while a preliminary is behind you.

4921. And therefore you think that should be retained?—I think so.

4922. Under the present system, is it not often productive of great delay?—It is.

4923. And the appeal is often taken for the purpose of delay?—Not very often; but I dare say it is in some cases.

4924. Would it not serve the purpose to allow the appeal to be taken, as it may at present be taken, when an order for proof is pronounced, and before the expense of a proof or remit is incurred?—Generally, if it is disposed of before the proof, it would do well enough. An objection to the relevancy cannot well be disposed of till the record is prepared.

4925. Then you think that appeals might be dispensed with till a proof or remit was ordered?—If the plea is that there is no case at all, I think that should be disposed of. The expense of the record should not be incurred with that preliminary behind.

4926. *The Chairman.*—If it were an objection to jurisdiction?—I think that should be cleared off at once.

4927. *Mr. Shand.*—For what reason?—Because otherwise you have the expense of the record.

4928. But is not that trifling compared with the evil of delay?—I don't think it. The delay might be much greater, because you might go on with the preparation of a record, and be turned back after all.

4929. Would you give the Sheriff-substitute power to allow amendments of the record at any stage?—I think so, and of admitting documents.

4930. Although they had been in the possession of the party all along?—Unless he was unaware of it. If he was aware of them, and kept them back, I don't think he should be allowed to put them in.

4931. *The Chairman.*—Documents that were in his own possession you would not allow to be produced afterwards?—Not if he was aware of them; but if he has made a search without finding them, and afterwards finds them by chance, I think he should be allowed to put them in.

4932. *Mr. Shand.*—Would not the power of giving expenses be quite sufficient protection against the evil of a party keeping up documents?—I don't know that.

4933. Are you aware that in the recent Court of Session Act there is a power given to parties to produce documents at any time, subject to questions of expenses?—If a party wilfully keeps back documents that should be put in process, he should suffer for it.

William M'Clure.

4934. By losing the case?—I think he has no right to win if he attempts unfair dealing in that way.

4935. *Mr. Clark.*—You think he has no right to speculate on winning the case without producing the documents?—No; he should produce everything that he can to forward the interests of justice.

4936. *Mr. Webster.*—His keeping back these documents may have altered the whole shape of the defender's case?—Quite possibly.

4937. *Mr. Shand.*—Would not his paying the expense be a complete remedy?—The proper remedy for a fraudulent man is to let him lose his case.

4938. The case where you would find against him on the merits, is where he was acting fraudulently?—Or keeping them back wilfully.

4939. *Dr. Barclay.*—Do you apply that even to incidental documents—a letter, for example?—If it was a very important letter, and one that would alter the complexion of the case, I think so.

4940. *Mr. Clark.*—A document which the party must have considered?—Yes, and known about.

4941. *Mr. Shand.*—Suppose a case where a party has not seen the importance of a document in his own possession, and has not produced it, what would you say?—I would say that if he did not see the importance of it, he should not be punished.

4942. Under the present system, is it not the law that a party, even in these circumstances, cannot put into process, after the record has been closed, documents which have been in his own possession?—The law used to be, that if there was anything that newly came to a person's notice, he was entitled to add it to the record, and to put it in the documents connected with it.

4943. At present, suppose a party innocently retains documents till the record is closed, is he allowed to produce them?—I don't know.

4944. *The Chairman.*—Have you any suggestion to make on the matter of costs?—I have not considered that question.

4945. *Mr. Baxter.*—Have you considered it in relation to the Debts Recovery Act?—It has been suggested that there should be a slump sum, and it has also been suggested that the payment should be by fees. My own impression is, that it is best that the agent should be paid in proportion to the trouble he has had.

4946. *The Chairman.*—Do you apply that to cases under the Debts Recovery Act?—Yes.

4947. Then you object to the principle upon which the remuneration is provided by that Act?—Yes, I do.

4948. What evils result from it?—You may have occasion to conduct a case for a long time, and get very disproportionate remuneration for your trouble; and you may have occasion to state a case in a very short time, and yet the remuneration would be the same, which I think is a bad system.

4949. It would be too much in the one case, and too little in the other?—Yes.

4950. Is that Act much resorted to in your court?—Chiefly for decrees in absence.

4951. That is to say, where opposition is not offered?—Where it is very seldom offered.

4952. *Dr. Barclay.*—And for the benefit of execution?—Yes.

4953. *Mr. Clark.*—And the cheapness of getting the decree?—Yes. It is for that reason chiefly that I think the Act should be extended to all cases. I don't see why a judgment on a bill should not be got in the same summary form as a judgment on an open account.

4954. *The Chairman.*—What is the expense of obtaining a decree in absence?—I cannot exactly say.

4955. *Dr. Barclay.*—It depends on the amount?—Yes.

4956. *Mr. Harrison.*—Do you think the fees are fair for obtaining a decree in absence under the Debts Recovery Act?—I think it is a fair enough fee in an unopposed case.

4957. *Mr. Campbell.*—What is the practice in your court with reference to the taking of notes in debt recovery cases? Is the Sheriff-substitute usually asked to take a note of the evidence?—He is asked, if it is intended to appeal.

4958. Is he generally asked to do so in practice?—There is really not a great many cases of that description in the court.

4959. *The Chairman.*—Have you anything to say as to the privileges of agents?—They are all now examined by the same body; and I don't see why, if they are admitted to one court, they should not be entitled to practise as agents in any other court in Scotland.

4960. *Mr. Baxter.*—You don't think they should be excluded from any court?—No.

4961. *Dr. Barclay.*—I suppose you would not admit them to the exclusive privileges which the procurators of Glasgow and Paisley enjoy?—I think these exclusive privileges should be abolished, except so far as regards funds.

4962. You would allow agents to practise in every court?—Yes.

4963. But to have any of these exclusive privileges, they should become members of the particular body?—Yes.

4964. *Mr. Baxter.*—So as not to participate in their property unless they pay for it?—No.

4965. *The Chairman.*—Do you hold that all agents should be entitled to practise in the Supreme Court, as well as in the Sheriff Court?—I think it would be a proper thing to enable the agent in the country to correspond directly with the clerk of counsel, and to give the clerk of counsel remuneration for the trouble he has.

4966. But do you think they ought to be allowed to practise before the Court of Session?—In their own cases I think they should be allowed to practise as agents in the Court of Session.

4967. Would you have them admitted by the Court of Session to practise in that court?—If the Court of Session have the power of framing regulations for the admission of procurators, I think they should so frame them that the procurators should be capable of practising in both courts. Their examination should be a test of their qualification in the Supreme Court if they wished to do so.

4968. Then the admission should not be by the Supreme Court, but by the council of procurators?—Perhaps the better course would be to have the sanction of the Supreme Court to the agents who wish to practise before that court.

4969. The Supreme Court would get a report from the council of procurators, and give the privilege?—Yes, if they think right.

4970. *Dr. Barclay.*—You said you would allow the country agent to correspond with the advocate's clerk. Would that not be making the advocate's clerk an agent in the Supreme Court?—The advocate's first clerk is so at present.

4971. *Mr. Webster.*—That is abolished?—I did not know that.

4972. *Mr. Harrison.*—You would wish every procurator to have such an education as would enable him to practise before any court in Scotland?—Yes.

4973. And you would leave it to the client to select any procurator in Scotland to conduct his case?—I don't see any harm in that.

4974. *Dr. Barclay.*—Do you think the standard is not sufficiently high now?—I think it is high enough.

4975. *Mr. Webster.*—Suppose you in Greenock were conducting a process before the court here, how would you manage the matter of borrowing and lending a process, keeping in view the right of your opponent to have immediate access to it in the way he has at present, which is enforced by process caption?—I suppose the process caption would require to be regulated so as to admit of that. I don't see any harm of the advocate's clerk borrowing a process and sending it down to the country agent.

4976. How would his opponent be able to get access to the papers with anything like the despatch which is required?—If it was sent down to the country for the agent to look at it, as in point of practice is often done now, there would be a limited time for that, and he

would send it back. Two people cannot read it at the same time.

4977. But how would that be managed in a case from Orkney or Shetland or Caithness?—It is quite plain that if the case were from Orkney or Shetland, it would be much better to employ an Edinburgh agent, and he would very likely be employed. I am supposing that everybody is seeking to get the case determined at the least possible expense.

4978. The party who selects the agent in Orkney or Shetland is on one side of the case, and is not selected by his opponent; suppose he wishes to have the case delayed, and the process is not made available at the time it is wanted by his opponent, how is his opponent to get it, if there be not some one liable to process caption living within the immediate vicinity of the court?—I don't see how he would get it in that way suddenly, nor would he get it suddenly if the agent was liable to process caption, because if he was in Orkney it must come back to Edinburgh. It is the distance that makes the difficulty.

4979. *The Chairman.*—It is the non-residence in Edinburgh of the person entitled to have the process. That is overcome in England. How would you overcome it?—I don't see how it is to be overcome in Scotland at all, except you hold that the person who got it was liable to caption as well as the person who sent it. He would take care that his correspondent sent it back within a reasonable time.

4980. It frequently happens that the agent on one side wishes to see certain documents or steps in a process which is in the possession of the other agent, and he writes asking him to return the process, or to allow him access to it. That is done in a couple of hours, but it would be impossible in the case you mention?—That implies simply that it is impossible for an agent in Caithness or Orkney to conduct a case in the Court of Session.

4981. But take the case of Greenock?—If the process were sent through to Greenock, it would be sent back next day. If a telegram was sent for it, it would be returned next day.

4982. But suppose access to it was wanted before next day?—I can hardly suppose that it would be necessary to have it so very suddenly as that.

4983. *Mr. Webster.*—Do you not know that the rule in the courts of Westminster Hall and Chancery, where agents at a distance may practise, is that papers can only be got by an agent residing within two miles of the seat of the court?—They generally have a branch in London.

4984. The object is to secure the interest of the opposite party, and to give the court an effectual control over the process?—Yes.

4985. *Dr. Barclay.*—Are you aware of the clause in the Act of Sederunt of 1839 that a procurator shall not be entitled to borrow a process unless his house or office is within the jurisdiction?—Yes.

4986. *Mr. Shand.*—Speaking practically, would it not be necessary that some such regulation as that should be introduced, if agents throughout the country were entitled to practise in the Court of Session?—They would only be practising in cases from their own county. I am not supposing that they would be practising generally.

4987. Even assuming that, would it not be necessary, that in order to give the parties and the court a control over the process, there should be a regulation that the process could only be borrowed by some one resident in the immediate neighbourhood, who should be responsible for it?—But if it is a case that has gone from the county, there will be an agent in the county on both sides, and I think the probability is that it is in the county that the process would be wanted to be seen on both sides. If counsel wanted to see it, that is likely to be after the agents have examined it, and it would then be in Edinburgh, and not in the county. I don't think that would be a practical difficulty.

4988. *Mr. Clark.*—Does it follow that the agents would always reside in the same county? Supposing a Perthshire man sues a party in Greenock, and the Perth agent conducts the case there on the one side, and the Greenock agent on the other?—The Perth agent would not conduct the case while it was in Greenock.

4989. Why?—Because that would be a very expensive thing.

4990. Then he conducts it in the court of appeal?—He might do that.

4991. And the case in the appeal court would be conducted by a Greenock agent and a Perth agent?—It is possible that such a case might arise.

4992. Is it not likely?—There must be many cases of that sort. It is more likely to be the case with Glasgow cases.

4993. *The Chairman.*—There is an understood rule of law that a country agent and an Edinburgh agent cannot arrange to participate in the fees or profits of a case. Do you think that ought to be altered?—I never had such an arrangement myself. I always give the agent his own fees, and let him take his own responsibility. I think, if such a thing exists, it ought to be abolished. It is not a right thing.

4994. *Mr. Webster.*—What is not a right thing?—Dividing fees.

4995. *The Chairman.*—As at present?—Yes.

4996. You think the stigma of *pactum illicitum* should be removed?—I think so.

4997. If that were done, might it not lead to some arrangement for enabling the country procurator and the Edinburgh agent to conduct the cause between them, the Edinburgh agent having the custody of the process?—If that was done, there would need to be an arrangement for dividing the profits in proportion to their labour. At present the evil consists in this, that the country agent gets a share of the fees of the Edinburgh agent for doing his own business.

4998. He is prevented from doing that by the rule against such participation?—I think that should be prevented altogether; but it would be quite different if the country agent was doing a share of the work. It would then be a partnership to a certain extent, and the participation in the fees would be proportioned to the labour of each.

4999. You think that would be a better position of matters?—I think so. That is the way it is done in England, the agents having a branch in London.

5000. Would there not be a difficulty as to the process?—The process would require to be sometimes in the provinces, if the country agent was doing any of the work.

5001. *Mr. Shand.*—Parts of the process are now frequently in the provinces; but there is a party in Edinburgh responsible to the court for these?—Yes.

5002. *Mr. Webster.*—Would you state your opinion as to whether it would be fairer that the country agent should be paid the whole fees for what he himself does, and that the Edinburgh agent should be paid the whole fees for what he does, or that there should be a division of both sets of fees between the two?—I think the right way would be to let each get the fees for his own labour.

5003. *The Chairman.*—Have you anything to say about the responsibility of a country agent to the Edinburgh agent for his account?—I don't think the country agent should be responsible. If the Edinburgh agent is getting the whole fees, and if a client is introduced to him, I think it is his business to make himself aware whether that client is able to pay him or not. If he gets the whole fees, he should take the whole risk.

5004. You think he should make inquiry as to the condition of the client?—Yes. If the country agent induced him to take up the case by misrepresentation, then I think the country agent should bear the responsibility, but not otherwise.

5005. You think it should be an introduction without responsibility?—Yes.

5006. I suppose the country agent at present considers carefully whether he is covered by the risk which he so runs?—According to my experience, a country agent is employed by the client, and the country agent employs the Edinburgh agent; but it would be much

William M'Clure.

better if the country agent had nothing to do with Edinburgh cases as a rule.

5007. You think it would not be agreeable to be always protesting to the Edinburgh agent that you are not to be responsible?—I think it should be the rule that the country agent should not be responsible.

5008. Do you think it incumbent on the country agent introducing a client to an Edinburgh agent, if he had any reason to doubt the sufficiency of the client, to make the Edinburgh agent aware of his doubt?—I think that should always be done. If he has any doubt, he should let it be known.

5009. He has a better opportunity of knowing the condition of the client than the Edinburgh agent has?—Yes.

5010. *Dr. Barclay.*—Would you make that an exception to your general rule?—I am supposing that it is a concealment which almost amounts to fraud. If he suppresses the truth wilfully, he would be liable on another ground. But if the client is habit and repute good when he is introduced, there should be no responsibility on the country agent.

5011. *Mr. Webster.*—If the country agent has no reason to think his client is doubtful, but otherwise there should be no responsibility on the country agent?—No.

5012. *The Chairman.*—Are there any other points which you wish to bring under the notice of the Commissioners?—No.

5013. Do you think there is any hardship attending the system of arresting ships and dismantling them?—Of course it might sometimes be a hardship to the people having goods on board; but if they have goods on board a ship which is clearly indebted to a creditor, they must submit to that inconvenience, and take their remedy against the shipowners for any damage that may accrue. I might perhaps suggest, that I think there should be a claim equal to a lien or preference in favour of creditors furnishing goods to a ship for a voyage on which she is about to proceed. I think there ought to be some rule of that kind.

5014. *Dr. Barclay.*—A lien on what?—Perhaps the remedy which I have already suggested would cover it; but there is great inconvenience, and often great loss occurs by shipmasters getting introduced to people and ordering goods and supplies for a voyage. These people expect payment till the last moment, and the shipmaster goes off without settling with them.

5015. *Mr. Baxter.*—They have given them the means of prosecuting their voyage?—Yes; without these goods the voyage could not have been begun. They ought to have a lien or preference for these goods if the ship is attached, and in competition.

5016. *Mr. Shand.*—Do you find that the remedy of dismantling ships is used oppressively?—No, I have never known an instance of that.

5017. You are aware that at present an alleged creditor may dismantle a ship on obtaining a merely formal order from a court, with a warrant to arrest?—Yes.

5018. Do you not think that is too great a power to give to a creditor, without the circumstances having been specially brought under the notice of the judge, and without special leave obtained?—You might perhaps call upon the creditor, in a case like that, to make oath to his debt before he got the power to arrest and dismantle; but I think that is a power which could not be with safety abandoned, because the ship would be off, and the remedy lost.

5019. But are there not cases in which small claims have been brought suddenly forward, and considerable hardship inflicted by keeping the vessel from sailing?—I have known one or two cases of that description—claims which the people themselves thought good, but which did not turn out to be good on investigation. But I don't think that is a hardship that has ever practically come under my observation.

5020. Have you had a great many cases of dismantling vessels in your own practice?—I have had them, but not many of them. We don't go to that extreme, if it can be avoided.

5021. How often does that occur in the port of Greenock or neighbourhood?—Very seldom. If the arrestment is in, and we have reason to believe that they will keep good faith, we don't dismantle; but if we think it is a person not to be trusted, we do dismantle.

5022. *Dr. Barclay.*—Can you not dismantle under the arrestment to found jurisdiction?—I doubt very much whether it is competent.

5023. You get the warrant from the local judge?—Simply to arrest to found jurisdiction.

5024. Is not the form given in the books to dismantle as well?—No.

5025. Then what is the use of it?—That is just the question. It has always been considered that it was not safe to trust to that arrestment until we got the arrestment *ad effectum*.

5026. Which you get from the Court of Session?—Yes.

5027. I daresay you remember the time when there was very stringent caution in all Admiralty cases?—Yes.

5028. That is now done away with?—Yes.

5029. On both sides?—Yes.

5030. Both pursuer and defender had to find caution?—If the one found caution, he had a right to ask the other to do so.

5031. Is it your opinion that the total abolition of caution in maritime cases has been beneficial, or would you have it in any degree put on again?—If we are allowed to arrest in the first instance, we thereby establish a nexus which renders caution unnecessary. If you have the power of arresting the vessel, caution is not necessary; but without that power, I think it would be necessary. For instance, if I put goods on board to furnish a ship, and she is going away on a voyage, and the freight is all paid on the other side; if I bring my action against the ship or the owners before she leaves, I think I should be entitled to get caution for the goods actually put on board, since I cannot get the freight.

5032. You have not that power just now?—No.

5033. You had it before?—Yes.

5034. Before dismantling a vessel, the creditor should make oath to the validity of his debt?—Yes.

5035. *The Chairman.*—If the creditor is at a distance, he should send an oath with his application?—Yes.

5036. Are there any courts in Greenock that exercise jurisdiction except the Sheriff Court?—None have maritime jurisdiction.

5037. *Dr. Barclay.*—Is there not the Water Bailie?—He lives in Glasgow.

5038. Has he not jurisdiction to the Cloch Lighthouse?—Yes.

5039. *The Chairman.*—Does the Baron Bailie exercise jurisdiction?—No; he does not hold any court.

5040. The magistrates?—The magistrates don't exercise any civil jurisdiction.

5041. Do they exercise criminal jurisdiction?—They exercise it in their police courts; and we have a Dean of Guild.

5042. Does he exercise jurisdiction?—Yes.

5043. In what class of cases?—In the same way that all Deans of Guild in Scotland do; but I think the constitution of the court is very defective, and that the Sheriff should have cumulative jurisdiction with him in everything.

5044. *Mr. Baxter.*—You think it is objectionable?—Yes, it is most objectionable in its constitution.

5045. *The Chairman.*—What is its constitution?—The Dean of Guild is one of the bailies. He is also a member of the Police Board as a councillor. The Police Board give orders for certain improvements about the town, and he is one of the parties who resolve that these things are to be done. He then goes with his court, and sits with four assistants and judges whether these things should be done or not.

5046. What are the four assistants?—A council of advisers.

5047. *Mr. Baxter.*—Has he a legal assessor?—Yes.

5048. *Mr. Webster.*—Is the assessor the town-clerk?—Yes.

5049. *The Chairman.*—You think there ought to be a cumulative jurisdiction with the Sheriff?—I think so. I think it is a very badly constituted court at present.

5050. Do you think there should be an abolition of it, and that the jurisdiction should be given entirely to the Sheriff?—The Dean of Guild Court was constituted only in 1865 by the Police Act.

5051. Do you think it would be better if the power was vested in the Sheriff?—Yes; I think it should be abolished altogether.

5052. Do you think there is so much to do in the Dean of Guild Court, that the business would be too heavy for the Sheriff?—I think they make more business in the Dean of Guild Court than is necessary.

5053. *Mr. Baxter.*—You think the Sheriff could overtake it?—Quite easily.

5054. *Mr. Shand.*—Don't you think it is of advantage that there should be a court of that kind to deal with matters of municipal regulation, in regard to which the members are much better acquainted than the Sheriff could be?—They appoint members of the Police Board to sit and advise the Dean of Guild. They don't call in tradesmen at all. The Dean of Guild Court is quite an anomalous court.

5055. Don't you think the constitution of the court has the advantages I have pointed out?—I don't think it. I don't think a bailie, chosen as he may be by haphazard, is a better judge than the Sheriff; and I don't think his advisers, who are taken from the general Police Board, and who are not tradesmen, can advise him in regard to buildings or linings in any way.

5056.—Do you know how the Dean of Guild Court works in Glasgow?—Tradesmen are called in to assist there.

5057. If that were done, would it obviate your objection?—Partly; but I think it is wrong to let a judge first sit at the Police Board, and determine that certain things shall be done, and afterwards sit in the Dean of Guild Court to determine as to the same matters.

5058. *Dr. Barclay.*—Greenock is not a royal burgh?—No.

5059. You had no Dean of Guild till the Police Act of 1865?—No.

5060. Did the inhabitants of Greenock suffer from the want of it previously?—No.

5061. Has there been any improvement since?—I don't think so. I think the Sheriff's judgments would give satisfaction to the community. The people have not confidence in the Dean of Guild Court as it at present exists.

5062. Is the Dean of Guild's province defined in the Police Act?—Yes.

5063. Is it as extensive as the Dean of Guild's in a royal burgh?—It is expressly so stated.

5064. *The Chairman.*—The Dean of Guild may have no special qualifications for the office?—Quite so, and his advisers are in the same position; and another anomaly is, that while they give him advice, he is not bound to take it.

5065. *Dr. Barclay.*—I suppose very important questions come before that court?—Yes; there is one depending just now before the Court of Session.

5066. *The Chairman.*—Do they deal with the matter of the Shaws Water?—No, that is now acquired by the town, and there is a separate trust for it called the Water Trust.

5067. The Dean of Guild exercises no jurisdiction about the repairs?—If there is anything needing repair in the buildings, he would take cognizance of that.

5068. You think the jurisdiction should be transferred to the Sheriff?—Yes.

5069. Do the Justices of the Peace exercise jurisdiction?—They do, in questions of seamen's wages, and otherwise.

5070. Do you think their Small Debt Court is a good court?—I have no doubt it is well administered. In regard to seamen's wages, I should say that the judges sitting are very generally shipowners, and they are apt to be a little biassed.

5071. *Dr. Barclay.*—Does the Mercantile Marine Amendment Act not contain a clause excluding them if they are shipowners?—Not if they are shipowners, but if they are interested in the particular ship.

5072. *The Chairman.*—Do the Quarter Sessions review the judgment of the magistrates in granting licences?—They do. I think it is very improper to leave the licensing of public-houses in the hands of the magistrates.

5073. *Mr. Clark.*—Where would you put it?—It was infinitely better in the hands of the Justices.

5074. *The Chairman.*—Do you think the review by the Justices is beneficial?—I think it would be much better to go back to the hands of the Justices. There is great temptation at present for election purposes.

5075. *Mr. Shand.*—Is there such a thing as canvassing of Justices with a view to granting licences?—That has been done.

5076. Is that not an objection to the tribunal?—I think it is. It would be much better in the hands of a stipendiary. There is no such great pressure on the Justices as there is on the magistrates. The magistrates have to be elected by the community again, and they depend on their votes for the election perhaps.

5077. Do you think the matter of licensing as you now have it is better than it would be in the hands of a Sheriff or stipendiary?—I think it would be infinitely better in the hands of the Sheriff or a stipendiary.

5078. Then you would transfer the jurisdiction as to licensing to the Sheriff?—I think so.

5079. *Mr. Baxter.*—Would you prefer that to the Justices of the Peace?—I would prefer them to the magistrates, but I would prefer the Sheriff to the Justices.

5080. *The Chairman.*—Does that apply to Greenock alone, or do you extend it to the country districts?—I think, where there is an election going on in a burgh, when the magistrates require to consult these spirit dealers, and get their influence in carrying their elections, it is a very wrong thing to put the licensing in their hands.

5081. Do you think the Sheriff a superior tribunal to the Justices in reference to country districts?—In country districts I think the Justices might retain it. I see no evil arising there.

FRIDAY, 8th JANUARY 1869.

Members Present:—

Lord Colonsay.
The Lord Justice-General.
Lord Barcaple.
Sir Edward Colebrooke.
A. R. Clark, Esq.
James Campbell, Esq.
George Harrison, Esq.
James Adam, Esq.
A. B. Shand, Esq.
T. D. Graham Murray, Esq.
James Webster, Esq.
J. B. Baxter, Esq.

The Right Hon. LORD COLONSAY in the Chair.

Henry Cockburn Macandrew.

Henry Cockburn Macandrew, Esq., examined.

5082. *The Chairman.*—You are a solicitor before the Sheriff Court at Inverness?—I am.

5083. How long have you been so?—Since 1855.

5084. Do you hold any official appointment?—I do not, except that of Secretary to the Faculty of Solicitors.

5085. In how many places in Inverness-shire are there Sheriff-substitutes?—In Inverness, Fort William, Portree, and Lochmaddy.

5086. I believe the Sheriff-substitute at Fort William has a district partly carved out of Inverness-shire and partly out of Argyleshire?—Yes.

5087. Have you any observations to make upon the constitution of the Sheriff Court, as consisting of the Sheriff and his substitutes?—I think that, on the whole, the Sheriff Courts give satisfaction to the country; but I think also that it would be a great advantage to the community if the status of the judges in the first instance was raised, and if one had a more satisfactory appeal than the present one, from one Sheriff to another, at something like the same expense.

5088. *Mr. Baxter.*—You mean if you had the appeal court strengthened a little?—Exactly.

5089. *The Chairman.*—What have you to suggest as to a more satisfactory court of appeal?—I think that if we had an appeal to two judges, it would be much more satisfactory than the present system; and it would not necessarily be more expensive, either to the country or to the litigants.

5090. Do you mean that two Sheriffs should sit together to hear the appeal?—Two Sheriffs, or similar judges, with very much larger salaries than the present Sheriffs draw, and confined entirely to the appeal functions.

5091. When you say confined to the appeal functions, do you mean that their official duty should be confined to that, or do you mean that they should be excluded from practice?—I mean that they should not practise,—that they should be simply appeal judges.

5092. That an appeal should lie from the Sheriff-substitute to them?—Yes.

5093. Has any mode of disposing of these appeals suggested itself to your mind?—My own decided impression is that the appeals should be heard orally, and that we should not have written pleadings. That, I think, is more satisfactory in every way, and less liable to error than the system of written pleadings.

5094. Do you think that oral pleadings would be more or less expensive to the party than written pleadings?—The oral pleading is very much less expensive.

5095. That would do away with the reclaiming petition?—Yes.

5096. How often do you think the judges should sit to hear such appeals?—That, of course, would depend on the result of a little experience as to the amount of business; but I should think that once a month would be quite satisfactory, and it would be at any rate a very great improvement on the present system. In our county we have the Sheriff only about three times a year.

5097. At present some of the appeals are dealt with by written pleadings, and these are transmitted to the Sheriff?—Yes; but I may mention that in Inverness-shire, I believe, that is not often done now.

5098. You have the opportunity of oral pleadings only about three times a year?—Yes.

5099. And you would desire to have it about once a month?—Yes.

5100. Would you have the judges to go to each seat of a Sheriff-substitute?—Unless the business very largely increases, that would not be necessary, because except in Inverness there is very little business before the Sheriff-substitutes. I think it would be quite sufficient for the appeal judges to sit in Inverness, not only for Inverness-shire, but also for Nairnshire, Morayshire, and Ross-shire. I am assuming that the country would be divided into districts larger than the present Sheriffdoms.

5101. How many districts?—I have seen a calculation based on the appeals in Glasgow, showing that five districts would be sufficient.

5102. *Mr. Baxter.*—That implies ten judges?—Yes.

5103. *The Chairman.*—You think that Inverness would be a centre, as it were, for hearing appeals from other parts of the district?—We would naturally expect to have it at Inverness.

5104. Do you think that it would suit to have it there, looking to the population of the district?—Looking to the means of communication, I think it is the natural centre.

5105. What range do you think it would comprehend? Would you take in the range of the whole Criminal Circuit?—I believe the business of that Circuit would not be too much for a single court.

5106. But would the convenience of the litigants be sufficiently consulted by holding it at one place?—Of course there would be necessarily very great inconvenience to litigants from the remoter parts of Inverness-shire and Ross-shire, but there would probably seldom be cases from these more remote districts; and the convenience of all the practising agents, except in the islands, would be sufficiently consulted, more particularly when the Skye Railway is finished, which will open up the western district.

5107. The paucity of cases would perhaps not be a strong argument in the mind of individual litigants?—Clearly not; but there must be exceptional cases under any system.

5108. *Mr. Adam.*—Does the Sheriff-depute at present go to Lochmaddy and Portree to hear appeals?—Yes; he goes there when there are cases.

5109. *The Chairman.*—Would you hold the appeal from the Sheriff-substitute to the two appeal judges to be final?—Clearly not.

5110. You would have an appeal from these judges to the Court of Session?—Yes; at least on questions of law. My own inclination would be, to hold it final on questions of fact.

5111. To any amount?—Yes.

5112. Would you have them to review the judgment of the Sheriff-substitute upon the matter of fact?—It appears to me that the investigation of questions of fact is the great difficulty in rearranging the courts, and I don't think that the present system of review on

matters of fact is altogether satisfactory on the proofs as at present taken; but I have a difficulty in suggesting anything that would be satisfactory on that point. I have seen a suggestion that the three judges should sit together and try questions of fact.

5113. That is, the two appeal judges and the Sheriff-substitute of the district?—Yes; and if that is practicable, I think it would be a highly satisfactory court for trying matters of fact. But whether it is practicable would depend of course on the amount of business, and on the number of proofs to be taken, as to which I have not seen any statistics.

5114. In the district of which Inverness would be the centre, would you have the Sheriff-substitute of the district from which the appeal comes to be the third judge who would sit with the others to take the proof? When a case comes from Ross-shire, would the Sheriff-substitute of Ross be the person to sit; or if a case came from Lochmaddy, would it be the Sheriff-substitute at Lochmaddy?—If that arrangement was to be adopted, I think it would be necessary that the appeal judges should go to these places to take proofs, because the expense of bringing witnesses such a distance would be a very serious matter.

5115. Then you think the appeal judges should go to the districts?—They should go at least to the head burghs of the districts.

5116. In regard to appeals on matters of law, who would sit with the two judges of appeal in a case from Sutherlandshire?—My proposal was that the two appeal judges should try questions of law on appeals from the resident judge, so that it would not be necessary that any third judge should sit with them in trying appeals; and while I stated that Inverness might be a convenient centre for the sitting of the court, if it is to sit at only one place in each district, I can see no good reason why the court should not go to the other counties and hear appeals from them.

5117. Is there any class of cases in which you would hold the judgment of the Sheriff-substitute to be final?—In small debt cases I think it should be final.

5118. You mean cases under £12?—Yes. I would not be inclined to extend it beyond that.

5119. *Mr. Adam.*—Even where the judge might certify that there was a reasonable ground for appeal?—I am not in favour of giving a judge the power of allowing appeals, because practically it would come to this, that an appeal would be allowed whenever it was asked. It is a delicate thing for a judge to refuse to allow an appeal from his own judgment.

5120. *The Chairman.*—Is there any point at which you think the judgment of the two judges should be final?—If one had a sufficiently cheap appeal to the Court of Session, I think it would be desirable that there should not; but at present I think it might be made final up to £100 or £200 in money value.

5121. Whatever might be the nature of the question involved?—Yes.

5122. Do you think that the jurisdiction of the Sheriff should be extended to questions other than those in which it is now competent?—Most decidedly.

5123. Such as?—I have tried to see any sufficient objection to extending the Sheriff's jurisdiction to all cases, and none occurs to my mind. It appears to me that the questions tried by the Sheriff are as difficult as any that could arise in cases which are at present excluded from his jurisdiction; and that there can be no reason why a judge who is competent to decide any question involving any pecuniary amount in a commercial matter, should not decide all other questions, more particularly questions of heritage, where there is nothing involved except pecuniary value. In questions between husband and wife, and parent and child, I have frequently seen cases of very gross hardship arising from the fact that the Sheriff has no jurisdiction.

5124. Do you apply your remark also to questions of declarator of marriage and legitimacy?—With an appeal, I can see no objection to the Sheriff trying them in the first instance.

5125. *Mr. Murray.*—Do you apply it to questions of divorce?—Yes; and my great reason for holding that opinion so strongly is, that at present all these actions are luxuries to rich people, which are quite denied to the poor.

5126. *Mr. Adam.*—Suppose you were to give that extended jurisdiction to the Sheriff, would you still hold that there should be no appeal on questions of fact from the appeal court?—I can conceive that there might be hardship if there was no appeal; but on the whole, I am inclined to think that on matters of fact the decision of three qualified judges sitting together is about as good as any decision that could be got.

5127. *Mr. Murray.*—And that might regulate the succession to landed estates in different counties from that in which the action was originally raised?—Yes. I don't see that the fact of the lands being in different counties affects the judgment.

5128. But does it not affect the question of the expediency of giving the Sheriffs that power?—If a Sheriff can try a question affecting heritage in two counties, he can give as satisfactory a judgment as if it was situated only in one.

5129. But do you think it expedient that that power should be given with reference to estates scattered over the country, without an appeal to the Supreme Court?—You make the judgment of a jury in Edinburgh applicable to land all over Scotland; and, in my opinion, the judgment of three such judges as I have mentioned would be infinitely more satisfactory.

5130. But that is a jury directed by a judge of the Supreme Court?—Yes.

5131. Would you think it expedient to give the Sheriffs that power?—Yes. That is to say, I see many objections to the working of it, which could only be solved by an accurate knowledge of statistics. I have not had an opportunity of examining these statistics, so that I am not prepared to say that it is practicable to constitute such a court; but if the court could do the work, my opinion is that it would be very satisfactory.

5132. *Sir Edward Colebrooke.*—You would make the judgment conclusive as regards the other counties in which the property lies?—If the question was involved in the action raised.

5133. The property lying in several counties, would the pursuer have the option as to the county in which he should bring his suit?—There would require to be some regulation as to that.

5134. What would you propose?—I should be inclined to give the pursuer of the action his option.

5135. And the decision of the court of appeal would be final?—On matters of fact. It would not be a court of appeal on matters of fact, but an original court.

5136. In what cases would you allow three judges to sit?—The three judges would sit to try questions of fact.

5137. And two only for questions of law?—The law, according to my proposition, would be decided in the first instance by the resident Sheriff, with an appeal to the two judges.

5138. And in the event of difference of opinion between these two?—Then the judgment of the Sheriff-substitute would stand. The advantage of that over the present system is, that it gives a judgment by two to one always. At present the appeal is from one Sheriff to another, and where they differ it is very unsatisfactory.

5139. Would you state generally what are the inconveniences which are felt from the present system of appeal to a single Sheriff?—One inconvenience is the infrequency of the Sheriff's sittings in the county. That applies more to counties such as Inverness-shire than to counties nearer Edinburgh. The second is the feeling that the profession generally have, that a great many of the Sheriffs are not men of the standing in their profession which they ought to be, holding that position.

5140. *Mr. Baxter.*—That they are not much superior to the Sheriff-substitutes?—Quite so.

5141. *Sir Edward Colebrooke.*—Are their judgments frequently appealed against, or are they generally recognised as final?—The tables of statistics show that the number of appeals from the Sheriff to the Court of Session is small. That arises in a great measure, I

Henry Cockburn Macandrew.

believe, from the fact that, although not quite satisfactory, the second discussion and decision are advantageous, and that when the two Sheriffs agree, the decision is satisfactory. But the great cause is, I believe, dread of the expense of the Court of Session.

5142. If such a court of appeal as you have suggested were established, would you propose that the Sheriffs should retain their executive functions?—No; my proposal would be that they should not.

5143. You think they should be merely judges of appeal?—Yes; but that, of course, is coupled with the raising of the status of the resident Sheriffs, which I think is essential.

5144. Then they would be local judges of appeal appointed throughout the country, with no other functions excepting those of an appeal court?—Exactly, unless they also sat as judges upon evidence in the first instance, as I have proposed.

5145. *The Chairman.*—Would you have the judgment of these two judges final as to any class of questions of heritage?—I think so, in questions of small value.

5146. Of what value?—I should say £200 would not be too much.

5147. But in questions of status you would allow an appeal?—In all questions involving considerations beyond pecuniary amount I would allow appeal.

5148. Such as?—Such as cases of status.

5149. What do you say as to an action *ad factum præstandum*?—There would be some difficulty in ascertaining any limit there; but I think, if you make them final as to questions of property in land up to £200, you may also make them final as to questions of that kind where the actual pecuniary value of the subject in dispute is not greater.

5150. But you think there may be a difficulty in finding whether it is within the limit?—There is a difficulty in that which would require to be got over. That might be met by allowing the case to be sent to the Supreme Court if the defender wishes it.

5151. Do you mean that the losing party should have an appeal?—No, I mean that when the action is brought in the Sheriff Court, the defender should have power to have it removed to the Supreme Court.

5152. *Mr. Baxter.*—Provided it is of a certain value?—I would allow that, in order to avoid any dispute as to value. Let the defender have the option, taking his risk of the expense.

5153. *The Chairman.*—That is, where the value is indefinite?—Yes.

5154. Have you considered what ought to be done towards raising the status of Sheriff-substitutes? I suppose you point particularly at their having better emoluments?—Clearly, such emoluments as would make it worth the while of men of ability who are likely to succeed in their profession to accept the office. At present the office could not be accepted by any one who had a chance of moderate success in his profession, and the appointments are confined almost exclusively to members of the bar.

5155. Have the appointments of Sheriff-substitutes generally given satisfaction, do you think?—I believe not. So far as I have had an opportunity of ascertaining the views of my brethren in other counties, they have not, as a rule.

5156. The Sheriff has a material interest, has he not, in getting an efficient Sheriff-substitute?—To some extent he has; but that does not appear to have weighed considerably with many Sheriffs.

5157. Is it not a comparatively recent thing, that Sheriff-substitutes are generally taken from the bar?—I believe it is. It is since the appointments became more valuable than they were before.

5158. You don't think that is a satisfactory thing?—I think it would be very satisfactory that they should be taken from the bar if we got advocates of standing; but at present they are, as a rule, taken from men who have admittedly no chance of success at the bar.

5159. But you think if the emoluments are increased, they ought to be taken from the bar?—I don't say that altogether. I think it would be a great advantage that it should be left open to members of my own branch of the profession also.

5160. Then you think it ought to be a matter of choice whether to take them from the bar, or from practitioners in the local courts?—I think so.

5161. *Mr. Campbell.*—Are you aware that in the case of some Sheriff Courts, where the emoluments are comparatively large, gentlemen of considerable practice have been induced to accept the appointment of Sheriff-substitute?—I am not aware of any case lately where a barrister with anything like good practice has accepted a Sheriff-substituteship, and it is not worth the while of a man who has any chance in his profession to take such an appointment.

5162. *The Chairman.*—What do you think the emoluments ought to be, so as to secure the services of the kind of person you point at?—I don't think any man could take the position with satisfaction to himself with less than £1000 a year.

5163. *Mr. Adam.*—Do you propose to appoint in Lochmaddy, Portree, and Fort William, Sheriff-substitutes with £1000 a year?—No. I mean that that should be given to the principal Sheriff-substitute in each county, residing at the county town.

5164. *The Chairman.*—Would you have a superior person, such as you have mentioned, at Lochmaddy and Portree?—No. I would be inclined to confine the duties of the Sheriff-substitutes in the outlying districts and remote counties to those of police magistrates. I think that all the judicial business of the county of Inverness might be satisfactorily transacted at Inverness, or by a Sheriff resident there, and holding courts occasionally at the other places.

5165. And you think that the Sheriff-substitutes at the other places, if they were retained, ought to deal merely with police matters as magistrates?—I think it would be sufficient to have police magistrates there.

5166. To deal with matters criminal?—Yes; and it might be advisable to let them hold Small Debt Courts.

5167. *Mr. Baxter.*—Is it very much so at present?—There is very little civil business at any of the outlying districts of Inverness-shire.

5168. *Mr. Adam.*—To what extent, in that case, would you give the resident Sheriff jurisdiction in regard to crime?—I have not had much experience in criminal practice, but I think the jurisdiction of the resident Sheriff might be extended. So far as I have observed, the class of cases decided by the Circuit Court is not materially different from those usually decided by the Sheriff.

5169. But my question refers to the Sheriff acting as a police magistrate at Lochmaddy and such places?—They would deal with police cases.

5170. *Mr. Baxter.*—What is the practice just now? Where is the Jury Court held?—All the Jury Courts are held at Inverness.

5171. *Mr. Adam.*—Are you aware, in point of practice, that cases which might otherwise be tried by jury owing to their serious nature, are sometimes tried before the Sheriff, on account of the expense and trouble of sending witnesses to Inverness?—There was a case lately from Lochmaddy appointed to be tried by jury; but some of the witnesses did not appear, and it was sent to be tried summarily.

5172. *The Chairman.*—As to the two appeal judges, what qualification would you require for them, and what should be their emoluments?—I think they ought to be taken from the bar, and that they should be eligible for promotion to the Supreme Court. I don't think that less than £2000 a year would be sufficient remuneration for them.

5173. You would exclude them from practising at the bar?—If they got districts similar to the Circuit districts, that would necessarily be the case.

5174. *Mr. Baxter.*—They would have work enough?—Yes; just as in the case of the Sheriff of Lanarkshire at present.

5175. *The Chairman.*—You think that if they went to the different outlying districts forming part of the Inverness Circuit, they would have sufficient occupa-

tion?—I assume that they would sit, not at Inverness alone, but at the other county towns at least. I would not propose that they should go to Lochmaddy or Skye, because there really is very seldom an appeal from these districts, I believe.

5176. And very few proofs to be taken?—I am not prepared to say how many proofs there are; but I know that they have generally only one or two cases, and sometimes not that number.

5177. *Lord Barcaple.*—You mean one or two in a year?—Yes.

5178. *The Chairman.*—Have you any remarks to make about the forms of proceeding in the Sheriff Court in civil matters?—I think that the three forms of process which we have at present are altogether unnecessary.

5179. *Mr. Baxter.*—You mean the Small Debt, Debts Recovery, and Ordinary Court forms?—Yes. I think that the system of processes under the Debts Recovery Act might with advantage be abolished, except as to the form which it introduces, and which is practically the same as the Small Debt form, of obtaining decrees in absence cheaply. At the time of the discussion of the Debts Recovery Act, my opinion was that the only real grievance which the mercantile bodies who agitated for it had to complain of, was the expense of obtaining decrees in absence. I would recommend that all cases should originate as they do in the Small Debt Court now, and that the expense should begin only when it is found that the cases are to be defended.

5180. You mean that cases should begin with a writ of summons, such as there is in the Small Debt Court?—Yes, so that any person can obtain a decree in absence without employing an agent at all, if he chooses.

5181. *Mr. Campbell.*—You would require the debt to be identified by some schedule?—Yes, there could be no *res judicata* otherwise; but that is done in the Small Debt Court by an account being produced, or a statement being introduced into the summons.

5182. *Mr. Baxter.*—A decree in absence could be got at very small expense?—I see no reason why it should cost above 5s. or 10s., apart from the expense of an officer serving the writ at a distance.

5183. *The Chairman.*—If appearance were made, what course would the case take?—My feeling is in favour of the present system of records. I am aware that it is abused; but if we had a higher class of judges, and if it was impressed on them that it was their duty to check any abuse of it effectually, I think the present form of process is simple and good.

5184. *Mr. Baxter.*—When you speak of abuse, do you mean that records are made up in the long form by condescendence and answers, when they might be made up under the short form?—I am not in favour of the short form of record; but I think records at present are often too long.

5185. *The Chairman.*—Too verbose?—Yes; and as entering too much into detail.

5186. *Mr. Campbell.*—Then you disapprove of the minute of defence?—I think it is clumsy. There might be a more articulate statement on both sides, without any increase of the length.

5187. *Mr. Baxter.*—But you find you don't have that in practice?—In practice the records are often made unnecessarily long; but we often have them such as there could be no objection to. The present form of the summons is also very awkward, in introducing the grounds of action as a parenthetical clause in the conclusions.

5188. *The Chairman.*—You think the small debt form the better form?—If you introduce anything beyond an account, that is liable to the same objection; but it might be very easily modified by introducing into the body of the summons, and before the conclusion, such a statement as is now introduced parenthetically in the conclusion.

5189. *Mr. Campbell.*—Or it might be done by a schedule appended to the summons?—Yes, it might be indorsed on the summons.

5190. *The Chairman.*—Do you see any mode of checking the prolixity of practitioners in making their statements?—I would suggest that the Sheriff should in all cases, when he closes the record, indorse on it what length of a paper ought to be allowed. I don't mean that he should interfere with the paper, but that he should state how many sheets should be allowed in the taxation of the account.

5191. Do you think that the closing of the record is the proper time for that? Would it not be better after he has heard the use that parties are to make of it?—It is more immediately under his notice when the record is closed. Afterwards his mind is more directed to the decision of the case.

5192. But if he does it when the record is closed, he must in some degree anticipate what is to be the case, and what are the reasons for the introduction of the statements?—I don't think it is material at what stage he does it, and perhaps it would be better at the end of the case; but I think a great deal might be done in that way if Sheriffs felt more that they were responsible for the proper conduct of business in their courts than they appear to do at present.

5193. And if the practitioners aimed at brevity?—If the Sheriffs addressed themselves to that, I think practitioners would very soon take up a tone that they are not encouraged to take up at present.

5194. *Lord Barcaple.*—Is it the fact that there are not many cases in the Sheriff Court in which a somewhat detailed explanatory statement is desirable?—The only reason for that is to give notice to the opposite party of what you are going to prove; and I think, as a rule, if you state distinctly and accurately the grounds of action, that would be sufficient. My objection does not point at records in the Sheriff Court only. I have seen quite as bad records in the Supreme Court as any I ever saw in the Sheriff Courts.

5195. I suppose you don't find cases occurring frequently in which any detailed statement is really beneficial?—There are some cases where you require necessarily to go into more detail than others; but my remarks point at this, that detail is gone into in most cases to a greater extent than it ought to be.

5196. *The Chairman.*—The record being closed, a proof would be allowed if that were required?—Yes.

5197. And that would stand over till the judges of appeal came?—Yes, if that plan were adopted; but I am giving the opinion as to taking the proofs in the way I have suggested, with the reservation that it would depend on whether the judges could do the amount of work.

5198. Do you think that appeals should continue to exist at the stages at which appeals are now competent?—I think there should be no appeal till final judgment.

5199. You would have no appeal on any preliminary matter?—No. The only matter in which an appeal might be necessary would be as to the admission or rejection of evidence; and I am inclined to think that appeals of that kind should be as much discouraged as possible, and of course no such appeal would be necessary if the case were tried by three judges, as I have suggested.

5200. Would you exclude altogether appeals on preliminary defences?—Until the final judgment; and I would be inclined to allow the summons to be amended at any stage, so as to obviate any merely technical objection, imposing always a sufficient fine for the default.

5201. Suppose an objection to jurisdiction, or an objection in point of law which would go to extinguish the action if it was sustained, would you exclude all appeal upon that till the end of the cause, and go to proof in the meantime?—If it was such an objection that it would render proof unnecessary if decided in a particular way, it might be advisable to have an appeal, although I am not sure that the ends of justice would not be better met by letting the party take his chance, and suffering for his wrong action.

5202. *Lord Barcaple.*—Do you think the party is not very apt to leave himself entirely in the hands of his agent in that matter?—The agent, of course, is responsible, and must take the consequences of his responsibility.

5203. But there is no remedy, I suppose, if he has

Henry Cockburn Macandrew.

made an error in judgment?—No, if it is a reasonable error.

5204. *The Chairman.*—Do you think that in all cases where an investigation of fact is to take place, that should take place before there is any judgment upon a preliminary point at all?—Certainly before any judgment on merely technical objections, which could be obviated by an amendment of the summons.

5205. But otherwise?—Otherwise, I think it might be advisable that if the objection were such that decree of absolvitor must pass if it is well founded, an appeal should be allowed before proof.

5206. You think that in that case it would be right for the Sheriff in the first instance to decide upon that point?—I think so, because that would render unnecessary the great expense of a proof which might be useless.

5207. *Mr. Campbell.*—According to the form of process which you recommend, I understand that whenever the Sheriff-substitute, or the judge in the first instance, considered that the case required to go to proof, it would be remitted from his court to that of the three judges?—The three judges would then sit very much as a jury.

5208. But would that not be a position of matters in which any defence of a prejudicial character might be disposed of before the actual diet of proof was fixed?—That is what I said in answer to Lord Colonsay's last question; and, of course, if appeals could be had as frequently as I suggest, the objection that exists to the number of appeals would be in a great measure removed.

5209. *Mr. Shand.*—An objection to numerous appeals is, of course, the expense?—Yes, and another is the delay; but the delay would be obviated if we had the appeal court sitting once a month.

5210. The same purpose might be served supposing the Sheriff went to his jurisdiction once a month, as far as delay is concerned?—Yes.

5211. You are aware that at present it is competent to appeal when an order for proof or a remit is made?—Yes.

5212. Don't you think that is a valuable provision, as giving the right of appeal at a stage when considerable expense is about to be incurred?—I have said that I think an appeal should be allowed where the point would necessarily exclude proof.

5213. There are two points at present at which such an appeal may be taken—one when a preliminary plea is disposed of, and again when a proof is ordered?—Yes.

5214. Don't you think that the first of these might be advantageously done away with, making the power of appeal only at the last of these stages, so as to cover both?—Yes, I think the fewer appeals the better. I have seen a case in which there were thirteen appeals to the Sheriff before final judgment.

5215. *The Chairman.*—Were some of these in the course of leading the proof?—No; there was no proof. It was an action of multiplepoinding in which various questions arose.

5216. Perhaps there were thirteen parties?—There were only three parties.

5217. *Lord Barcaple.*—But you find that, practically, the number of appeals taken is a great grievance?—Yes; that makes the cases take three times as long as they otherwise would do.

5218. Might not many of them be dispensed with without any disadvantage?—Many of them are unnecessary, and are not pleaded before the Sheriff.

5219. *Mr. Baxter.*—Are they taken for the sake of delay?—Yes.

5220. *Mr. Shand.*—I think there are only five or six stages at which an appeal can be taken at present?—There are only two properly before final judgment, viz. on a preliminary defence, and on the order allowing proof.

5221. Also at the close of the proof?—Yes, if objections are taken to evidence.

5222. And on the merits?—Yes.

5223. And a fifth is on the expenses?—Yes.

5224. Do you think that two or three of these might be done away with?—I think the appeal about the expenses might certainly be done away with. It may not be possible to get rid altogether of the appeal in evidence if you are to have review on evidence; but appeals on that should be discouraged as much as possible.

5225. *Lord Barcaple.*—As a general rule, do you find that the proof causes a very large portion of the whole expense of the cause?—A very large portion—the expense of witnesses.

5226. *Mr. Campbell.*—And time?—Yes.

5227. *Lord Barcaple.*—But the expense of the proof is a very large portion of the expense of the cause?—Yes, but the expense of witnesses attending a proof cannot be got rid of by any system.

5228. *Mr. Campbell.*—A very large proportion of the cases tried in the Sheriff Court are disposed of after proof?—It was my impression that the proportion was larger than it appears to be. I got from the Sheriff-clerk-depute a few days ago 27 accounts of expenses; I asked him to pick out accounts in which decrees had been extracted in the course of this year; he sent me 27, chosen at random, and which were all he could lay his hands on, and in only 5 of these were there proofs. The payments to witnesses alone in these amounted to about one-fifth of the whole expense.

5229. Assuming that proofs continue to be taken by the judge in the first instance, are you of opinion that it would be an advantage to give him a permissive power to employ, where he could obtain it, the assistance of a shorthand writer?—I think it would be an advantage to have the proof taken by a shorthand writer.

5230. *Lord Barcaple.*—With what view?—The appeal judge would get a much more correct view of the evidence than he can do by the Sheriff taking it down shortly.

5231. *The Chairman.*—Would you let the Sheriff dictate what was to be put down, or would the shorthand writer take down every question and every answer?—I think the most satisfactory way would be, if competent shorthand writers could be got, to take down question and answer.

5232. Would that not lead to an immense bulk of evidence, or rather of written matter?—That is the only objection to it, and it is an objection.

5233. It would be difficult to find out in three or four printed pages the only point that is involved?—That might happen.

5234. How would it answer if the Sheriff were to dictate in the hearing of the parties what the shorthand writer is to put down?—I think the objection to that would be, that there would be endless disputes between the Sheriff and the agents as to what should be put down.

5235. Proofs taken on commission are dictated in that way to a clerk, the evidence is then read over to the witness, and signed by him?—Yes. Proofs on commission take very much longer than proof before the Sheriff.

5236. When the Sheriff takes the evidence himself, he takes his own notes, and there is no reading over and no signing?—The Act provides that the evidence should be read over, but it is very often not read over.

5237. *Mr. Baxter.*—You don't know what the Sheriff has taken down until the end?—The Sheriff at Inverness is exceedingly accommodating, and tells us from time to time, at any important point, what he is taking down, so that we cannot complain of any practical inconvenience beyond the fact that it is a mere summary of the evidence that goes to the appeal judge.

5238. *Sir Edward Colebrooke.*—Does he read the evidence to you after he has taken it down?—He is bound to do that, unless the parties dispense with it, which they very often do.

5239. *The Chairman.*—And if they have confidence in the Sheriff's way of taking it down, they may be disposed to dispense with it?—Yes; and we almost invariably do so.

5240. *Mr. Baxter.*—What is your opinion as to extending juries to the Sheriff Court?—I have heard that very much discussed, but I would decidedly object to it. There is one suggestion that has been made with reference to proofs, viz., that the evidence should be taken down by a shorthand writer, and that parties should be heard, and the judgment on the facts given immediately, and that the notes should only be extended in cases where there was an appeal on the matter of fact. That might be a good system.

5241. Would that not require the shorthand writer to remain during the discussion upon the evidence?—Yes; that would be necessary, but it would not occupy very much more of his time.

5242. As to the matter of review, you have expressed your opinion already. The first question is, whether there should be review within the Sheriff Court itself?—I think that a great evil would be done if we had not a review, I don't say within the court, but as cheap as we have it now; and if such a court as I have mentioned were not constituted, I think it would be a great improvement if single appeal judges were confined to large districts, with largely increased salaries, and confining themselves to appeal business.

5243. *Mr. Shand.*—What advantage would you expect from that arrangement over the present?—That we would get a higher class of gentlemen as a rule to undertake the office of Sheriff.

5244. In consequence of the higher salary?—Yes.

5245. *Mr. Campbell.*—You think there should be five districts?—That number would not give to any one district more than the Sheriff of Lanarkshire does at present.

5246. *Mr. Shand.*—Does not the present arrangement secure as Sheriffs those in the highest practice at the bar, except the four Crown officers?—There are a few Sheriffs who are men of the highest standing in the profession; but the great majority are not.

5247. Under the present arrangement, don't men of the highest practice at the bar accept the office of Sheriff?—They do; but there are not enough of them.

5248. Do you think that men in such practice would accept such an office if they were obliged to give up practice altogether?—I think that the ordinary rule in all cases would follow, that if you make it worth the while of good men to take these offices, good men would be found.

5249. Would you expect that men in the highest practice would accept these offices?—I would expect that more men of great ability would go to the bar than go at present.

5250. *The Chairman.*—Have you any observations to make on the mode in which costs are charged, or the scale of them?—I think there might be a revisal and readjustment with advantage, but I don't think that the remuneration to the Sheriff Court practitioners at present is too much; in fact, I don't think it is sufficient.

5251. Do you approve of the system on which remuneration is given under the Certain Debts Recovery Act?—Most decidedly not. I think it is quite unjust. It is making one litigant who has a light case pay for another who has a heavy one, because the charge is the same in all cases.

5252. Is it in the interest of the litigants that you object to it, or is it in the interest of the agents?—I object to it principally in the interest of the agents, but also in the interest of the litigants with light cases; and in the long run I conceive that what is justice to the agents must be of advantage to the clients.

5253. And the equity of the principle?—Yes.

5254. *Mr. Harrison.*—You are aware that litigants generally attach great importance to obtaining speedy decisions?—I am not aware that there is any great general complaint as to that. There are occasional complaints, and there are very unnecessary delays in a great many cases.

5255. Does the Debts Recovery Act, fixing *ad valorem* fees, not make the interest of the procurators the same as that of the litigants with reference to avoiding these delays?—I don't think so; it is quite the reverse.

5256. When the maximum expense is fixed, is it not the interest of the procurator that as little delay as possible should take place?—I think not; because if the agent has anything else to do, he naturally postpones the case that pays him worst.

5257. Are you aware that the *ad valorem* principle has been in operation in the County Courts in England?—Under a very different system from that established by the Debts Recovery Act.

5258. What is the difference?—The difference is, that the case in England is tried at one sitting.

5259. Does that apply to all cases in which there are *ad valorem* fees?—So I understand. The diet of trial is appointed, and the case is then tried and decided. Under the Debts Recovery Act there is a sort of a record, and there may be as many adjournments as need be,—a separate diet for making up the record and for the trial, an appeal to the Sheriff and to the Court of Session.

5260. Do you think that if the system in England were introduced into Scotland, the *ad valorem* fees would then work well?—I think the *ad valorem* fee is unjust in principle, and should not be introduced anywhere. The remuneration should be with reference to the amount of work done.

5261. *Mr. Adam.*—Is the Debts Recovery Act in point of fact much used in your county?—Very little. I have only had in my own practice three litigated cases under it.

5262. Do you think that the fact of the costs being paid as they are has anything to do with that?—I think agents don't think them worth their while, and would rather not have the cases.

5263. Do they discourage the use of the Act?—I don't know that they can do that, because we are compelled to adopt it when the cases arise.

5264. *The Chairman.*—Is the Sheriff Small Debt Court much resorted to?—There is a considerable business in the Small Debt Court in Inverness-shire.

5265. *Sir Edward Colebrooke.*—You don't desire to see jury trial introduced into the Sheriff Court?—Certainly not.

5266. You are averse to it even with the consent of the parties?—I think a jury is a very unsatisfactory tribunal for determining facts. The opinion of my brethren, almost without exception, coincides with my own, that jury trial should not be introduced into the Sheriff Court, and in fact that it should be abolished in the Court of Session. I think there is a general concurrence of opinion to that effect.

5267. *Mr. Clark.*—What do you find to be the expression of opinion on that matter of the clients who consult you?—I don't know that there is any general opinion among men who have had no experience.

5268. But when they come with their cases to you?—I tell my clients, as I believe all my brethren do, that if they go to a jury it is impossible to give them any sound opinion as to the result.

5269. Do you know whether there is any public feeling on the subject in your district?—I really cannot say that there is any public opinion about it, beyond a dread of the expense.

5270. *Sir E. Colebrooke.*—Your objection is chiefly to the uncertainty of the tribunal?—Yes.

5271. And the expense?—The expense in the Court of Session is enormous at present.

5272. But that would not apply in country places?—It arises in great measure from witnesses being brought from a distance, and from very large fees being paid to counsel, which would not apply if the trials were conducted in the Sheriff Court.

5273. *Mr. Webster.*—But still you object to the principle of a jury, as being an unsatisfactory way of ascertaining either fact or law?—So far as I can ascertain, it is the opinion of all who have had any experience of them, that they are unsatisfactory; and it stands to reason that twelve men chosen at random cannot be good judges of evidence.

5274. *Lord Barcaple.*—Do you know if there has been much saving by the abandonment of juries in a

Henry Cockburn Macandrew.

large number of cases where proof is now led in Edinburgh?—I believe the expense of a trial before the Lord Ordinary is very much less than a jury trial.

5275. Have you experience in that matter?—I have not much personal experience of it.

5276. *Mr. Clark.*—Have you reason to know that it is the fact?—Yes.

5277. *Lord Barcaple.*—Do you mean that you actually know that it is so, or that you have that impression?—I have heard it stated by people engaged in cases that it is very much less.

5278. There will be the same expense of witnesses?—The witnesses would cost the same; but perhaps there may be this in favour of it, that parties don't bring so many witnesses.

5279. Can you explain why?—Because they have more confidence in the judge who sits and takes the evidence.

5280. *Mr. Clark.*—And the jury part of the case is not brought up?—The case is not got up for popular decision.

5281. *Lord Barcaple.*—Is a jury less likely to be worn out by a multiplicity of unnecessary evidence?—A jury is much more likely to have dust thrown in their eyes than a judge. I apprehend that nobody would attempt to throw dust in the eyes of a judge, while everybody attempts to throw dust in the eyes of a jury.

5282. *The Chairman.*—Have you anything to say as to the privileges of agents?—I think it would be an advantage if there was only one class of agents.

5283. All over Scotland?—All over Scotland, entitled to practise in all courts, and admitted after sufficient examination in Edinburgh.

5284. Admitted by the Supreme Court?—Under the regulation of the Supreme Court.

5285. If the privilege were so conferred, do you think it would be much taken advantage of by parties practising in other localities than that in which they reside?—I don't think so, to any great extent. There might be cases in which they would practise in the Court of Session, if some modification of the etiquette of the bar was introduced, and if practice could be carried on by an agent in the country, corresponding directly with counsel in Edinburgh; and I think that the counsel's clerk might do nearly all that is at present done by an Edinburgh agent.

5286. What would you say as to the custody of processes and documents?—If the agent is subject to the Court of Session, and is an agent in the Court of Session, I don't see that the distance that he is at from Edinburgh would be matter of very great consideration, and the counsel's clerk might borrow the process. It would very seldom be necessary to transmit it to the country.

5287. The country agent, if he carried on the business, would probably require the process as often for that purpose as the Edinburgh agent would require it in carrying on the business in Edinburgh?—But the Edinburgh agent requires it very often merely to hand it to counsel.

5288. And you think the counsel's clerks could do that? That is putting them back partly into the position which they occupied a century and a half ago?—I may mention that one of the grievances which country agents have to complain of in the Court of Session is, that we are obliged to put the case into the hands of an Edinburgh agent, who is the only recognised agent. We are allowed no remuneration for our services; and the Edinburgh agent, as a rule, really gives very little assistance, and takes no responsibility. As a rule, they merely hand papers from the country agent to counsel, and in many cases they will not even advise or give you their own opinion on the case.

5289. There is a rule of law against participation in profits between the country agent and the Edinburgh agent?—Yes.

5290. If that were removed, do you think it would give you relief in some degree as to what you complain of?—I think it would be better that the country agent should be recognised as the agent, and paid for what he does. I would not be in favour of the English principle.

5291. *Mr. Clark.*—Which is?—Giving the country agent a share of the profits made by the London agent.

5292. *Mr. Webster.*—You have alluded to the mode in which business is conducted by the Edinburgh agents. I think it right to ask the extent to which you have had an opportunity of seeing business done by Edinburgh agents doing nothing excepting handing papers to counsel which they get from the country agent?—In this matter I am not speaking from my own experience alone. I stated what I said as a grievance that I find complained of by my brethren who have had experience, and which I can corroborate by my own experience.

5293. Is that applicable to cases originating in the Court of Session, and conducted there from first to last; or has it reference to the mere advocation process?—It has reference to all cases where the instructions are originally given by the country agent.

5294. For all kinds of processes?—In all cases of difficulty, I notice that Edinburgh agents at once resort to counsel, and take no responsibility either as to decision or advice.

5295. That is, those of the Edinburgh agents that you have been in communication with?—Not all of them. I have received very great assistance from some of them; but what I have stated is a general complaint in my branch of the profession.

5296. *Mr. Clark.*—You are not making it a universal complaint, but only a general complaint?—Yes; there are exceptions.

5297. *Mr. Murray.*—Are the country agents accustomed to decide matters of great difficulty without reference to counsel?—In all matters connected with cases in our own courts, we do all the work. It is very rarely that the opinion of counsel is taken in Sheriff Court cases, or any assistance got from them.

5298. Might it not be an advantage sometimes if the opinion of counsel was taken?—No doubt, if the case could afford the expense of taking the opinion of eminent counsel, it might be a great advantage; and if it were commenced as a rule, I have no doubt that we would very soon get into the practice of Edinburgh agents, of throwing all the responsibility on the shoulders of counsel.

5299. *Mr. Webster.*—You spoke of a modification of the etiquette of the bar: did you mean to permit the agent to supersede counsel in a discussion or in the preparation of papers?—No; I explained what my suggestion meant. It was, that the agent residing in the country should correspond directly with the counsel, or with counsel's clerk, instead of employing an agent resident in Edinburgh.

5300. *Mr. Murray.*—But an agent in the country at present may lay a case before counsel without the intervention of an Edinburgh agent?—Yes; but he cannot conduct any step in the Court of Session without employing an Edinburgh agent.

5301. *The Chairman.*—Would you allow charges to the counsel's clerk for correspondence?—Certainly; he must be paid.

5302. Then he becomes a sort of agent in the cause?—For merely formal steps.

5303. *Mr. Murray.*—Suppose he borrowed a process for the country agent, and the country agent did not return it, would you allow caption to go out against the counsel's clerk, or against whom should it go out?—I think the country agent would have to become responsible in that case.

5304. *The Chairman.*—While the counsel's clerk, who borrowed the process and gave the receipt, would not be responsible?—It would not be fair to make him responsible, any more than it is to make our clerks responsible now when they borrow processes.

5305. *Mr. Webster.*—You are aware that in Aberdeen, Glasgow, and some other towns, the procurators have exclusive privileges?—Yes.

5306. What is your opinion as to the maintaining or putting an end to these exclusive privileges, so far as regards practice?—I have stated that I think it

would be advisable that there should be only one class of agents, entitled to practise all over Scotland, and in any court.

5307. *The Chairman.*—In Inverness-shire is there much judicial business, or any, done by Justices of the Peace? Do they hold Small Debt Courts?—They do, once a month, but very little business is done.

5308. They hold these courts in the town of Inverness?—Yes; and I think that might with advantage be abolished.

5309. Do you think there is any evil attending their existence?—I think so. There are what are called Justice of Peace constables, who really have that little practice in their hands; and it depends entirely on the clerk whether injustice is done or not.

5310. The Justices of the Peace trust to their assessor or clerk?—Entirely.

5311. But are they much resorted to?—Very little.

5312. In outlying districts, do you think it expedient that that jurisdiction should exist for settling disputes between country people?—I don't think that any jurisdiction of that kind should be extended to Justices of the Peace.

5313. You don't think it should be allowed to remain with Justices of the Peace?—I don't think so.

5314. You think it should be all absorbed by the Sheriff?—Yes; one strong reason is, that it is difficult to get hold of a Justice to hold a court on any matter, even where they have jurisdiction at present, such as poaching complaints, and cases of that kind.

5315. I was referring to small debt questions?—Even there it is difficult to get Justices to hold a court.

5316. In regard to licensing, do the Quarter Sessions hear appeals from the magistrates' decisions?—I think that is a system that might with very great advantage be improved.

5317. What would you suggest?—I would suggest that it should be left entirely in the hands of the Excise, with very strict regulations as to deprivation in the case of breach of certificate.

5318. *Sir E. Colebrooke.*—Practically, have not the Excise given licences in every case?—Yes; and I think that would be an advantage.

5319. Then you are against putting any restriction on licensing?—Except on the abuse. I would make very strict regulations as to breach of certificates.

5320. Are you aware that in England, where the Excise licences are given for beerhouses, they are given almost indiscriminately, with very little check, upon the application of two or three householders?—Yes; I don't know whether that is found to be a nuisance or not, but I think very great injustice is often done by the licensing magistrates.

5321. By a capricious exercise of their powers?—Excessively capricious. If a magistrate happens to have strong views on teetotal questions, he takes every opportunity of refusing a licence, and that often practically amounts to depriving persons of their means of subsistence.

5322. *Mr. Harrison.*—Are you aware whether in your district it is the custom of applicants for licences to canvass the Justices?—Yes.

5323. *The Chairman.*—Do they canvass the magistrates?—I believe that is invariably done. They go to them beforehand; and if it is a case of great importance, there is a strong canvass to get up a sufficient number of Justices for the appeal court.

5324. *Sir E. Colebrooke.*—Both for and against in some cases?—Of course the magistrates don't as a rule do it, but I have known them do it.

5325. *The Chairman.*—Do the magistrates of Inverness hold any Burgh Court for civil business?—The only cases that ever I have known in the Burgh Court were removings from burgh subjects.

5326. *Mr. Clark.*—Are these frequent?—Not now. They are frequently taken to the Sheriff.

5327. *Mr. Webster.*—Are you in favour of abolishing the civil jurisdiction of the bailies?—Certainly.

5328. *The Chairman.*—Have you any Dean of Guild in Inverness that exercises jurisdiction?—We have a Dean of Guild, but he holds no court.

5329. Who exercises the jurisdiction?—I don't know what his powers may be, but the Dean of Guild exercises no functions.

5330. Is there a special Police Act for Inverness?—Yes.

5331. *Mr. Clark.*—Who give decrees of lining?—I never heard of such a thing in Inverness. I never heard of a process in the Dean of Guild Court there.

5332. Who give such decrees in Inverness as are equivalent to the ordinary decree of lining in the Dean of Guild Court?—Since I went into practice, all these questions have come before the Sheriff.

5333. *Mr. Murray.*—Does a proprietor within the burgh commence to repair his tenement without any warrant?—Yes.

5334. Just at his own hand?—Yes.

5335. *The Chairman.*—Does any evil result from that?—I don't think so.

5336. Anybody who feels aggrieved may complain?—Yes. There may be a little litigation arising out of that, which might have been saved; but I don't think there is any serious inconvenience felt.

5337. *Mr. Webster.*—Do you think the Commissary Court should be kept up as a court, with a separate staff from the Sheriff Court and Sheriff-clerk?—I don't see any advantage in the separation, except that it supports a Commissary-clerk.

5338. *Mr. Baxter.*—Have you a separate Commissary-clerk?—Yes.

5339. *Mr. Murray.*—Do you see any objection to a party being entitled to obtain confirmation of personal estate in Edinburgh as well as in the country?—I see no great objection to it, but no advantage that could arise from it. I presume that would only occur where the agent originally employed is resident in Edinburgh.

5340. When a person dies domiciled in a particular county, confirmation of his personal estate can at present only be obtained in that county. Do you see any objection to make the principle which is applicable to a service to heritable estate, applicable also to personal estate, so that an executor might obtain confirmation either in the county in which the party died domiciled, or in Edinburgh, as the *commune forum*?—I don't see any great objection to that. It might be inconvenient if there was a competition for the office of executor.

5341. In what way, if proceedings had commenced before one or other court?—If the proceedings commenced in Edinburgh, and there was a contest, it might be more convenient that the litigation should go on in the district than in Edinburgh, assuming the Edinburgh Commissary Court to have no higher status than that in the country. The only advantage that I can see in that would be to give business to Edinburgh agents, which would at present come to the Sheriff Court practitioners.

5342. *Mr. Baxter.*—There is not much need for that, I suppose?—I don't think so.

5343. *Mr. Murray.*—Suppose it was a convenience to the public?—If it can be shown to be a convenience to the public, of course all other interests must give way; but I don't see that it would be any convenience.

5344. *Mr. Shand.*—What is the opinion in your district as to the administration of the Justice of Peace Court in game cases?—I think that ought to be taken from them. It ought to be confined to the Sheriff.

5345. Is that the opinion in your district?—Yes.

5346. In regard to licences being granted by the Justices, does the present system to any extent secure that the licences shall be given in accordance with the public opinion of the district?—Only to this extent, so far as public opinion can be brought to bear on the individual magistrates at the time.

5347. Do you not find that public opinion is brought to bear on them?—In our district the teetotal body generally send a deputation to the magistrates before each licensing court, to impress on them the duty of limiting the number of licences as much as possible.

5348. Is the result, do you think, that the licensing is carried out in accordance with public opinion or

Henry Cockburn Macandrew.

against it?—I think the opinion brought to bear is the opinion of the teetotal body, who take the trouble to exercise it, and the rest of the public are apathetic.

5349. Is the licensing not in accordance with public opinion?—The result is, that the magistrates have adopted a kind of rule, that they will take every opportunity of reducing the number of licences, and that power is often exercised in what appears to me to be a capricious way.

5350. So as to be injurious to individuals?—Yes.

5351. Is it against the view of the majority of the public?—The view of the majority of the public is against the lower class of public-houses that we have at present. The view of all sensible persons must be so; but I don't think there is any tendency to secure a better class under the present system. On the contrary, I think that the tendency is, by limiting the number, to make the keeping of public-houses a monopoly, and that all the evils of monopoly result.

5352. Does any system occur to you that would be better?—I would be inclined to leave it in the hands of the Excise, and to make it open to competition, like all other trades.

5353. *Mr. Adam.*—Does the Sheriff-clerk of your county do his duty personally?—No. He is not obliged to reside in the county.

5354. *Mr. Baxter.*—Does he reside in the county?—Not usually.

5355. *Mr. Clark.*—Inverness-shire is divided into four districts?—Yes.

5356. Are these districts observed with relation to civil processes?—No; civil processes from all the districts are brought at Inverness, and we have never had a decision as to whether that is competent or not.

5357. Is the bulk of the litigation from the other districts than the Inverness district disposed of in Inverness?—The great bulk of litigation from the county is disposed of at Inverness—out of all proportion to the comparative size of the district; but as to the number of cases arising in other districts which are tried in Inverness, I cannot say.

5358. The Inverness district must contain the bulk of the Inverness work; but is the bulk of the work of the other three districts disposed of in Inverness?—The amount of litigation at Inverness, as compared with the other districts, is out of proportion to the population; but whether that is caused to any great extent by business coming from the other districts, I cannot say.

5359. But you do often find cases coming from the other districts at once to the Inverness district?—Yes, very often.

5360. *Sir E. Colebrooke.*—Does the opinion which you have expressed as to the tendency to reduce the number of public-houses apply to country or town districts, or both?—It applies to both.

5361. You think that both in the country and in the town the present tendency is to reduce the number of licences?—Yes; the burgh magistrates are Justices of the Peace for the county, and always sit in the county licensing courts, and they very often compose the bulk of it.

5362. You think the magistrates' jurisdiction in poaching cases should be taken away from them?—I think the present system is not satisfactory; that is the feeling of the public, and it is the feeling of all my professional brethren.

5363. That they pass more severe sentences than the Sheriff would?—Sometimes the one, and sometimes the other. I have heard a Justice refuse to convict on the evidence of one witness, on the ground that the Bible provides that there shall be two, and that it is higher authority than the Act of Parliament.

5364. *Mr. Harrison.*—Is the public feeling that the Justices in such cases are acting as judges in causes in which they are themselves specially interested?—I don't think there is any feeling as to proprietors sitting in the court. They very seldom do. There is no feeling on that point, so far as my experience goes.

5365. On what do you ground your desire that the power should be taken from the Justices?—Because they sit irregularly; and, in fact, the judgment is the judgment of their clerk, except in rare cases, and in these they generally go very far wrong.

5366. *Mr. Shand.*—Do you know that many Justices who are proprietors have expressed a wish that that jurisdiction should be taken away from them?—Yes, I believe they have.

SATURDAY, 9TH JANUARY 1869.

Members Present:—

LORD COLONSAY.	JAMES CAMPBELL, Esq.
THE LORD JUSTICE-GENERAL.	GEORGE HARRISON, Esq.
THE LORD JUSTICE-CLERK.	JAMES ADAM, Esq.
LORD BARCAPLE.	A. B. SHAND, Esq.
THE LORD ADVOCATE.	THOMAS GRAHAM MURRAY, Esq.
SIR EDWARD COLEBROOKE.	JAMES WEBSTER, Esq.
EDWARD S. GORDON, Esq., Q.C.	JOHN B. BAXTER, Esq.
DR. HUGH BARCLAY.	ADAM PATERSON, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

Horace Skeete.

HORACE SKEETE, Esq., examined.

5367. *The Chairman.*—You are a practitioner before the Sheriff Court at Perth?—Yes; and also in Forfarshire.

5368. How long have you been a practitioner?—Seventeen years.

5369. In both places?—Seventeen years in Perth, and about ten in Forfarshire.

5370. You qualified as a member of the Society of Procurators in Perth?—I did.

5371. And the same in regard to Forfarshire?—The same.

5372. You served an apprenticeship, I suppose, before entering at Perth?—I served an apprenticeship at Perth.

5373. Did that apprenticeship qualify you, so far as apprenticeship was concerned, for entering in Forfarshire?—It did.

5374. *Dr. Barclay.*—Were you not also in Glasgow for some time?—I was four years in Edinburgh, in the offices of Hope & Oliphant, Mr. T. G. Murray, and Tods & Romanes. I was also for four years a principal clerk to Bannatynes & Kirkwood in Glasgow.

5375. *The Chairman.*—What is your opinion as to the constitution of the Sheriff Court, as consisting of the Sheriff and his substitutes?—In reference to the Sheriff-substitutes, I think it is extremely important

that their status should be raised, by giving them higher salaries than they have at present. We have in the country a good many inexperienced Sheriff-substitutes; we get them from Edinburgh. The salary is not large, and therefore it is not possible to get men of first-class ability; so that we have frequently gentlemen as Sheriff-substitutes who we think have not sufficient experience for the office. There are many exceptions to that rule. There is a strong feeling in our body, that if the Sheriff-substitutes' salaries were raised, we would get men of a higher status, and that would be a very great improvement to our courts.

5376. What body do you allude to as 'our body'?—The Society of Procurators in Perth. Procurators themselves are competent to hold the office of Sheriff-substitute; but they are seldom or never appointed. There are, however, some exceptions; and we find that these exceptions, generally speaking, form the best judges. If the salaries cannot be increased, we think that better judges could be got in Scotland from the procurators than are at present got, with these low salaries, from Edinburgh. In reference to the appeal from the Sheriff-substitute to the Sheriff-principal, I think that if Scotland were divided into certain districts, with two judges for each district, sitting as an appeal court, it would be a great improvement on the system of the single appeal judge which we have at present.

5377. Have you thought of any arrangement as to the places where these judges would sit, and the number of times they would visit each place?—That is a matter of detail which would require to be marked out according to the statistics which might be got of the number of appeals from the various districts. Probably four districts would be sufficient; and I think the judges ought to sit at such places, and as frequently as may be found necessary for doing justice to the district.

5378. Do you think that by that means there would be obtained, in the first place, a better court, and in the next place, greater expedition in disposing of appeals?—I do.

5379. Do you think the cost of disposing of appeals would be diminished?—The cost in the Sheriff Court at present is exceedingly small, and I don't see how it could be diminished. It is very small indeed; and on that account it is greatly valued.

5380. It is next to nothing?—It is.

5381. It is a very simple form of appeal. Would you retain the same simplicity of form if there was such an appellate court as you have suggested?—I would.

5382. Would you have the appeal disposed of upon oral pleading or upon written pleading, or upon one or other, according to circumstances?—In most cases I would have it upon oral pleading; but there might be exceptional cases in which it might be necessary to adopt written pleading.

5383. Such as?—A case of interdict that was in a great hurry, where it was absolutely necessary, and for the interest of the parties, that there should be as speedy a decision as possible. In such a case, and probably with the consent of the Sheriff-substitute, who ought to be a good judge in such matters, I would allow a written pleading.

5384. How would the written pleading expedite the proceeding?—It would depend upon the number of times that the judges sat in the district. If they sat very frequently, a written pleading might not be necessary at all; but if the intervals between their sittings were lengthy, probably the written pleading might be quicker than the oral pleading. That, however, is a matter of detail, and would be determined according to the number of times the judges came to the place.

5385. Suppose that there was written pleading, how would you carry it through? Would you have a reclaiming note, and an answer to it?—I think so.

5386. And would you transmit that to the place where the judges were or might be expected to be?—I think it would be desirable that there should be some one in Edinburgh, such as an appeal clerk, to whom it might be sent. An arrangement might be made whereby the clerk could always know where the judges were, if they were on circuit, and he could send it to them.

5387. Do you contemplate that the residence of the judges should be chiefly in Edinburgh?—I think so. I think that would be better.

5388. Do you think they ought to be in attendance on the Supreme Court when they are in Edinburgh?—I think they ought not. I think they should have such a salary as would be amply sufficient for them.

5389. You think they ought not to practise?—I think they ought not to practise.

5390. *Mr. Baxter.*—That is what you mean by attendance?—Yes.

5391. *Mr. Campbell.*—But they would have the benefit of the professional society of Edinburgh, and of the libraries and other privileges?—Yes.

5392. *The Chairman.*—And if they chose to be present in court to hear the proceedings, I suppose you would think that no disadvantage?—I think it would be an advantage.

5393. *Mr. Paterson.*—In what respect do you consider that practising would be a disadvantage?—I think, when a man becomes a judge, the sooner he forgets that he ever was an advocate the better.

5394. And you contemplate that they would have a good deal to do?—Yes; and there is another reason, viz., that a man's practice necessarily comes into competition with his duty as a judge. In the one case he has a fixed salary, and is sure to get it; in the other case, unless he attends to his practice, he is not sure to get it; and in most cases there can be no doubt as to which he would give most attention to.

5395. *The Chairman.*—Human nature, you think, would lead him to do that?—I think so.

5396. Have you considered what finality, if any, should be attached to the judgment of the Sheriff-substitute, and what to the judgment of the appellate court?—In cases not exceeding £50, I think, if the three judges were unanimous, their decision should be final; but if one differed, there should probably be a right of appeal.

5397. You mean that if the two appeal judges were to affirm the judgment of the Sheriff-substitute, that should be final?—Yes.

5398. Up to £50?—Yes.

5399. But if they either differed from the substitute, or differed from each other, you think there should be a right of appeal?—I think so.

5400. Do you apply that both as to fact and law?—I think so. I think it should apply to both.

5401. Do you think the Sheriff-substitute should dispose of the facts in the first instance, and how?—There is considerable difficulty in that; but if it was possible to get the three judges to sit together as a jury, I think that would be the most satisfactory disposal of the facts of the case. It would avoid the necessity of taking down the evidence at all, and great expedition would be got; and I think that three lawyers sitting as a jury would be extremely satisfactory to the public, and also to the profession.

5402. You would dispense with the taking down of the evidence?—I would; and if that were the case, I think there should be no appeal in point of fact to the Supreme Court.

5403. *Mr. Webster.*—Whether the three concurred or differed?—There could be no appeal, because there would be no record of the facts.

5404. *Mr. Campbell.*—Do you contemplate that they would frame something of the nature of a special verdict in each case after they had heard the facts?—I think they should, in the first place, make a series of findings in fact, and then they should apply the law to these facts. In that way there could be an appeal to the Court of Session on the law, and they could look at the facts found, and see if the law was properly applied.

5405. *The Chairman.*—As is now done in the Court of Session in reference to advocations where there has been a proof in the inferior court?—Quite so.

5406. Would you have any mode of correcting an erroneous conclusion in fact which might have been come to?—I cannot see that there could be any mode of doing that if what I have suggested were adopted;

Horace Skeete.

but the probability is that erroneous conclusions would not be come to by the three lawyers sitting as a jury. I think such cases would be extremely exceptional.

5407. *Mr. Adam.*—Might not one of the three judges take notes, as the judge presiding at a jury trial does now?—That is perfectly possible, but it creates great delay.

5408. *The Chairman.*—You would hold the opinion of the majority of these three to be conclusive upon the facts?—I would.

5409. And however erroneous that might be found to be, or whatever error might have crept into their views, you don't think it necessary that there should be any mode of correcting it?—I would have such confidence in the opinion of three educated lawyers, that I think a mistake would not arise once in a thousand times; and therefore I think it would be unnecessary to have any mode of correcting it, the chances of mistake would be so small.

5410. You are not in favour of a jury in the inferior court, I presume?—I am not.

5411. In the Supreme Court, when a jury has gone wrong on matter of fact, there is a mode of correcting that?—There is.

5412. You think this would probably be so accurate and perfect a tribunal, that there would be no occasion for correcting its decisions?—I don't think so, and I don't see any mode of correcting it without introducing such an element of delay and expense that it would probably not be worth having.

5413. The finality of the finding would depend on the amount at stake?—The finality of the finding in point of law.

5414. But, in point of fact, it would go to any extent?—To any extent.

5415. Whether it was matter of pecuniary measure, or matter of right of a different kind?—If the mode that I suggest were adopted, I think that would be necessary; but I don't say that the mode I suggest is essential, because if the jury of three were found not to be workable, we could keep matters as they now stand, the Sheriff-substitute taking a note of the evidence. I have no great objection to that myself. It is remarkably done in the court in which I act, and I am perfectly satisfied with it.

5416. In that case you would have the facts reviewed by the appellate court, upon his notes of evidence?—I would.

5417. *Mr. Campbell.*—Do you see any objection to the Sheriff-substitute taking advantage of the services of a competent shorthand writer, supposing that could be got, for the recording of the evidence?—The chief objection to that is the great expense. If the shorthand writer could read over his notes at the time to the witness, that would be more satisfactory. At present that is not done in the Court of Session. The witness is examined, and the shorthand writer is supposed to take down everything he says; the witness leaves the box, and afterwards you are dependent on the shorthand writer's notes, and there is no mode of correcting any mistake. At present, in the Sheriff Court, the evidence is read over to the witness; and if anything is wrong he corrects it, so that you know you have a satisfactory record of his evidence. Therefore I think the present mode is more satisfactory than a shorthand writer would be.

5418. But assuming it to be the fact that a competent shorthand writer can read his notes with the same facility as ordinary manuscript, and suppose that the Sheriff-substitute dictated to the shorthand writer that which he now writes down himself, and that the shorthand writer read over to the witness before he left the box that which had been so dictated, would that not prevent any of the mistakes you speak of?—I have a great objection to other people dictating the evidence of a witness. I think it far better that the shorthand writer should himself take down verbatim every word as it comes from the witness' mouth, and then it might be read over to satisfy the witness that it was correct. I think that would be much better than interposing another mind between the witness and the shorthand writer. If I could get over the difficulty about expense, I would have no hesitation in saying that a shorthand writer is the best of all modes of recording evidence.

5419. It might be necessary that the parties should consent to that course being adopted?—I know quite well that they would not consent in the country unless the expense were greatly reduced. The agents would not consent, because they know quite well that their clients are unable to stand the expense.

5420. Are you aware that the power is given as a discretionary power in the Debts Recovery Act?—I never heard of its being used.

5421. *The Chairman.*—According to the present mode of taking evidence in the Sheriff Court, does the judge dictate?—He writes it himself with his own hand.

5422. Does not the witness often utter a great deal that is not worth putting down, and that should not be put down?—That is quite true, but the judge takes it down in such a way as to give the complete and absolute meaning of it.

5423. Supposing the same judge that you now have, who does it to your satisfaction, were to dictate to the shorthand writer just what he takes down himself, would that not preserve the absolute meaning, without incurring the great expense of taking down every question and every answer, relevant or irrelevant?—That depends very much on the judge. If he was a good judge, it would be well done; if he was a bad judge, there would be constant objection taken to what he was dictating; the agents would differ as to what the witness said, and the witness might be biassed very much by the statements which the agents made.

5424. You said that your own judge at present takes down the true meaning of what the witness has said. My question was, supposing you had the same judge dictating what he now takes down to your satisfaction, would that not be a great saving of expense?—If I had the same judge, I would be quite satisfied, but I cannot tell how long I may have the same judge.

5425. *Mr. Webster.*—As to the constitution of a jury of three, would you contemplate that a case should be exhausted at one continuous sitting, or that, in the event of any complaint of surprise or the like by either party, there should be a power of adjournment?—As far as possible, cases ought to be disposed of at one sitting, like a jury trial; but if the court was satisfied that either of the agents had conducted his case in such a way as to create surprise, or to spring a mine upon his opponent in a matter which could not possibly be anticipated, I think there should be a power of adjourning.

5426. You would make that the remedy, rather than any review of the findings, after the court had made findings?—I think so.

5427. *Mr. Baxter.*—You stated your opinion that the finding of these three judges should be final in point of fact. But supposing that were not thought expedient, do you see any objection to the evidence being taken down by one of them, or by a shorthand writer?—I see no objection to that. We would then just be in the same position as we are at present.

5428. *The Chairman.*—When evidence was in use to be taken by commission, the commissioner dictated it to a clerk?—He did; and that was a highly objectionable system. I think it was about the worst system that could be set up for getting at justice. I recollect it quite well. The commissioners were generally incapable of dictating what the witness said, and it was always a paraphrase of what he said. If it was possible to dictate something else than what the witness said, they always did it. I had a great deal of experience in that, and I never once saw a commissioner dictate anything correctly.

5429. *Lord Barcaple.*—Do you refer to commissions issued from the Sheriff Court at Perth?—Yes, and in Glasgow, previous to the present practice.

5430. Professional gentlemen?—Yes.

5431. Have you had any experience in the framing of such special verdicts or cases as you say the three

appeal judges should frame after hearing the evidence?—At present all Sheriff-substitutes are bound, in pronouncing a judgment, to make certain findings in fact, and then findings in law applicable to the facts.

5432. They are bound to keep their findings in fact and their findings in law separate?—Yes.

5433. But I understood you to say that the findings to be pronounced by the appeal judges should be of the nature of what is called a special verdict or a special case. I suppose the question put to you was intended to imply this, that like a special verdict or special case, they should be findings of all the facts material to the cause?—Quite so.

5434. And of no facts not material to the cause, which were established by the evidence on either side?—Yes.

5435. That is to say, which would either be in favour of the judgment to be pronounced, or which one of the parties might afterwards say would be against the judgment. Now, have you had any experience in regard to the preparation of findings of that peculiar character?—No one can have experience of that except the judges.

5436. But you have no such findings in your court at present?—No, not exactly.

5437. Are you aware that there is extreme difficulty and delicacy in the framing of such a series of findings?—I have no doubt there may be considerable difficulty and nicety; but I think if a judge is fit to fulfil his office, he ought to be able to do that.

5438. May the three judges not differ very materially in regard to the framing of such a special series of findings?—Whenever a court consists of more than one, no doubt there may be difference, but that is incidental to all courts of more than one judge.

5439. Does the delicacy and difficulty of that operation not suggest some doubt as to the expediency of entirely removing all review in regard to the facts?—If there is to be review, there must be notes taken down, as is done at present. That gets rid of the difficulty entirely.

5440. Is it not obvious that the framing of such a series of findings must involve, or may involve, the determination of a great deal of law as well as fact; because all relevant facts established are to be inserted, and no facts except what are relevant, and the opinion of the appeal judges upon relevancy is an opinion upon a matter of law; but the result may be to affect their findings of fact, by either introducing or leaving out specific facts, which may be thought to be relevant, or may be thought to be irrelevant?—That is perfectly true. That might occur; and if it did occur, it would necessarily affect the result very materially.

5441. As a very general rule, are the questions of fact which arise in causes in the Sheriff Court, of a comparatively simple nature?—That depends on circumstances. The Sheriff has jurisdiction to any extent in all personal matters, and all sorts of cases come before him.

5442. Then you have pretty frequently questions where the facts are of a considerably complicated and detailed character?—We have.

5443. *Mr. Paterson.*—When you spoke of the three judges taking the evidence, that has not reference, as I understand, to the appellate jurisdiction, but it applies to the ordinary court?—Yes.

5444. You contemplate that the decision of a majority of the three judges should give finality to the judgment?—I think so, unless notes of the evidence are taken. If it should be thought better that one of the judges should take notes of the evidence, as is done at present, perhaps having them authenticated by the other two judges, it would not be necessary to make the judgment final, excepting to a certain amount, in matter of fact.

5445. Do you contemplate that the judgment should be final without reference to the amount?—I would greatly prefer a system whereby a record of the evidence should be taken, so as to have an appeal upon fact as well as law.

5446. A judgment by a majority of the court of three would be tantamount to a judgment of two judges?—It would; but if you had an appeal, you could carry it further.

5447. But in what respect would the judgment of these two be more satisfactory to the parties than the judgment of the Sheriff-substitute reviewed by the Sheriff? Have you not just two minds in either case applied to the cause?—If they both agree, that is satisfactory; but if they differ, it is one mind differing from another. In the other case, it is two minds differing from one.

5448. I am speaking of a case in which a judgment is carried by two out of the three judges. Would that be more satisfactory to the parties concerned than the present system, by which you get the judgment of the Sheriff-substitute, and then the review of the Sheriff?—It is in the case of a reversal that the difficulty arises in the present system. If the Sheriff reverses the judgment of the Sheriff-substitute, our clients are not satisfied, because there is a judgment on each side, and that necessitates to a large extent an appeal to the Supreme Court.

5449. Supposing the Sheriff-principal to affirm, you have then the judgment of two judges?—Yes; and that is frequently satisfactory, and very few cases in which they have agreed are appealed to the Supreme Court.

5450. In the appeal court which you suggested, if two out of the three judges come to a certain judgment, you have two minds agreed?—Yes.

5451. How is that better than having the two judgments as at present, if the Sheriff-substitute and Sheriff-principal agree?—It is in the case of their differing that we require something more.

5452. I am speaking of the case where they agree?—In the case where they agree it may not be more satisfactory, but in the case where they differ it is more satisfactory. At present, if the Sheriff reverses the judgment of the Sheriff-substitute, it is just one mind against another; and in order to get a satisfactory decision, it is necessary to go to a higher court, and to incur large expense. But in the other case, if you have two of the three judges against you, you are likely to be satisfied with the decision.

5453. *Mr. Baxter.*—Don't you think it a great advantage that the Sheriff-substitute at present sees the witnesses, and that the court of three judges which you have suggested should also see the witnesses?—I think that is a matter of great importance.

5454. Would that give you more confidence than the present mode of review by a Sheriff of his substitute's judgment?—It would.

5455. *Mr. Paterson.*—Supposing that each of the three judges adopted a different impression of the facts, would you allow an appeal there?—If there was any mode of taking down the evidence, and the three judges differed, then I would certainly allow an appeal. There would be no other way of getting a decision.

5456. The evidence would be necessary for the court of appeal?—Yes.

5457. And you would allow an appeal where each of the judges took a different impression of the evidence?—Certainly.

5458. *The Chairman.*—That would be an appeal to a court which did not hear the witnesses?—It would.

5459. *Mr. Shand.*—Would the arrangement as to three judges sitting together on proofs not be apt to lead to delay in getting a decision? Supposing a case of difficulty to occur, and the appeal judges were going on their circuit, they could not consult with the resident judge and come to their conclusion before leaving the place; and they must again meet with the resident judge before giving their decision. Would not the result of an arrangement of that kind generally be, that in cases of difficulty no decision would be got till the judges returned to that place again, and had a consultation with the resident judge?—In the great majority of cases they would have little difficulty in deciding at the time, just as a jury does at present.

5460. A jury now decides very much upon matters of fact; but supposing the appeal judges had to adjust an interlocutor both on fact and law, would it not fre-

Horace Skeete.

quently be necessary that they should take time to consider the case?—In some cases it certainly would be necessary that they should take time to consider, but that is matter of detail. The two judges could communicate their decision to the other judge.

5461. Would that not necessarily infer in very many cases considerable delay?—It would infer some delay, but not such great delay as we have at present.

5462. Would it not generally infer delay till the appeal judges came back to that place again?—Not necessarily. I think some plan might be hit upon whereby that might be avoided.

5463. There must be communication with the resident judge?—In cases of great importance, I think it is only right that a judge should have proper time for deliberation; and if the judges came round sufficiently often, the delay would not be great.

5464. Suppose there were several cases set down for proof, would you have a roll of proofs for the court of three to take up?—I think so.

5465. Would that not be very apt to lead to expense, from the necessity of bringing witnesses, in many cases, to the place where the proofs were to be led?—I think there would not be very great difficulty in that. The Sheriff-clerk could generally ascertain what number of witnesses would probably be examined in a case, and it could be arranged that certain cases should be taken on a particular day, and finished on that day.

5466. Would that not frequently lead to witnesses being kept waiting for two or three days?—It might occasionally do that; but that might be obviated to a large extent by a proper arrangement of details.

5467. Do you think it would be satisfactory to the country, if in each district there was a resident Sheriff, with an appeal directly from him to the Court of Session, and no intermediate appeal?—I don't think that would be satisfactory at all.

5468. Why?—Because the expense of going to the Court of Session is so great, that it is tantamount to giving no appeal at all.

5469. You don't think that arrangement would be satisfactory to the country?—I don't think so. It would, in effect, be entirely cutting off our right of appeal.

5470. *Mr. Baxter.*—Have you had any appeal to the Court of Session under the Debts Recovery Act?—I have.

5471. What did you find the expense to be?—In July 1868 I raised, in the Sheriff Court at Perth, an action for £43 under the Debts Recovery Act. The Sheriff-substitute decided in my favour. The Sheriff-principal, without hearing me, reversed, upon different grounds. The case was carried to the Court of Session, and upon 21st October 1868 the first hearing took place; and that day, simply for agent's and counsel's fees, cost £12, 17s. 2d. The court did not decide the case that day. I think counsel were not prepared, or something of that sort; and it was continued to a second day, the fees that second day being £9, 14s. 4d. The court did not decide the £43 case that day, but found it necessary to take it to *avizandum*. An interlocutor was pronounced next morning; and agent's and counsel's fees for the advising were £7, 1s. 10d. So that the one hearing in that small case cost £29, 13s. 4d. in the Court of Session.

5472. *Lord Barcaple.*—Was that the expense of one side, or both sides?—Both sides. I lost the case, for the Court of Session took a third view of it, and decided against me; and I paid altogether for that £43 case, £44, 15s. 10d.

5473. *Lord Justice-General.*—What was the name of that case?—*Davidson* v. *Waddell Boyd.*

5474. *Lord Barcaple.*—Do you know whether that was the first case under the Debts Recovery Act which had been taken to the Court of Session?—I am not aware.

5475. *Lord Justice-General.*—When was it decided?—In October 1868.

5476. *Mr. Adam.*—Was it not a case of anticipated payment of house-rent?—Yes.

5477. *Mr. Baxter.*—Have you got the account with you?—Yes.

5478. Does the account show the expense of getting the case into the roll?—Yes; the expense of getting it into the summar roll was £3, 13s. 11d.

5479. *Lord Justice-General.*—Give us the items?—[*Witness read the items.*]

5480. *Mr. Webster.*—That is without the printing?—Yes; and my fee for conducting the whole case from beginning to end was £4; and the country agent on the opposite side was allowed 10s. 6d. for his whole work in reference to the appeal to the Court of Session.

5481. *Lord Justice-General.*—Will you be kind enough to give in the whole of the account as part of your evidence?—Yes.

5482. *Mr. Murray.*—Have you the account on the other side?—I have the accounts on both sides.

5483. Have you ever had occasion to see an appeal under the Act of 1868 carried through in the same way?—I had a case lately; but I was afraid to come to the Court of Session with it, and I stopped it.

5484. *Dr. Barclay.*—Was that the *Inch* case?—Yes; it was a very important case; but I was afraid to come to the Court of Session with it. It might have ruined my client.

5485. *The Chairman.*—Was the stake great in that case?—It was a question of considerable importance to the public. It was as to the public use of the North Inch at Perth. The Sheriff-substitute decided in my favour, but the Sheriff-principal reversed. My client was not a rich man, and I advised him to go no further.

5486. *Lord Justice-General.*—Was he representing the public?—He was representing himself then. He had an interest in using the Inch for a certain purpose.

5487. *Mr. Baxter.*—Had you a good opinion of his case?—I had, and I have still; and if I could have come to the Court of Session satisfactorily, I would have done it.

5488. *The Chairman.*—You mentioned, in regard to the other case, that the Sheriff had altered the judgment of the Sheriff-substitute without hearing parties?—Yes.

5489. Had you no opportunity of being heard?—That is one of the blemishes of the Debts Recovery Act. Under the 11th section neither party can crave to be heard; but the party who appeals has a right to affix a note of decisions on which he founds, while the other party has no such right. The Sheriff, in that way, gets the decisions on one side and not on the other. The case to which I referred was decided on different grounds from those taken by the Sheriff-substitute, and without my being heard. We have no right to crave to be heard.

5490. You consider that a blemish in the Debts Recovery Act?—I do.

5491. *Dr. Barclay.*—There is nothing to prevent the Sheriff ordering a hearing?—He is empowered, but not obliged to order a hearing.

5492. *Mr. Baxter.*—In your case he did not?—He did not.

5493. *Mr. Adam.*—In the case you mentioned, was not something saved by the agents taking payment of the account without obtaining decree for the amount?—I have given the results after deducting that.

5494. These expenses are not included?—They are not.

5495. *Mr. Webster.*—I see from the account that fees to two counsel are charged. Are you aware that the court and the auditor have been in the practice of allowing a fee to only one counsel in cases under the Debts Recovery Act?—This account was taxed by the auditor. I employed only one counsel; but there were two allowed on the other side.

5496. *Dr. Barclay.*—I thought you said it was not taxed?—It was taxed.

5497. *The Lord Justice-General.*—It was paid without a decree?—It was paid without a decree—without extract.

5498. *Mr. Webster.*—Does the account not show

that the case was delayed on account of counsel not being prepared?—There is an entry: 'In respect so and so wished to look into cases.'

5499. *Mr. Gordon.*—That was your own counsel?—Yes, my own counsel.

5500. After two speeches, your own counsel asked that the case should be adjourned to enable him to look into some decisions?—That is quite true; but I think I should only pay counsel one fee for a debate.

5501. *Mr. Adam.*—A new ground was started which had not been pleaded in the inferior court?—I was not present in the Court of Session, and the only information I have on the subject is an entry in the opposite parties' account, to the effect that my counsel wished to look into cases.

5502. *Mr. Baxter.*—Why were you not present in such an important case?—There is no provision for paying the expense of an agent from the country. If I had come, I must have charged it against my own client; and in nine cases out of ten they won't pay you. They say you ought to get it from the opposite party, if you are successful.

5503. *Dr. Barclay.*—Your own client in that case was a bankrupt estate?—Yes; and I did not wish to incur any expense that I could possibly avoid.

5504. *Mr. Webster.*—Is there any necessity for a country agent attending a debate in the great majority of cases?—It depends on his Edinburgh agent to a large extent.

5505. Does it not depend upon the counsel?—It depends both on his counsel and agent.

5506. *Mr. Gordon.*—And the nature of the case?—It depends of course entirely upon his counsel and his Edinburgh agent. If they get up the case thoroughly without him, he is of no use. But in the large majority of cases they don't get it up thoroughly without him, and they look to him for information about the case.

5507. *Dr. Barclay.*—In law and facts?—In facts.

5508. *Mr. Murray.*—He has the selection both of his counsel and agent?—Some Edinburgh agents always select their own counsel. They claim that as a privilege.

5509. *Lord Barcaple.*—In what respect is it that it depends on his counsel whether it is necessary for the country agent to be present?—Perhaps I was wrong in saying it depends on his counsel. It depends on whether the Edinburgh agent thoroughly gets up the case. If he does thoroughly get it up, the presence of the country agent may not be necessary.

5510. Must not the case be within the record?—That is quite true.

5511. Then there is very little getting up about it?—There are constantly new points started in various ways.

5512. But they must be points of law. The fact is within the record, is it not?—That may be, and is so; but what I have stated does occur.

5513. *Mr. Gordon.*—Is your statement applicable to jury causes where evidence is in course of being led, or to causes where there is a discussion upon the relevancy of the record, or to causes where there has been a concluded proof in the inferior court?—I refer to appeals from the Sheriff Court. In jury cases I think the country agent is often absolutely necessary. I also think that in appeals from the Sheriff Court he is frequently necessary, because I have found myself that when I was not present, parts of my case had been missed. I cannot say why; but I have found in practice that important parts of my case had not been attended to as I thought they should have been.

5514. *Dr. Barclay.*—In the case which you have mentioned under the Debts Recovery Act, if you had been present, would you not have pointed out a section in the Bankrupt Act which was omitted to be referred to?—From the Court of Session decision it occurred to me that a clause in the Bankrupt Act, of extreme importance in the case, had not been pleaded to the court, and I think, if it had been pleaded to the court, a different decision would probably have been pronounced.

5515. *The Lord Justice-General.*—Mention the section, if you please?—I have not the Act here.

5516. *Mr. Baxter.*—What is the import of it?—It is to this effect, that the sequestration shall have the effect of a decree of maills and duties, and of poinding the ground, and also of a decree of furthcoming.

5517. And put you in the position of an heritable creditor?—Yes; and in this case it was a great hardship, because the property was bonded, and the trustee had paid all the interest for that half-year; but when he tried to get the rent to meet the interest, he found it was gone.

5518. *Mr. Webster.*—Did neither your counsel nor agent know of that clause, though the case was delayed for a day in order that they might look into it?—I don't know; but looking at the decision of the court, I find no reference to it; and the court proceeded on the principle of holding that the trustee, my client, represented the personal rights of the bankrupt.

5519. Might it not be upon this other theory, that they thought the section had no reference to the matter in dispute?—If the court had thought that, they would have decided it, and said so in the interlocutor.

5520. *The Chairman.*—I understand the import of what you have said to be, that in the case you refer to there was a clause in the Bankrupt Act which was very pertinent to the question, and which, I suppose, had been pleaded in the court below, that was not referred to in the Court of Session: the Edinburgh agent missed it, the counsel missed it, and the court missed it; but if the country agent had attended, the client would have had that additional protection, and it would have avoided any such miscarriage. Now, do you state that as a reason why a client should generally have the protection of his country agent in the Court of Session, for fear that the Edinburgh agent and the counsel should go wrong without him?—I only give that as an illustration. I don't say that it is absolutely necessary in all cases that the country agent should come to Edinburgh.

5521. But as a general rule?—As a general rule, I don't think it is absolutely necessary that he should come to Edinburgh; but in many cases it is of importance that he should be present in court. I was not present at the discussion; but in the decision of the court I can find no reference to that section of the Act which appeared to me to be of importance.

5522. Your remedy for that would be some provision by which the country agent might attend, and by which it might be worth his while to attend?—I think so. I think he ought to be able to attend if he thinks proper.

5523. And that in the costs of the suit provision should be made for that case?—I think so.

5524. *Sir E. Colebrooke.*—You give this case as an example of the difficulty of any appeal being made to the Court of Session?—Yes.

5525. You don't confine your statement to the experience of that particular instance?—Oh no! That is only an illustration of my experience.

5526. Do you think that the procedure in the Court of Session may not be susceptible of some amendment which would reduce materially that expense?—I think it is susceptible of very great amendment.

5527. In case of its being so amended, would that in any degree affect the opinion which you have given as to the necessity of an intermediate court such as you propose?—I don't think we shall ever be able to get it amended so far as to make the appeal to it sufficiently cheap to be taken in place of the appeal we have at present.

5528. In the account which you read, counsel's fees formed a very large item?—Yes.

5529. Do you not think that if a court of appeal, such as you have proposed, were established, whose judgments would in many cases be final, counsel would be retained to argue the cases before it?—I don't think they would ever be retained; at least it would be in very exceptional cases. The procurators would plead their own cases.

5530. You think the procedure before that court would probably be as cheap as it now is before the Sheriff?—Quite as cheap.

Horace Skeete.

5531. You stated that the appeal judges should reside in Edinburgh, but go circuits?—Yes.

5532. Do you conceive that their whole time would not be occupied with their judicial duties?—I think it would; but of course they need not be always on circuit.

5533. How often do you propose that these circuits should be held?—That is a matter of detail, which would depend on the number of cases coming up.

5534. Then they would go just as they were wanted?—I think so. I think they should go whenever they are required to do their duty in the district.

5535. I think you said that you would divide Scotland into four districts?—Probably four might be sufficient.

5536. Do you include Edinburgh and Glasgow in these?—I think Edinburgh and Glasgow ought to be excluded.

5537. Then the four districts would be independent of Edinburgh and Glasgow?—Yes.

5538. So that there would be eight appeal judges independent of these two counties?—Yes.

5539. *Mr. Adam.*—Would you allow the employment of counsel as a charge against the opposite party in these courts?—Yes, if allowed by the judge, as at present. We can move the court to employ counsel; and if the court approves, then counsel's fees are allowed. I would retain that power still.

5540. *Mr. Webster.*—Your theory is, that you would have one resident judge?—Yes.

5541. If he was permanently resident, would there not be great risk of local ties and connections militating against his usefulness?—As long as human nature remains what it is, I suppose that necessarily arises to some extent; but with the court of appeal, I think we would be quite safe to have any little aberrations of that sort corrected.

5542. *The Chairman.*—That may be one of your reasons for thinking that there should be an intermediate appeal between the resident Sheriff and the Court of Session?—I think so.

5543. To guard not so much against actual influence of that sort, as the apprehension of it?—Yes. It frees the public mind from all apprehension on that point.

5544. *Mr. Webster.*—Would you propose that the judge of appeal should have anything to do with the general administrative duties in the county?—I think not.

5545. You would leave these entirely to the resident judge?—I think so.

5546. Would you not deem it unwise to do so in purely rural districts?—I think they might be safely trusted to do these duties.

5547. *Mr. Shand.*—Can you form any idea how often the appeal court would require to sit in Perth, for example?—That is a matter of detail.

5548. Would so often as once a month be necessary?—I would not like to give an opinion on that.

5549. *Mr. Adam.*—Have you any opinion as to the time within which it would be satisfactory that they should come?—I don't think that it would be judicious to tie them down to exact periods; but if there is a certain number of cases, I think they should come and hear them whenever they are required.

5550. Beyond what time would you think it wrong that they should not come, even if there were few cases?—I think they should come at least once every six weeks.

5551. *Lord Barcaple.*—And the same at Aberdeen and other towns of that sort?—I think so. There is no difficulty in their going frequently, now that there are railways all over the country.

5552. *Mr. Adam.*—Should they go so frequently even if it were to hear a single case?—I think if Scotland were divided into four districts, there would be very little risk of their having only a single case to hear once in six weeks.

5553. *Lord Barcaple.*—What salaries do you think these judges should have?—I think they should have from £1500 to £2000 a year at least.

5554. Do you think that for such a salary as that, a suitable class of judges of appeal would be got to exercise the kind of functions and perform the constant journeys that you point at?—Yes, I think so, for £2000 a year.

5555. Would that be exclusive of their travelling expenses?—I think so.

5556. *Mr. Shand.*—If you made such a place as Aberdeen the centre of a large northern district, would it not add considerably to the expense of discussion if agents had to travel for four or five hours, and were obliged to leave home the night before?—I have not proposed to make Aberdeen, or any place, a centre. I think the appeal judges should go to the places where the cases are to be heard. When there was a sufficient number of cases in any town of sufficient importance, it might be arranged that the judges should go there.

5557. Would you have them sit in every county town where the Sheriff now sits?—That is matter of detail. It might not be necessary in every county town; but it would be seen how the thing worked, and what was required, and it might be altered to suit circumstances.

5558. *Mr. Baxter.*—I suppose you think that the great amount of business would be in the large towns, and in their neighbourhood?—It would.

5559. *Lord Barcaple.*—Would you make it compulsory that these appeal judges should reside in Edinburgh?—I think it better that they should not reside within their district.

5560. Your object in making them reside in Edinburgh would be to prevent them residing in their own district?—I think so.

5561. You would otherwise apprehend that they probably would reside within their own district?—I think they might. They would probably be residing in Edinburgh when they were appointed, and they might prefer residing where they had lived all their lives.

5562. But you anticipate that if there was not such a rule, they might not improbably prefer to reside in their district?—Some might.

5563. Are you aware how that is in England with reference to the County Court judges?—I presume they reside within their district; but I am not aware.

5564. *The Chairman.*—Have you thought of what salary the resident judge should have?—I think that depends a good deal on the amount of his work. If he has sufficient work, I think £1000 a year would not be an unreasonable salary.

5565. *Mr. Shand.*—What would you name as the minimum for such a judge?—I think in small counties they might be joined together, so as to give each of them £1000 a year.

5566. That is about the minimum?—Yes.

5567. *Lord Barcaple.*—Would you make any special provision in regard to the resident judge in the more remote counties,—in the Highlands and Islands?—I admit that there may be some little difficulty there.

5568. I suppose you would treat these as exceptional cases?—I think so.

5569. *The Chairman.*—Do you think the jurisdiction of the Sheriff ought to be extended?—I think it ought to be extended to all civil cases, except marriage and legitimacy.

5570. Would you extend it to divorce?—I think there is some little difficulty there; but I would even be inclined to say that the Sheriff Court ought to have that jurisdiction, from what I have seen of the hardships occurring from parties not being able to get a divorce. I know a case at present of a man whose wife has been on the streets for ten years, but he has been unable to get a divorce; the result is that he has for some years been living with another woman, and has a family by her. He came to me and asked what I could get him a divorce in the Court of Session for. I told him, and showed him an account in a case which I had had. He said 'I am quite unable to pay that, and I must just be doing;' and he has been doing ever since.

5571. *Mr. Shand.*—Are you satisfied that that is a

type of many cases which exist in Scotland, particularly in populous localities?—Yes.

5572. *Mr. Baxter.*—May there not be the same hardship in the case of a woman who is really married, but cannot get a declarator of marriage in the Court of Session?—That is a thing affecting to a large extent the rights of other people, and it is so important that I would not be inclined to give such a jurisdiction to the Sheriff Court.

5573. *Lord Barcaple.*—And it affects the morals of the community?—Yes.

5574. Assuming the privative jurisdiction of the Court of Session in divorce cases to remain, would it materially lessen the expense if the proof were taken by commission in the district?—That depends on who the commissioner is. If he were to come from Edinburgh.

5575. Assume that the Sheriff-clerk depute was the commissioner?—The commissioner has very important duties to perform.

5576. Are you aware that in a very large proportion of cases of divorce there is no appearance?—I believe that to be so.

5577. And that if it is a divorce against the wife, she comes there quite readily, and exhibits herself before the witnesses, in order to aid the divorce?—I am not aware of that. I had a divorce case in the Court of Session not long ago, and my client did not do that. She had to be got hold of by the other party for the purpose.

5578. *Mr. Shand.*—Where appearance is entered, the husband has to pay the expense of counsel and agents on both sides?—Yes.

5579. *Mr. Baxter.*—Do you know that the expense debars poor people from applying for a remedy?—Yes. I know another case of a client of mine whose wife was a woman of the same description. She raised an action of aliment against him in the Sheriff Court, and she got 3s. 6d. a week; and though she was behaving in that way, he had to pay her that till she died.

5580. *Mr. Webster.*—Can you state the cost of the divorce in the Court of Session in the case which frightened your client so much?—I cannot recollect.

5581. What was about the expense?—It was about £60.

5582. *Mr. Murray.*—Was it an opposed case?—It was an unopposed case; but I had to bring all the witnesses from different parts of the country to Edinburgh. If I could have done it in Perth, I would have done it for probably £10 or £15.

5583. Were they witnesses from the county of Perth?—Yes; they were in different parts of that county.

5584. *Mr. Gordon.*—How many witnesses were there?—Six or eight.

5585. *Mr. Murray.*—If it had been in Perth, you would have had to bring the witnesses to Perth, and keep them there?—I would have sent them all back the same night, which I could not do in Edinburgh.

5586. *Mr. Webster.*—Have you not seen accounts in other undefended cases, where the amount was £20 or £30?—I never did.

5587. *Mr. Shand.*—For what sum do you think an undefended divorce might be got in the Sheriff Court?—A good deal depends on where the witnesses have to be brought from, but £10 would probably cover an ordinary case; it might be much less, it might be £5 or £6.

5588. *Lord Barcaple.*—If the witnesses happened to be in Perth, it would be very little?—Very little.

5589. *The Chairman.*—Would you extend the Sheriff's jurisdiction to heritable rights of all kinds, however extensive?—I would.

5590. *Mr. Baxter.*—Do you know any cases of hardship from the Sheriff not having jurisdiction in regard to heritable rights?—There are two cases which were recently decided in the Sheriff Court,—one of them, a case of *Robertson* v *M'Kinlay*, which was in the Sheriff Court of Perth last year. The contention was about a small bit of ground, worth about 10s. a year, on the banks of the Tay. One person claimed it, and produced a sasine on it; an adjoining feuar also claimed it, and produced a disposition which he said included it, but he was not infeft. The Sheriff-substitute decided in favour of the pursuer holding the sasine; but the Sheriff-principal reversed, and held that it was a case which could not be brought in the Sheriff Court at all. The case is in abeyance, because the parties will not come to the Court of Session, so that the defender virtually holds possession of this piece of ground. It is not worth coming to the Court of Session about. The other case to which I refer is the *Baptist Chapel* v *Whitelaw*. About twenty-five or thirty years ago, according to the pursuer's allegations, the Baptist congregation in Perth bought a piece of ground, and built a chapel on portion of it, leaving a small bit which they did not require. A neighbour, seeing that it was not looked after, took possession of that small bit, and shortly afterwards got some one who had no earthly right to it to grant him a disposition. A disposition was accordingly granted, and infeftment took place on it. Some years afterwards the Baptist congregation began to feel that they were rather short of ground, and they proposed to this man to buy that bit from him, and they offered him a very considerable sum for it. He said he did not feel inclined to sell it, nor to show his papers. This excited some suspicion in their minds, and they looked at their own titles, and found that they were infeft in the ground. They immediately raised an action of ejection against the man; but they were thrown out of court because it was a contest about heritable right; and the man still retains possession, because the Baptist Chapel will not come to the Court of Session to fight about £2 a year. I may mention a third case. A client of mine was possessor of a small field. A neighbouring proprietor encroached, as she alleged, about two feet upon her ground, and she wished me to interdict him, and gave me a list of witnesses to examine. I was not satisfied that I could make out her case, and I told her she must go to the Court of Session, because it was a question about heritable right; and I would not raise the action for her, as I said she might be ruined. She shortly afterwards sold the field to a Mr. Gray, and he immediately raised an action against the neighbouring proprietor, or rather he pulled out a post belonging to the neighbouring proprietor, which he alleged was on his piece of ground. The piece of ground was not worth 20s. altogether. Mr. Turnbull, whose post was pulled up, raised an action against Mr. Gray, and on 19th July last the pursuer's account of expenses was taxed against Gray for £278, 14s.; so that there is really a case now, though there was not one to begin with, and probably your Lordship will have to decide it soon in the House of Lords, as it has gone there. *Horace Skeete.*

5591. *Mr. Murray.*—How does that case show the advisability of giving jurisdiction in heritable questions to the Sheriff?—If I could have raised the action in the first instance before the Sheriff, we would have had it settled for a few pounds, and it would probably never have gone further.

5592. *The Lord Justice-General.*—Provided the parties had acquiesced in the Sheriff's judgment; but suppose they had been animated by the same zeal that they seem to be now, would they not have gone to the House of Lords in the end?—I would not have allowed my client to be animated by that zeal, if I could have controlled her.

5593. *Mr. Baxter.*—But they would have had an opportunity of getting the case settled in the Sheriff Court?—Yes, for extremely little; and if after that they had liked to behave in that way, they must have taken the consequences. But at present we have no alternative; we are bound to go to the Court of Session.

5594. *The Chairman.*—Don't you think they might have referred the case to somebody to settle, if they had been animated by the spirit that you would have infused into them?—They might; but I had only control over one of them. The agent cannot control both sides.

5595. And he can only control by advice?—Yes.

5596. Do you know whether there was any suggestion from the court as to the propriety of settling that case without incurring expense about it?—I am not aware.

Horace Skeete.

5597. *The Lord Justice-Clerk.*—Were you agent for either of the parties who ultimately had the case tried?—No; I was agent for the party who sold the field.

5598. Then your advice could have had no influence?—No. It had influence on the original possessor, whom I prevented from going to the court.

5599. *Dr. Barclay.*—The proof in that case was taken on commission in Perth?—Yes.

5600. *Mr. Murray.*—Although the value of the property in dispute in that case is very small, does not one of the parties consider that non-possession of it would materially interfere with his access to a mansion-house of considerable value?—It is not connected with a mansion-house at all. It is a grass field, and this was the entrance to it. I looked at it, and I found that the entrance to it was sufficiently wide to let in a cart without this small bit which was claimed. Of course, the wider the entrance the better.

5601. But the yearly value of the ground in dispute may not be a true test of the value of the subject in the opinion of the parties?—I don't know what opinion they held on the subject; but that is the opinion I held.

5602. *The Chairman.*—You looked at it, and saw that there was room for a cart?—I thought so.

5603. Are you aware, or not, that there was conflicting evidence as to whether there was room for a cart?—I know there was; but I saw it myself.

5604. And so did the witnesses who gave the conflicting evidence?—That is quite true.

5605. *Mr. Shand.*—Speaking, however, generally from your experience and observation, have you found that in a great many cases, parties who are owners of small heritable subjects have suffered injustice rather than come to the Court of Session?—I certainly have.

5606. And they have suffered injustice because, as the law at present stands, there is no remedy open to them without incurring large expense?—That is my experience. I have advised them against it.

5607. *The Chairman.*—You think the jurisdiction ought to be extended to heritage of whatever value?—I do. At present the Sheriff has jurisdiction to any amount of moveable property; and I cannot see any difference, so far as he is concerned, between £1000 in land and £1000 in a bank.

5608. *Mr. Webster.*—Would you make any difference on account of having the assistance of counsel available in the Court of Session?—No; I would not be inclined to make much difference on that account, because a large portion of the conveyancing of the country is conducted by country practitioners, who are now quite as good conveyancers, generally speaking, as counsel are.

5609. *Mr. Shand.*—Would you not give the defender power to remove the case to the Court of Session if it involved a question of considerable value?—No. If he found that the Sheriff-substitute and the appeal court decided against him, he would probably be satisfied with that decision, and would not go further; and it would be for his own good to restrain him.

5610. Suppose a case raised in such a county as Perth, involving right to large estates in that county, and that the defender is resolved that he shall not be satisfied with anything short of the decision of the Supreme Court, would it not be right that he should have the power of removing such a case as that at once to the Supreme Court, instead of leaving it to drag its way through the inferior court?—In a case of that sort, if all the doors of the courts were open, I think the public might safely be left to regulate their own rights and interests. If they have a large case, in which they are satisfied that the decision of the Court of Session will ultimately be taken, they will go there at once, and not to the Sheriff Court. It is only such cases as they think fit for decision in the Sheriff Court that they would take into the Sheriff Court.

5611. But you would leave to the pursuer the power of determining that without giving the defender any choice?—Certainly, because he has the power of appeal afterwards; and if he is satisfied with the judgment in the Sheriff Court, he need not use that power of appeal.

5612. *Mr. Murray.*—You would allow an appeal to the Court of Session in all questions of heritable right?—I would put on the same footing, moveable and heritable. I can't see why a man possessed of £500 worth of heritable property should be placed on a different footing in a court of law from a man possessed of £500 in bank.

5613. *Mr. Shand.*—You are aware that, at present, power is given to either of the parties to remove the case to the Court of Session when proof is ordered, if the value is above £40?—I am aware of that.

5614. Do you propose to abrogate that provision?—I think it would be a good thing to take it away.

5615. Do not litigants often take advantage of it?—I never had any such cases. I have been told of one or two cases where the defender took advantage of it, and where the case has not gone further, because the pursuer would not follow the defender into the Court of Session.

5616. Are you not aware that in many cases pursuers take advantage of it?—I cannot say so. But it seems to have been meant to apply to cases intended for jury trial, although the Court of Session is not bound to send them to a jury. But a jury trial about £40 would be out of the question.

5617. *The Chairman.*—Would you allow it if the sum was a great deal higher than that?—I would not be inclined to allow any appeal to the Court of Session until the case was decided in the Sheriff Court.

5618. In regard to intermediate appeals in the Sheriff Court itself, have you any remarks to make? There are several stages now at which appeals may be taken from the Sheriff-substitute?—Yes, I think six appeals can be taken at present.

5619. Would you abridge the number?—I would not be inclined to abridge the number. There is a provision at the end of the 19th section of the present Sheriff Court Act, to the effect that an appeal taken against any interlocutor in the cause shall bring up all the previous interlocutors. I think it would be advisable to alter that to this effect, that it should bring up all previous interlocutors not previously appealable, so as to put matters into the position that when an interlocutor is pronounced which is appealable, if the parties don't then appeal against it, it ought to be held final.

5620. *Dr. Barclay.*—If they have acquiesced in it?—Yes. An important case on this point occurred in the Sheriff Court of Perth on 21st June 1859, *Gall* v *Smith*. It was an action raised by the mother of an illegitimate child. A preliminary plea was set up when the case came into court that the defender was not twenty-one years of age, and that his tutors and curators had not been called. The Sheriff-substitute repelled that plea, and the parties did not then appeal against that interlocutor, which they might have done. The case went to proof, and a very strong proof was led; and the Sheriff-substitute decided against the defender, finding that he was the father of the child. The case was brought up on appeal, and the Sheriff-principal, although concurring with the Sheriff-substitute on the merits, found himself bound under the Act of Parliament to consider the preliminary plea, and he altered the Sheriff-substitute's judgment upon it and sustained the plea; so that, after all that expense had been incurred, the case was thrown out of court, and in the interval the principal witness had died, so that they had no case; and at the present moment, I understand, the child is being supported by the parish. If they had been bound to appeal against the Sheriff-substitute's interlocutor on the preliminary plea, all that would have been avoided. I think it advisable, therefore, to alter that provision of the Act.

5621. *Lord Barcaple.*—That alteration would have the effect of increasing the number of appeals taken in the Sheriff Court?—It would not have the effect of increasing the number which can be taken.

5622. But it would have the effect of increasing the number which in point of fact are taken?—The general practice is to appeal against an interlocutor, if it is appealable.

5623. And that would have the effect of encouraging that practice?—It would necessitate it.

5624. Are you aware that there is a considerable prevalence of opinion that the appeals taken at present in the Sheriff Courts are too numerous?—I know that that opinion does exist; and if it were possible to cut them down satisfactorily, I myself would be very much inclined to do it.

5625. Don't you think it to be very much a matter of expediency whether in particular cases it is better that these appeals should be taken or postponed? Sometimes they lead to unfortunate results, of which you have given us an instance; and sometimes, where they prove to be unavailing, they cause great expense and great delay?—They do.

5626. So that it is a balance of evils somewhat?—It is.

5627. *Mr. Adam.*—In point of fact, in the Sheriff Court of Perth, are these appeals taken for purposes of delay?—Frequently.

5628. *Mr. Shand.*—Don't you think that the present power of appealing upon preliminary defences might very well be left until the time when an order for proof is made? Power is given to appeal when a proof or a remit is ordered, and up to that time comparatively little expense has been incurred?—There would sometimes be a good deal of expense if you are to keep a long record; but if you can shorten the record, I think your suggestion would be very valuable.

5629. But even with the record as it is, is it not a less evil than deferring the pleas?—Yes.

5630. Don't you think, therefore, that that appeal might with advantage be dispensed with till an order for proof is pronounced?—I think so.

5631. *Mr. Baxter.*—Have you any experience of the expense of appointing factors and curators to insane persons?—There was a case from Perth in 1866. Mr. Logan was an old teacher, and his whole income was £52, 19s. 4d. a year. He became insane, and a judicial factor was appointed without opposition; and it cost £20, 14s. to appoint that factor. Mr. Logan remained in the asylum only six months, so that nearly half his income was eaten up during the six months he was insane by the appointment of the factor, and he had nothing to live upon.

5632. What would have been the expense if the case had been before the Sheriff?—£2 or £3.

5633. What was the expense of the discharge of the same factor in the Court of Session?—I think the expense of the discharge would be £10 or £15.

5634. Have you any other case to mention?—There was the case of William M'Laren, Comrie. It cost £150.

5635. *Mr. Shand.*—There was a long litigation there?—Yes; but if it had been in the Sheriff Court, the Sheriff could have decided the whole thing in twenty-four hours, by going out with a doctor and seeing the man, which he did ultimately.

5636. *Mr. Baxter.*—The court remitted to the Sheriff?—Yes. The question was, whether the man was insane or not.

5637. *Mr. Shand.*—And the judge had merely to look at him?—I think that was quite sufficient.

5638. *Mr. Baxter.*—Had you also a case of Cassidey?—Yes; there is a case of Cassidey where the appointment cost upwards of £30.

5639. What was the amount of the estate?—£2000.

5640. Do you know any case of lapsed trust?—Yes; there is a trust at present in Perth—Duff's trust—and the estate consists of only £80 in heritage, but it cannot be wound up. Nothing is being done in it, and it is hung up for years on account of the expense of coming to the Court of Session to get a trustee appointed, so as to get possession of the heritage.

5641. *Dr. Barclay.*—Is it £80 a year?—No; the capital is £80. It is a house. All the trustees have died, and it has lain for ten or fifteen years.

5642. *Mr. Shand.*—You are aware that factors for persons under disqualification are under the surveillance of the Accountant of the Court of Session?—Yes.

5643. Would you propose that that should continue?—Yes.

5644. *The Chairman.*—And that they should render an account to him?—Yes. I think that is a very salutary provision.

5645. *Mr. Shand.*—If such appointments could be made at considerably less expense in the Court of Session, would you think it an advantage that the jurisdiction should remain there, from the Accountant of Court being resident in Edinburgh?—I don't see how the residence of the Accountant in Edinburgh could affect the matter, because the factors in general are resident in the country.

5646. But it is the expense alone that causes you to make the suggestion?—Yes, it is.

5647. *The Chairman.*—Have you stated all the classes of cases in which you would extend the jurisdiction of the Sheriff?—I have stated that I would give him jurisdiction in all civil cases, excepting the two I have specified.

5648. *Mr. Gordon.*—You said that a case which you mentioned could not be proceeded with, owing to the death of a witness. Was the deposition of that witness not available?—I don't know that it was. I don't know that it could be produced in any process of which it did not form part. The case never was raised again.

5649. *Mr. Adam.*—Would you be inclined to extend the system of jury trial to the Sheriff Court?—No.

5650. *Mr. Baxter.*—Have you any experience of Jury Court practice?—I had at one time.

5651. Do you know a case of *Cameron*?—I had a case of accounting before the Sheriff Court of Fifeshire. There was a remit to an accountant in Fifeshire, and he gave in a very long report, for which we paid him £130. He brought out a sum of £800 as due to my client, with a great deal of interest. The opposing party took the case to the Court of Session, and raised some outside pleas. They pressed very hard to get it sent to a jury, and it was ultimately decided that it should go to a jury, and we were ordered to adjust issues. But my client got so alarmed at a case of that description going to a jury that he gave it up, and he has never got a penny of his money yet. That took place twelve years ago. He was afraid to go to a jury lest he should be ruined. He said he had better give it up than risk it. The other party never moved further.

5652. *The Chairman.*—You don't approve of juries in the Sheriff Court?—No. I don't approve of a jury at all in civil cases.

5653. You stated that in that case £130 was paid to an accountant. Is that not a very large expense to incur?—It was a very large expense; but there was a great amount of labour, an enormous number of documents, and a most voluminous report, and we did not think that was too much.

5654. *Mr. Gordon.*—What was the nature of the case?—It was an accounting between the partners of a dissolved firm.

5655. *Dr. Barclay.*—A firm of common carriers?—Yes.

5656. *Mr. Baxter.*—Would you have any reliance on a jury in such a case?—No; neither had my client.

5657. *Mr. Paterson.*—You said that when the case came to the Court of Session, certain outside pleas were raised. What were they? Had they not been stated in the court below?—They were; and were decided in the court below. They raised the question whether the party was a partner, and what was due. These two questions were to be sent to the jury.

5658. *Lord Barcaple.*—Was not the misfortune there, that the great expense of accounting had been incurred before it was determined whether there was a partnership or not?—But that had been determined in the court below.

5659. That was subject to appeal. Was not the misfortune that that matter had not been exhausted before the remit to the accountant was made?—It was exhausted. We could not come to the Court of Session with it. It could not have been carried to the Court of Session till it was finally decided in the court below.

5660. Might it not have been brought up under the 40th section of the Judicature Act?—There was no

Horace Skeete.

proof. But I only mention the case to illustrate the objection that people have to go to a jury. At present that could not have occurred, because the remit was of consent; and now a remit of consent is final. The result of the accountant's report would have been final if the case had occurred now.

5661. Final upon the accounting?—Yes.

5662. That would not have settled the question whether there was a partnership or not?—No; but it would have been final in the accounting.

5663. And it turned out that the accounting was of no use, because it had not been finally ascertained that there was a partnership?—I only mentioned the case to show the objection which people have to the Jury Court. This could not occur now, because the report would be final on the question of accounting, and we would not have had much objection to go to the jury on the question of partnership.

5664. Was anything but the question of partnership to go to the jury?—Both the partnership and the amount due were going to the jury.

5665. *The Chairman.*—Then it amounted to this, that the expense frightened the party?—Yes.

5666. That is, a person with an accountant's report in his favour, finding a balance of £800 due him, would rather not go into the Jury Court with his claim of £800 backed by an accountant's report?—He was afraid of the expense and uncertainty.

5667. He would not go into the Jury Court with a claim of £800 fortified by the report of a neutral accountant, and with two judgments in his favour?—I was present myself when the case came before the judge in the Court of Session, and he expressed views against the report, which frightened me very much.

5668. Then the party began to get afraid on the merits of his case?—We did not know what a jury might do with a case of that description. We could not tell the result of going to the jury.

5669. Nor even of remaining with the judge?—We would at all events have fought the case to the end, and got a result, if it had been before the judge; but we never got that determined.

5670. You were startled because you thought the expense more than was suitable for a claim of £800?—My client could not afford to pay it.

5671. *Lord Barcaple.*—Had issues been adjusted?—No.

5672. Then you cannot say whether, if issues had been adjusted, they would have comprehended the accounting?—I was present and heard the points that were to go to the jury. They were, first, whether there was a partnership; and second, what sum was due, if any.

5673. That was in the Outer House?—Yes.

5674. You did not adjust issues?—No.

5675. You would have taken the judgment of the Inner House as to whether such an accounting should go to a jury?—I thought it should not, but the judge thought differently.

5676. But the judge had no power to settle that in the Outer House?—When I explained to my client the course which the case was taking, he said, 'I don't see my way to run the risk of a jury trial about that; if I lose the case, I may be ruined.'

5677. *Mr. Baxter.*—It was his terror of the Jury Court that prevented him from going on?—Yes.

5678. And the expense?—Yes.

5679. *Mr. Adam.*—What is the opinion of your clients about jury trial?—The general opinion of clients is against jury trial. It is extremely expensive and uncertain.

5680. *The Chairman.*—Do you approve of the principle on which fees are regulated in the Debts Recovery Act?—No, I do not approve of the principle.

5681. What is your objection to it?—My objection is that it is a slump payment, altogether irrespective of the work done.

5682. You think that is not a sound principle?—I think not.

5683. Is it unfavourable to the agents?—I think it is unfavourable both to the agents and to the clients.

5684. You mean that in some cases it is unfavourable to the one, and in some cases to the other?—In nearly all cases these slump payments under that Act I consider to be wholly insufficient, except for decrees in absence. I think a slump payment is a bad thing; because if agents have a slump payment for doing work, they don't take such an interest in the various details of their work as they would do if they were paid for the respective pieces of work they perform.

5685. On the general matter of costs in the Sheriff Court, have you anything to suggest?—I think that our tables of fees are not very correct at present. I think the whole table of fees should be revised.

5686. With what object?—With the object of putting them on a sound basis.

5687. What is the defect in their basis at present?—There are a good many of the fees which I think are not exactly applicable to our Acts of Parliament as they stand.

5688. Do you think that, taken as a whole, they are reasonable?—I think that the fees of the ordinary court are reasonable.

5689. You think they are not applicable in all respects to the present form of proceeding?—I think they are not.

5690. And in order to make them so, you think they should be adjusted?—I think so.

5691. But upon the whole, you think the amount is reasonable, though it ought to be differently distributed?—I think the amount is pretty reasonable.

5692. Have you any suggestions to make as to the privileges of agents?—I think all agents should pass the same examination, and be entitled to practise in any court.

5693. In any local court, or in the Supreme Court also?—Or in the Supreme Court if they think proper.

5694. Where would they be admitted as agents?—There should be some body appointed for the purpose of examining agents and admitting them.

5695. The admission of agents to practise in the Supreme Court should be regulated by the court, should it not?—I think it should.

5696. You think all agents should be so admitted, and should be allowed to practise wherever they please?—I think so.

5697. Do you think any difficulty would arise as to the conducting of causes in the Supreme Court from agents living at a distance?—I think the practical effect would be, that we would probably employ agents in Edinburgh, but it would give us much greater control than we have at present over the cause.

5698. What do you mean by more control over the cause?—We would be able to keep down expense. We ourselves would be the agents in the cause, and we would therefore have the power of regulating matters of expense much more than we have at present.

5699. You would employ an Edinburgh agent?—Yes; but having the power to come to the Court of Session if we thought proper, that would give us an influence and a power over the conducting of the cause and the expense of it which we have not at present. We are quite helpless at present.

5700. *Mr. Paterson.*—Would you charge less than the Edinburgh agent?—That is matter of detail. We would not charge more.

5701. Would you shorten the steps of procedure, or how would you have more control over the costs?—Counsel's fees are one very great expense.

5702. *The Chairman.*—You would have more control over them, you think?—If I fee'd counsel for a debate, I would pay him for the debate; and if he did not finish it, I would not pay him more next day. I would give him a fair fee for the debate; and if he liked to speak three days for his fee, I would not interfere with him. But if he liked to finish his case in two hours, I would give him the same fee if he did it satisfactorily; and I would pick out a counsel who would attend to my case, and go to the bottom of it, and do it justice.

5703. *Mr. Paterson.*—You think you would be better judges of these matters than the Edinburgh agents?—We know quite well about the abilities of counsel.

5704. You told us you disapproved of a slump fee

being given under the Debts Recovery Act to the practitioners in the local courts?—I don't propose to give counsel a slump fee. I propose to pay him for each step he performs; but if he chooses to break one step into three bits, I would only pay him one fee.

5705. *Mr. Webster.*—Would you send the fee only after you had seen whether the work was satisfactorily done?—I think it would be a very good regulation to pay counsel after they had performed their work. I would not insist upon it, but I think it would be a very good regulation.

5706. *Mr. Murray.*—What would you do if counsel would not accept the employment under the conditions you imposed?—I would employ somebody else, unless there was a strike amongst the counsel, which I don't think likely.

5707. *The Chairman.*—Would you give counsel an action for recovery of his fee, if it was not paid to him?—I would. A counsel works for his money the same as anybody else, and it is quite a fiction to put it on other grounds. He lives by his profession just as other people do; and if he is not paid for the work he does, he should have an action for payment the same as any other man has.

5708. *Mr. Webster.*—Suppose you were not quite satisfied with the manner in which counsel had done his work, would you send him any fee?—Yes; I would send him a good fee. I would probably give him the same fee, but I would not give him any more fees.

5709. *Mr. Paterson.*—You think the agent should be the judge of how counsel does his work, and how counsel should be paid?—Yes, unless you make a table of fees for counsel, and I don't see any objection to that.

5710. Do you think it would be fair that a disappointed litigant should be the judge of counsel's remuneration?—You might have a table of fees, and pay counsel before he performs his work. All other practitioners have a table of fees, and I don't see any difference between a practising counsel and any agent who practises.

5711. *Lord Barcaple.*—Do you think it would be favourable for the litigants and the community at large to have a table of counsel's fees?—I think it would be satisfactory to them.

5712. Is that a matter that you have thought of before?—I have thought of it frequently, and I know that it would be extremely satisfactory to the public to have such a table. I don't wish to cut down counsel's fees. I wish to pay them well.

5713. Do you see no difficulties about it?—There may be.

5714. Do you see no risk of excessive hardship to the poorer class of litigants?—I don't think they would be in a worse position than they are at present.

5715. In the table of fees would you have reference to the value of the question at issue?—That is a matter of detail which I am not prepared to go into. All other Bodies have tables of fees framed upon some principle more or less satisfactory to them, and I don't think it is beyond the powers of the profession to frame a table of fees sufficiently elastic to meet these difficulties.

5716. It might be very satisfactory to the profession, but the question I was putting was whether it would ultimately be found to be satisfactory to the community, and especially to the humbler class of litigants?—It would be satisfactory in this way, that you would be able to see exactly from the table what fee counsel should have, and you could count the cost of a litigation to a considerable extent before entering on it.

5717. And you could not control it at all?—I would not wish to control it if it was fair.

5718. *Mr. Shand.*—Would you introduce a table such as there is in the Debts Recovery Act, applicable to counsel's fees?—No. I repudiate the principle of slump payments.

5719. *Mr. Webster.*—On your system of sending fees only after the work is done, how would you protect a losing party from being charged an excessive fee after he had lost his case?—I have not said that I would adopt that principle.

5720. Would you send the fee in anticipation that the counsel would do his work well, or how are you to regulate it if you don't delay sending or fixing it till after the work has been done?—If there is a table of fees, there would be no difficulty. If there is no table of fees, the best way would be to send the fee first. *Horace Skeete.*

5721. And where, as often happens, the case is decided by the court upon hearing the opposite counsel only, how would you judge of the fee for the counsel who had never been called on to speak?—I think such counsel would be entitled to the same fee as if he had spoken, because he was there prepared, and ready to speak.

5722. You would assume that he was prepared?—Yes.

5723. *The Chairman.*—If you did not send the fee till after the work was done, would you intimate to counsel beforehand what fee he was to get?—I think that would be fair to the counsel.

5724. Might it not have some effect in reference to the client that the counsel should know what fee he was to get? Do you think the counsel's efforts would be at all regulated by the amount of the fee?—I have no doubt that it might.

5725. *Mr. Paterson.*—In sending fees to counsel at present, an agent judges by the importance of the case, its bulk as involving evidence or otherwise, and in some degree by the circumstances of the party. How could you anticipate these so as to frame beforehand a table of fees for counsel?—We in the Sheriff Court act as both agents and counsel, and we have a table of fees found to meet all the exigencies of our court. If that is possible in the one court, I don't see that it should be impossible in the other. I am not prepared to go into the details of that; but we have that example of it.

5726. In the inferior court the agent is paid for each step of the cause in detail. The fee to counsel is generally a slump sum. How could you frame a sliding scale of such fees? Could you anticipate beforehand all the elements entering into the case?—You would pay him for the various steps that necessarily arise in each case. Each case goes through a fixed routine, and you pay counsel for each of the steps.

5727. Would you pay him according to the time occupied, without reference to the importance of the case?—I am not prepared to go into the exact details of how the table is to be framed; but in the Sheriff Court we are paid without reference to the importance of the case. We get a certain fee for the debate, whether the case is short or long, difficult or easy; and that is on the principle that one case must make up for another, I suppose.

5728. *The Chairman.*—In the event of the country agent conducting the cause in Edinburgh, would there be any difficulty as to the custody of the process?—We could get it borrowed by an Edinburgh agent.

5729. Then you would have to employ an Edinburgh agent?—That is what it would fall into; but we would have the complete control. We at present get copies sent to the country, and these copies would serve us without getting the process itself. There would be no more expense.

5730. *Mr. Webster.*—Do you not find it very material generally to look at original documents in conducting a process?—Where it was necessary, we would get that done for us.

5731. *Mr. Baxter.*—Have you anything to say with reference to making up records?—I think that instead of our present summons, a short writ calling the parties into court would be sufficient in nearly all cases; and when they appear in court, I think that if they were to state their case orally to the judge, he would be able there and then to frame an issue sufficient to send the case to proof, as is done at present in the Jury Court. That would save the expense and the delay of our present condescendences.

5732. *The Chairman.*—You would have the judge to frame an issue before proof?—After hearing the parties orally he ought to have sufficient information to enable him to frame an issue for the proof. Of course that would not apply to equity cases. In the case of a reduction it might be necessary for him to order the

Horace Skeete.

parties to give in a condescendence; but in common law cases I think that would be sufficient.

5733. Have you any suggestion to make as to criminal matters?—I think that the taking of the declaration of the prisoner ought to be abolished.

5734. *The Lord Advocate.*—Do you mean that the prisoner should not have any opportunity of making a statement?—I think he ought to be brought into court, and that probably, as is done in England, he ought to hear read over to him what has been sworn or stated against him; and then, if he chooses to make any voluntary statement, it should be taken down, and there I think the matter should end.

5735. That would be a declaration, with the exception that you would not ask him any questions?—I would ask no questions.

5736. *Lord Barcaple.*—You would just ask if he wished to say anything, as an English magistrate does?—That is all.

5737. *Mr. Shand.*—Would you allow him the privilege of having it read at his trial if he wished it?—Yes.

5738. You are aware that that privilege is not given to prisoners at present?—I am.

5739. *Mr. Adam.*—You wish his declaration taken after he knows what has been sworn against him, and not before?—Certainly. I think, before you ask a man to speak, he is entitled to know what you charge him with.

5740. You want him to hear the evidence against him as well as the charge?—That is the practice in England, and it seems to work well.

5741. *Lord Barcaple.*—He hears the evidence itself in England; the witnesses are examined in open court?—Yes.

5742. Would you propose that?—I think that is a good practice too. I think as much should be done in open court as possible. It satisfies the public.

5743. *The Lord Advocate.*—Have you considered the difference between the systems in England and Scotland in regard to that matter?—I have frequently considered that.

5744. What is your view as to the effect upon innocent persons, of having these inquiries conducted in open court?—I have no experience of that matter.

5745. What I mean is this. Is there not an advantage in the present system in Scotland, that it does not bring before the public cases of suspicion against parties who turn out to be innocent?—If there is any case against a man, it generally oozes out, and he has no means at present of clearing himself. When an accusation is made against an innocent man, I think it better that it should be made publicly, giving him an opportunity of clearing himself, than that it should be made *sub rosa.*

5746. *Mr. Adam.*—Have you in your own experience ever seen a case in which an innocent man suffered injury by the present mode of taking declarations?—It is difficult to know whether a man is innocent or not.

5747. *Dr. Barclay.*—Do you frequently find the prisoner's declaration refused when you have called for its production?—Frequently.

5748. And in these cases the prisoner thought it an advantage to have it read over to the jury?—Yes; and not only so, but when a man refuses to answer any questions, that is generally put to the jury as a proof of his guilt. I have heard it frequently stated to the jury.

5749. Not by the judge?—No, but I have heard it said by the public prosecutor, that if the prisoner had been innocent, he would not have refused to answer questions. I have heard that stated frequently, and a jury is very apt to think that there is something in it.

5750. *Mr. Paterson.*—You would entirely exclude the power of interrogating an accused party?—Certainly.

5751. You would take down his statement as given by himself?—Yes.

5752. Supposing it appeared to the judge that some part of the statement might be explained to the advantage of the accused, would you debar the judge from giving him an opportunity of explaining it?—I would give him an opportunity of making his meaning clear. If the judge did not understand his meaning, he might ask what he meant. But I would take down what the accused said as nearly as possible verbatim.

5753. *The Chairman.*—If a man is accused of an act of theft which has been committed an hour before, and he is found in possession of the stolen goods when apprehended, would you think it was right or not right to ask him how he came to possess these goods?—I would think it wrong to ask him any question whatever.

5754. It might give him an opportunity of clearing himself from that suspicion which the law attaches to the recent possession of stolen goods; but you would not put the question?—I would not put the question; but if he were innocent, he would probably take advantage of the opportunity to give an explanation voluntarily.

5755. *Lord Barcaple.*—He would hear the evidence as to his having been in possession of the stolen goods?—Certainly.

5756. Would you suggest that he should have legal assistance at that stage?—If there was a lawyer on the other side, I think the prisoner is also entitled to legal assistance.

5757. There is the Procurator-fiscal on the other side. You would give the accused legal assistance at that stage?—I think so.

5758. *Dr. Barclay.*—Have you any remark to make as to previous convictions?—Yes; I think previous convictions ought not to be libelled. They ought to be reserved until the jury have found the prisoner guilty, and then put in for the purpose of aggravating the sentence.

5759. *Mr. Baxter.*—Suppose he puts his character in issue, and says he is a man of good character?—Then he must stand the consequences, and the public prosecutor is entitled to use these convictions as evidence against him in conjunct proof. But I don't think the public prosecutor is entitled to have anything on the face of his libel except what is relevant to the charge made against the panel. If there is anything of that sort there which influences the mind of the jury, the prisoner does not get fair play.

5760. *Dr. Barclay.*—Do you know that that does influence the mind of the jury?—It influences their minds very much. I have frequently spoken to them about it, and they have said, if there was not enough evidence in the particular case, the man had been often convicted before, and that the evidence was enough in these circumstances. They say he has a bad character, and that influences them.

5761. *The Chairman.*—Is the principle on which a prisoner proves good character, in order to make it improbable that he committed the offence?—It is.

5762. Then on what principle would you allow the convictions to be put in?—To counteract that.

5763. To make it probable that he did commit the offence?—To bring out the truth. I think the truth and the whole truth should be laid before the jury, as far as is relevant.

5764. Then it would be rather to prove that he had not that good character which raises a presumption of innocence?—Certainly.

5765. Would you give him notice that these convictions were to be produced against him?—Yes; I would give him notice, so as to enable him to investigate them.

5766. *Mr. Shand.*—Do you approve of the intermediate verdict of not proven which exists in Scotland?—Yes; I am inclined to approve of that.

5767. You think that should remain?—Yes; I think so.

5768. *Dr. Barclay.*—Is it your opinion that if that verdict were given up, juries would convict more than they do?—I think they would.

5769. Would it be for the benefit of public justice to give up that verdict?—I think it for the benefit of public justice that whenever there is a deficiency of evidence, so as to create a doubt on the minds of the jury, it is better that the prisoner should escape than that they should be driven to convict him.

5770. Is it a good thing for him to escape with a taint on his character, as he does with a verdict of Not proven?—It is better for him than being convicted.

5771. *The Chairman.*—Have you anything else to say as to criminal matters?—No.

5772. Would you extend the power of the Sheriff in regard to punishment?—I do not feel inclined to do that. I think the Circuit Courts are very satisfactory. I would sooner be tried in the Circuit Court than in the Sheriff Court, if I must be tried by either.

5773. Why so?—Because I think there is rather an undue pressure for convictions in the Sheriff Court, according to my experience.

5774. Do you not think the party is equally ably defended in the Sheriff Court?—I don't doubt that at all; but I think there is often a stronger pressure for convictions in the Sheriff Court than in the Court of Justiciary.

5775. *Mr. Murray.*—Do you think that Procurators-fiscal should be allowed to carry on private practice?—I think they should not.

5776. If the salaries were sufficient, you think they should be debarred from private practice?—I think so. If the salary is not sufficient, I think it should be made sufficient.

5777. *Mr. Baxter.*—And a large enough district given to them?—Yes.

5778. And a retiring allowance, I suppose?—Certainly.

5779. *The Chairman.*—Have you a Dean of Guild Court in Perth?—We have.

5780. Does it do any work?—It does a good deal of work; but it does it very unsatisfactorily I think.

5781. Is there an assessor?—There is.

5782. Is he practically the judge?—He is,—an irresponsible judge.

5783. What would you suggest in order to make it more satisfactory?—I think that in all towns, except perhaps Edinburgh and Glasgow, the Dean of Guild Court should be abolished, and the jurisdiction transferred to the Sheriff. In Glasgow the Dean of Guild Court is very satisfactory; at least it was so when I was in Glasgow. But other Dean of Guild Courts that I have experience of are not satisfactory. A case occurred in Perth, where a petition was presented for an interdict against a man building a stair on a piece of ground which the petitioner alleged to be his. He asked interim interdict; but the assessor said he did not like interim interdicts, and that they were dangerous things to meddle with. Accordingly interim interdict was not granted. The man completed his stair, and afterwards the court decided that he had no right to put it there; but they could not remove it; there was no conclusion to take it down; what was asked was merely an interdict against putting it up.

5784. *Dr. Barclay.*—There was a long proof in that case?—Yes.

5785. *The Chairman.*—Except in large cities, you would transfer the jurisdiction to the Sheriff?—Yes.

5786. Is there a Justice of Peace Court in Perth?—Yes, there are Quarter Sessions. They never exercise any small debt jurisdiction.

5787. What jurisdiction do they exercise?—Game licences, spirit licences, and poaching cases.

5788. Do you think it is a good jurisdiction for spirit licences?—Well, I would much prefer having all these transferred to the Sheriff.

5789. Why?—It does not appear to me to work satisfactorily. For instance, taking the town, the licences are first of all granted or refused by the magistrates; and when you go to the Quarter Sessions, they generally say that the magistrates ought to know much better than they do what should be done in their own district, and they almost universally affirm. They regard it as an interference on their part to touch the licences granted in town, so that the appeal is of no use.

5790. In country districts don't the Justices grant licences?—They do.

5791. Who would you give that jurisdiction to?—I think it would be better that all these things were transferred to the Sheriff.

5792. Do you think the Justices have not a better knowledge of the requirements of the district?—The Sheriff, in general, knows all the districts of the county remarkably well.

5793. Have you a Burgh Court in Perth for cases of debt?—We have; but it never sits. It is in abeyance.

5794. It is of no use?—It is of no use.

5795. I suppose the magistrates exercise police jurisdiction?—They do.

5796. Is that under a special Act for Perth, giving the powers of the general Act?—Yes.

5797. Is that a satisfactory jurisdiction?—It is not satisfactory at all.

5798. How would you remedy that?—I would transfer the whole of that jurisdiction to the Sheriff.

5799. What is unsatisfactory about it?—The criminal is usually brought up there in the first instance, and the person who sits on the bench is a bailie, who knows nothing about law or the rules of evidence. Sometimes he has an assessor, and sometimes not. The cases are therefore often decided in the most unsatisfactory manner. We find, as agents, that there is not the slightest use in speaking to a bailie, who is altogether ignorant of law, or evidence, or anything else, for he always takes his own way. Therefore we decline to go to that court, and the parties are often convicted without being defended by any agent.

5800. How often is that court held?—They hold it at any time, when there is anybody to try.

5801. Are there many cases brought before them?—A great many.

5802. Would that not be a very heavy duty to throw on the Sheriff?—It would increase his duty considerably; but if he could not overtake it, a stipendiary magistrate might be appointed.

5803. The Sheriff in Perth used to have a good deal to do?—That has not diminished of late.

5804. You think that in towns which cannot afford to have an experienced assessor, there should be a stipendiary magistrate appointed to deal with these matters where the Sheriff cannot overtake them?—I think so.

5805. *Mr. Paterson.*—On what grounds would you except the Dean of Guild Court in Edinburgh and Glasgow from your proposal to hand these courts over to the Sheriff?—Because I think they are better conducted.

5806. The courts over the country generally are constituted on the same principle?—Yes.

5807. The Dean is an elected magistrate?—He is.

5808. Holding his office only for one or two years?—Yes.

5809. In Glasgow the Dean is assisted by a certain number of liners?—Yes.

5810. Selected from the Trades' House and Merchants' House?—Yes.

5811. Both of these are large corporations in Glasgow, and hold considerable property?—Yes.

5812. And they may be parties to actions in the Dean of Guild Court before the Dean?—Quite possible.

5813. Have you known such?—No, I never knew it; but it might possibly occur, and that would be an objection.

5814. The liners chosen from the Trades' House are generally tradesmen in Glasgow in large business?—Yes.

5815. And they may be contractors for executing the very work which the court is considering?—That is very true.

5816. The assessor is generally one of the town clerks of the Corporation of Glasgow?—He is.

5817. And the corporation holds extensive property, and may be parties to cases before the Dean of Guild Court?—No doubt.

5818. The assessor of the Dean of Guild Court in Glasgow is also statutory secretary of the River Trust?—Yes.

5819. That is also a large incorporation?—Yes.

5820. And it also may be a party to causes in the Dean of Guild Court?—It may.

5821. So that the assessor in the Dean of Guild Court, if a River Trust case should come up before him, has to dispose of the case of his own employers, the River Trustees?—No doubt of it.

5822. *Mr. Shand.*—Do you know whether the Dean

Horace Skeete.

of Guild Court works well in Glasgow, and is a popular court?—When I was there it did work well, and it was satisfactory to the public at that time. There was a remarkably good town clerk.

5823. *Mr. Murray.*—Is the assessor of the Dean of Guild in Perth also the clerk of the Dean of Guild Court?—He is.

5824. Are there fees payable in the court?—There are.

5825. Payable to the clerk?—Yes.

5826. And he is also the judge?—Yes.

5827. *Dr. Barclay.*—He is also clerk to the Guildry?—Yes, and clerk to the police.

5828. In Perth, are there liners?—Yes, there are three or four councillors.

5829. Are they equally competent with the liners in Glasgow?—No.

5830. Have they a vote?—Yes; but they never have any lining in Perth. Any person may pull down a building, and build it up in any way he likes, till he is interdicted by his neighbours. In Glasgow, before you commence to build, you must present a petition to the Dean of Guild Court for a lining, and serve it on the adjoining proprietors; and the plans are seen, and can be objected to.

5831. *The Chairman.*—Is there a Commissary Court at Perth?—There is.

5832. Has it a separate clerk from the Sheriff Court?—Yes.

5833. Is there any advantage in keeping up that distinction?—I think it is better not to crowd too much upon one official, and the Commissary Court does its work in an extremely satisfactory manner, as far as my experience goes. I would therefore not be inclined to put them together, as the Sheriff-clerk has generally enough to do with his own duties.

5834. *Mr. Baxter.*—Does the Sheriff-clerk in Perth do his duty himself?—He does it by deputy.

5835. *Mr. Shand.*—Might not the Sheriff-clerk's and the Commissary-clerk's duties be combined with great advantage, by getting one or two more subordinate clerks, if necessary?—I can only say that I have always got my business done in a much more satisfactory way by the Commissary-clerks than by the Sheriff-clerks.

5836. *Dr. Barclay.*—Would the public gain anything by the change?—The public would gain nothing by the change, because the whole of the Commissary-clerk's fees are paid by the public for what he does.

5837. *Mr. Murray.*—May what you have stated not partly arise from the present mode of paying Sheriff-clerks, by which there is a sort of contract with them to do the whole duties of the office?—I don't think it ought to arise from that, if they are sufficiently paid.

5838. But by the present system there is contract with the Sheriff-clerk to do the work; and it is therefore his aim to do it at as cheap a rate as possible?—It is.

5839. And perhaps not to have such efficient assistants as he would have if his salary was a fixed sum?—I think that his salary should be a fixed sum, and that there should be fixed sums for the clerks in the office.

5840. In that case, would you see any objection to joining the Commissary-clerkship with the Sheriff-clerkship?—If the Sheriff-clerks were to do the work of the Commissary-clerk as satisfactorily as the Commissary-clerks do at present, I would see no objection to combining them; but I see no public good to be got by it.

5841. *Mr. Shand.*—The nature of the two offices is such that they would admit of being combined?—Yes.

5842. *Mr. Murray.*—And a different mode of paying the Sheriff-clerk would probably remove the objection which you state to the mode in which his business is conducted?—It might.

5843. *Dr. Barclay.*—Very important records are kept in the Commissary-clerk's office?—Yes.

5844. Is it not an advantage to have a separate office where these might be consulted?—Yes.

5845. *Lord Barcaple.*—These, I suppose, should in any event be kept separate and very accessible?—Yes.

5846. The decrees of the Commissaries should not be kept along with the decrees of the Sheriff?—No; there ought to be separate establishments for them.

5847. *Mr. Baxter.*—In many counties the offices of Sheriff-clerk and Commissary-clerk are joined?—Yes.

5848. *The Chairman.*—Have you any further observations to make?—There is just one thing which I wish to bring before the Commission, and it is this: Under the Cessio Act, 6 and 7 Will. IV., chap. 56, § 2, it is provided that if a debtor has been or shall be charged to pay a civil debt, and a warrant to imprison him has been issued, then it shall be competent to him to apply for interim protection, and for decree of *cessio bonorum* in the manner hereinafter provided. The first objection that I have to this clause is, that the debtor cannot apply for *cessio* until a warrant to imprison him has been actually issued. He can never know when that warrant is issued; he has no means of finding it out; and the first thing he hears of it is when he is apprehended and put in jail. Great hardships arise from this; but if the provision were, that as soon as a man was charged on a decree he could apply for *cessio*, the difficulty would be got over. Under the Act, it is provided that a debtor shall be able to apply for interim protection, so as to prevent him being incarcerated at all, and for interim liberation if in prison; but the 4th section says that a day shall be appointed, not earlier than thirty days, for the meeting of his creditors at a certain place, and that he must send them notice to that effect; but an Act of Sederunt was passed on 6th June 1839, the 6th section of which is as follows: 'In processes of *cessio*, whether the creditors, or any of them, shall have been called by letters, or cited in terms of law, the cause shall not be enrolled, nor shall any procedure take place therein either as a *cessio*, or any application for interim protection or liberation, or otherwise, until the diet of compearance in the same.' Now, the diet of compearance in the Act is thirty days after the man may be apprehended and put in prison; so that the practical working of these two Acts is, that though the object of the Act is to give him interim protection, he cannot find out when the warrant is issued to put him in prison, and he is generally put in prison; and when he gets there, although it is intended that he shall be able to apply for liberation, and to get out of prison, this Act of Sederunt says that he shall not apply for thirty days. The result is, that every one put in prison under the Act of Parliament must remain thirty days at least in prison before he can move one step. There is at present a man in Perth jail in these circumstances, and I am sure I have had fifty of them since I have been in Perth. In that way a man suffers about thirty-five days' imprisonment whether he has been guilty of anything fraudulent or not. That is the only case with reference to bankrupts in which this can occur now, as, under the Sequestration Statute, the Sheriff can grant immediate protection.

5849. *Dr. Barclay.*—The Act of Sederunt applies only to Sheriff Courts?—Yes.

5850. *The Lord Advocate.*—How would the difficulty be got over?—By enabling a man to apply for *cessio* as soon as he was charged on the decree; and, second, on the petition for *cessio*, applying for interim protection, authorizing the Sheriff to grant it.

5851. *Dr. Barclay.*—And liberation without waiting the thirty days?—Yes. The 6th section of the Act of Sederunt should be abolished.

5852. *Mr. Baxter.*—It is different in the Court of Session?—Yes. They can do that in the Court of Session, but we cannot in the Sheriff Court.

MONDAY, 11TH JANUARY 1869.

Members Present:—

LORD COLONSAY.
THE LORD JUSTICE-CLERK.
LORD BARCAPLE.
SIR E. COLEBROOKE.
JAMES CAMPBELL, ESQ.
GEORGE HARRISON, ESQ.
JAMES ADAM, ESQ.
A. B. SHAND, ESQ.
T. G. MURRAY, ESQ.
JAMES WEBSTER, ESQ.
J. B. BAXTER, ESQ.
ADAM PATERSON, ESQ.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

JOHN NAISMITH, ESQ., examined.

John Naismith.

5853. *The Chairman.*—You are a practitioner before the Sheriff Court in Glasgow?—Yes.

5854. How long have you been so?—Since 1853. I have been a member of the Faculty of Procurators there since that date, and previous to the passing of the Sheriff Court Act I conducted business there as managing clerk of the firm of which I am now a partner.

5855. Do you hold any official situation?—None.

5856. Have you any suggestion to make as to the constitution of the Sheriff Court, as consisting of a Sheriff and his substitutes?—I consider that it is essential that a cheap and effective system of appeal within the court itself should be maintained. The system may be improved; but it cannot be improved, or even maintained, if the office of Sheriff be abolished.

5857. Does the constitution of the court as it exists give satisfaction in your district?—Upon the whole it does. We consider that there may be improvements introduced; but upon the whole it gives great satisfaction, I believe, both to the profession and to the general public.

5858. What are the improvements that you would suggest?—That if possible some plan should be devised by which the court of appeal should not be constituted of a single judge.

5859. Have you considered how that could be carried into execution?—That is a matter which several committees named by our society have considered from time to time at various periods during the last twelve years at least, and the idea which has been entertained is, that the court might be improved by arranging that in appeals upon the merits, from final judgments in the cause, the Sheriff should be assisted by two of his substitutes.

5860. How many Sheriff-substitutes are there in Lanarkshire?—There are seven substitutes, four of whom are in Glasgow.

5861. *Mr. Paterson.*—I suppose you are speaking of the appeal court at Glasgow alone?—Yes.

5862. *The Chairman.*—You think the constitution of the appeal court for that district should be the Sheriff, with the aid of two of his substitutes?—Yes. That applies, however, only to the case of appeals at the final decision of the case. It would be too cumbrous in the case of appeals against interlocutory judgments.

5863. *Mr. Baxter.*—Would you include in the two substitutes, the substitute who gave the decision appealed against?—Never, where it could be avoided.

5864. *The Chairman.*—What are the advantages which you would expect to derive from that arrangement?—There certainly appears to be an anomaly in an appeal from a single judge to another single judge; and by that alteration in the constitution of the court, I would expect that it would enjoy to a still greater degree than it now does, the confidence of the public.

5865. Are there many appeals from the judgment of the Sheriff of Lanarkshire to the Court of Session?—I don't think they are very numerous. I have looked into it for some years back, and they generally range considerably under two dozen; but since the recent Court of Session Act was passed, abolishing the obligation of the party appealing to find security for costs, I believe they have become considerably more numerous.

5866. When you say two dozen, do you mean to comprehend the whole county of Lanark, or only the Glasgow district?—Only the Glasgow district. I cannot speak as to the other courts.

5867. *Mr. Campbell.*—To what do you chiefly attribute the small number of advocations under the old system, and the number of appeals under the new?—To two causes: first, the confidence which the people have in the local court; and second, but in a minor degree, to the expense necessarily incident to an appeal to the Supreme Court.

5868. *The Chairman.*—And I suppose in some degree to the necessity for finding caution?—Well, I must say that I do not recollect of a single case, where a party in *bona fide* intended to appeal with the expectation and hope of getting a reversal of the court below, where he was not able to find caution.

5869. To what do you attribute the recent increase in the number?—I believe a very large proportion of them are brought for the purpose of obtaining delay. A party cannot pay, and consequently he is very indifferent on the subject of expense.

5870. You said that they had increased since the passing of the recent Court of Session Act; has that increased the expectation of delay?—No; I said that I did not believe the necessity for finding caution prevented any party, who was litigating in good faith—at least the cases are infinitesimally rare—from bringing an advocation to the Court of Session. In saying that they were brought for the purpose of delay, I did not mean to say that the delay in the Court of Session has increased; on the contrary, I believe it must have greatly diminished; but still there necessarily is a considerable delay, and a party who wants to put off the evil day of payment of his debt as long as possible will hazard an appeal when he has not to find security for costs.

5871. I understood you to say you were of opinion the appeals had increased in your district since the passing of the recent Court of Session Act?—I speak not as matter of opinion, but as matter of fact.

5872. To what do you ascribe that increase in the number?—To a very great extent to the abolition of the rule, which I consider a salutary one, that caution should be found.

5873. *Mr. Paterson.*—In how many instances have the appeals been carried out?—That I cannot tell, because I speak only from information which I have gathered in a rough way from the books of the Sheriff Court, and the statistics in the Sheriff-clerk's possession. When the appeal is intimated, he cannot tell its after fate.

5874. Even under the old rule, I suppose it was not an uncommon thing for parties to find caution, and yet not to carry the advocation to the Supreme Court?—It was far from uncommon. They got fifteen days' delay by doing so; and in many cases bonds might be lodged by parties who acted in perfectly good faith, just because they wanted to get that time in order to consider whether they were to advocate or not.

5875. A party wanting delay in that way was aided, also, if the court happened to be in vacation?—Yes.

5876. *Mr. Adam.*—Would you prefer the scheme

John Naismith.

which you have suggested, of the Sheriff-principal sitting with two substitutes, to the Sheriff-principal sitting with another Sheriff of equal status?—Upon the whole, I would. I think, practically, it would work better.

5877. Don't you think you might get into this difficulty, that you would have cases where the judgment of the Sheriff-principal and one of the substitutes would be overruled by that of two substitutes?—Certainly you might; but it is hardly possible to figure a court of appeal in which there might not be a result of that kind, when you reckoned up the whole number of judges who have given an opinion upon the case.

5878. *Mr. Baxter.*—Taking the appeal to two Sheriffs, the judgment would be two to one?—Yes.

5879. But according to your suggestion it might be two to two?—Yes.

5880. Don't you think it would be better to have two sitting in the appeal court instead of three?—I think it would be an advantage to have, as two members of the court, judges engaged in the actual taking of evidence, and in the other details of the office of Sheriff-substitute, which the Sheriff-principal does not take part in.

5881. Do you think it would give satisfaction to have a judgment by two to two?—It might or it might not. It would depend, to a great extent, on the reasons by which the judgment was supported.

5882. *Sir E. Colebrooke.*—On the whole, you attach importance to having a tribunal consisting of three judges?—Yes.

5883. And you think it would give perfect satisfaction if the two judges, in addition to the Sheriff, were Sheriff-substitutes of Glasgow?—I believe it would. Of course I speak only for Glasgow. As to how such a court might be organized elsewhere, I cannot venture to give an opinion.

5884. Do you confine your remark to the substitutes of Glasgow, as distinct from the middle and upper wards of Lanarkshire?—The cases from the middle and upper wards of Lanarkshire are argued and disposed of by the Sheriff at Glasgow.

5885. The Sheriff-substitutes of the middle and upper wards are Sheriffs for the whole county. Do you mean that the Sheriff-substitutes, in the appeal tribunal which you have suggested, should be taken from the city of Glasgow only, or from the whole body of the Sheriff-substitutes of Lanark?—They might be taken from the whole body.

5886. That is to say, the tribunal might be composed, from time to time, of Sheriff-substitutes taken from the county, and not of any two of them named specially?—Yes.

5887. *Mr. Baxter.*—Have you thought how the appeal court might be strengthened in other places than Glasgow, where there are not so many Sheriff-substitutes?—Any views I might state on that subject are purely speculative, and entirely my own. Hitherto I believe I have been speaking the mind of the profession in Glasgow. As to other places, it might be arranged by combinations of counties—making such combinations as would admit of a larger salary being given to the Sheriff-principal, so that you would be entitled to demand a larger share of his time.

5888. *The Chairman.*—If you gave him a larger district, you would aid him in disposing of appeals by allowing two of the substitutes of that larger district to sit along with him?—Yes.

5889. *Mr. Baxter.*—It has been proposed that the Sheriffs should be grouped into appeal courts of two, to review the substitutes' judgments?—I believe that would be a considerable improvement.

5890. In other places than in Glasgow?—I don't say that that would not command the confidence of the public even in Glasgow; but the scheme which I have suggested, and which has been suggested by our committees, appears to me to be better. What you are suggesting may be second best.

5891. *Sir E. Colebrooke.*—You attach great importance to the present appeal to the principal Sheriff?—Very great.

5892. Are the cases usually very carefully considered by the Sheriffs-substitute?—Yes; we don't complain that they are not carefully considered by the Sheriffs-substitute. Still we consider that a cheap and rapid right of appeal is necessary, or at all events desirable: first, as a check on the judge of the first instance, and as a stimulus to zeal and care on his part; second, the appeal judge has the advantage of the analysis of the facts and views of the law contained in the interlocutor of the judge of the first instance; and third, and perhaps beyond the other reasons, the first discussion and the judgment of the Sheriff-substitute tend to clear away irrelevancies, and to present the real questions for decision to the minds of the parties and their procurators, as well as of the appeal judge. In short, we consider that the second discussion is even more valuable than the second decision.

5893. *Mr. Baxter.*—Do you think the Sheriff-substitute has some advantages,—in the taking of the proof, for instance?—Yes; he has the advantage of seeing and hearing the witnesses.

5894. *Sir E. Colebrooke.*—Do you consider that those advantages which you have just stated would not be secured by a direct appeal to the Court of Session?—No; because the expense of an appeal to the Sheriff is a very small matter. At the utmost it can hardly exceed in any case £5, taking the costs of both sides into account; whereas the expense of an appeal to the Court of Session will probably, taking the costs of both sides into account, in very few cases be lower than ten times that amount, or £50, because a great many expenses are necessarily incident to the one which are not incident to the other.

5895. In the Sheriff Court is the expense of the appeal caused by written pleadings, or is it confined to the fees of the practitioners?—In our court, written pleadings—reclaiming petition and answers before the appellate judge—are practically unknown.

5896. It is done entirely by oral hearing?—Entirely.

5897. Does the Sheriff-principal ever direct new evidence to be taken?—I believe that in a few cases he has done so.

5898. But in the great majority of cases it is confined to a hearing of the parties after the Sheriff has made himself master of the proceedings in the lower court?—Yes.

5899. Supposing there were a cheap appeal to the Court of Session, don't you think that more frequent appeals would be made direct to it?—Of course it would be so; but I believe it is impracticable to reduce the expense of appeals to the Court of Session to anything approaching the cheapness of the appeal from the one Sheriff to the other.

5900. There are at present very few appeals to the Court of Session?—Yes, comparatively few.

5901. But they have increased to a certain degree under the late Act?—They have.

5902. Have you any information as to the extent to which they have increased?—I speak from memory, and I can hardly commit myself to any figure; but if my memory serves me right, they are at least doubled, if not more.

5903. *Mr. Paterson.*—You speak now of cases in which notice of appeal only has been given. You have not experience of how many of these have been carried through?—I speak of cases in which appeal has been noted.

5904. *Mr. Baxter.*—Do you mean that the appeal has actually been entered, or that notice of appeal has been given?—The actual entering of the appeal is by writing on the interlocutor sheet, in a few words, that the party appeals.

5905. *Lord Barcaple.*—That is no evidence that any step has been taken in the Court of Session at that time?—No.

5906. *Sir E. Colebrooke.*—With regard to the appeals to the Sheriff-principal, do many of them consist of matters of form, such as setting right some error on the part of the Sheriff-substitute?—A good many turn on points of form.

5907. That makes it a matter of great importance

that the present cheap and easy appeal should be maintained?—Yes.

5908. And you entertain no fear that if there was a tribunal such as you propose, the proceedings would be rendered more expensive by the employment of counsel?—It is competent to employ counsel now.

5909. But do you think there would not be a desire to employ counsel more frequently?—I can hardly express an opinion on that subject.

5910. You stated that the subject had been long under the consideration of the body to which you belong. They have given an opinion on the subject more than once, have they?—They have.

5911. Have you with you the statement which they have circulated on the subject?—I have not; but I can procure a copy, and transmit it to the secretary.

5912. But it is a matter which has been long deliberated upon by your body?—Yes.

5913. Has their decision been a pretty unanimous one?—I believe on that subject it was absolutely unanimous.

5914. Were you present at former meetings when the subject was discussed?—At many of them. I believe I was a member of the committee. Indeed, on the occasion on which it was most elaborately gone into, and a long report drawn up, I recollect that I was a member of the committee.

5915. And that report was agreed to unanimously?—Unanimously, I believe.

5916. *Mr. Adam.*—Have the Sheriff-substitutes in Glasgow more experience in business than the other Sheriff-substitutes in Lanarkshire?—Necessarily they must, during the period of their service as Sheriffs-substitute.

5917. They have a greater quantity and a greater variety of business passing through their hands?—Necessarily they must have.

5918. Would it be desirable that the judgments of these Sheriff-substitutes should be subject to review by the other Sheriff-substitutes of Lanarkshire?—Although nominally the arrangement of the appellate judges might throw the office open to the other judges, so as not to throw any slight on them, or put them on an unequal footing, practically it would always be the Glasgow substitutes who would sit, I imagine, except in a case of emergency, at all events in Glasgow cases. But in point of fact one of the country substitutes does regularly sit in a Small Debt Court in Glasgow.

5919. If the time of the Sheriff-substitutes in Glasgow was very much occupied, do you not think it might happen that Sheriff-substitutes in the country, who were not so much occupied, might be taken in as appeal Sheriffs?—It might be so.

5920. And that would not be satisfactory?—It might or it might not. It depends on the gentlemen who hold these offices.

5921. *Sir E. Colebrooke.*—Was the proposal formerly made by your body exactly the same as that which you now suggest, namely that the Sheriff-principal shall have the assistance of two substitutes?—I believe it was.

5922. Was it not that he should have the assistance of Sheriffs of other counties?—Not as to Lanarkshire. I believe the plan formerly suggested was that the smaller counties should be grouped, but that Lanarkshire, and other counties similarly situated, should be kept separate.

5923. Could the work to come before the Sheriffs be done as efficiently as at present, supposing this court were established, without some increase of their number? If some of the substitutes were taken from their present duties to act in the court of appeal, would it require some addition to the number of Sheriffs?—Perhaps an additional Sheriff might be necessary; but I don't think it.

5924. At present they have to give their whole time to get through their work: their work is very heavy?—The work is heavy, certainly.

5925. *Mr. Paterson.*—Do you think the Sheriff-substitutes in Lanarkshire are over-worked?—No, I do not think they are. I don't think they are harder worked than the average of professional men.

5926. You think the experiment might be tried of giving them additional duties as members of a court of appeal; and if the result showed that the work was too heavy, you think an additional Sheriff-substitute should be appointed?—Yes.

5927. *Mr. Adam.*—Was the scheme of having another Sheriff of equal status with the present Sheriff-principal, as an appeal tribunal, considered by your body?—Yes; I may say that it was. I don't know whether it was formally considered, that is to say, whether anything was minuted on the subject; but I believe it was a subject of conversation at the meetings of committee.

5928. As a possible scheme?—As a possible scheme.

5929. *Mr. Harrison.*—Do you think it would be desirable, in any class of cases, to make the decision of the Sheriff-principal, with the assistance you propose to give him, final?—Perhaps there are some classes of cases in which it might be proper to do so; but that is really a question to which I cannot say that my mind has been directed. But one class of cases occurs to me just now, viz. cases of affiliation and aliment of illegitimate children, cases of which kind, turning on mere questions of fact, and seldom involving questions of law,—in these the decision of such a court as that might be declared final. However, I would not desire to commit myself to an opinion to that effect.

5930. The cases I was referring to are cases where the value in dispute is of small amount?—Nominal value is often a very deceptive test of the real interest at stake.

5931. *Lord Barcaple.*—There is at present finality at £25?—Yes.

5932. Does that include a large number of the causes brought in your court?—Not very large.

5933. You said that at present the time of the Sheriff-substitutes in Glasgow is very fully occupied?—It is fully occupied.

5934. Do you think that the present staff could possibly carry on the appeal business upon the footing that you have recommended?—Well, I think they could. I think there are a good many matters of office arrangement and detail by which a considerable saving of the time of the Sheriff-substitutes could be effected.

5935. I suppose the appeal court would necessarily occupy a very large amount of time over the whole session?—I should say that one day a week would do. The Sheriff-principal at present has two days a week; but what I contemplated was, that the appeal upon merely interlocutory judgments should be heard, as at present, by the Sheriff sitting alone; so that the proposed court would only be occupied with final judgments on the whole cause.

5936. How do you propose that the opinions of the appeal judges should be announced?—Of course there must be an interlocutor signed by the Sheriff.

5937. That is the formal judgment; but how do you propose that the opinions of the individual judges shall be announced, and the grounds of their judgment?—In the general case, in a note to the interlocutor, leaving it, however, to the judges, when they thought proper, from the nature of the case, to express their opinions orally from the bench.

5938. Then you would expect that, in the general case, there should be a note prepared by one of the judges?—Yes.

5939. Suppose the court not to be unanimous, how would you suppose the matter would be then?—It would be done by one of the judges selected by the majority.

5940. But would the dissentient judge also, according to the expectation of your committee, indicate his opinion in a separate note?—No.

5941. Where the opinions were given orally from the bench, do you anticipate that there would be any system of law reporting by which they would be preserved and made available, either to the parties or to the Court of Session, in the event of the case going there?—That is a matter which I have not considered.

John Naismith.

5942. Have you considered whether there might not be a good deal of difficulty and delicacy found in the preparation of a note stating the opinions of the court?—Of course there would be a certain amount of difficulty, as there always is, in deciding a case of difficulty; but I don't suppose it would be greater than in the case which frequently occurs, where a judge of the Supreme Court in Scotland delivers the judgment of the court.

5943. That is a case where the judges have found that their views were entirely coincident?—Yes.

5944. But where their views are not entirely coincident, although leading to the same result, do you think that it could be conveniently and systematically recorded in a note?—Where there was a difference of opinion or a difference of reasons, although arriving at the same result, each judge might give a separate note.

5945. Then you would rather anticipate that the system of notes in one form or other must continue?—I should think so.

5946. Is there a very large proportion of the causes in the court at Glasgow which depend upon evidence taken in the cause?—Of course there is a very large proportion.

5947. Can you give me any idea whether in your court the number is large in proportion to causes in general?—That is to say, questions turning upon evidence rather than upon law?

5948. Yes; where there are disputed facts cleared up by evidence taken in the cause?—Considerably more than one half of the whole cases.

5949. In those cases in which proofs are taken, is there a very large proportion of them in which, after the proof is taken, there really remains a matter of dispute about the fact, or is there a very considerable number of them in which the taking of the proof explains the facts so as to leave no real controversy?—Both classes are pretty numerous.

5950. *Mr. Campbell.*—Is the profession in Glasgow on the whole satisfied with the mode in which the evidence taken in the Sheriff Court is recorded?—In one sense they are. We are generally pleased with the result; but the way in which it is taken occasions occasionally considerable delay, and I shall revert to that in speaking of the procedure.

5951. *Lord Barcaple.*—In the causes which come for advocation to the Court of Session from Glasgow, and where the advocation is really prosecuted, do you find that the bringing of the advocation depends mainly upon the serious value of the suit?—In most cases it does. In others, of course, it depends considerably upon the temper of the litigants.

5952. You have cases of large amount in your court?—Yes.

5953. Occasionally cases involving directly thousands of pounds?—Yes.

5954. Do you find that cases of that sort, as an almost invariable rule, go to the Court of Session?—On the contrary, it is seldom that that class of cases go there.

5955. Can you explain that?—These cases are generally more thoroughly dealt with in the Sheriff Court than cases where a smaller amount is at stake; and, I believe, from the thorough investigation of the facts, both on the part of the procurators employed and of the judge, matters of fact are cleared up, and matters of law are discussed in such a way as to satisfy both parties, one way or other.

5956. Probably in that class of cases also it may pretty generally happen that the parties interested are parties of a superior position and superior intelligence?—It may be assumed that the parties interested in such cases generally are so.

5957. And therefore they come to recognise the fact that the true merits of their case have been ascertained?—Yes.

5958. *Mr. Paterson.*—Your theory of the appeal court is, that it should apply only to judgments of the Sheriff-substitute on the merits?—Yes.

5959. You would propose that all incidental interlocutors should be reviewed, as at present, by the Sheriff-principal alone?—Exactly.

5960. Might not a hardship arise in some instances, that is assuming your appeal court to be the better of the two, where the interlocutor involved the maintaining or the dismissing of the action?—Of course, where it involves the dismissing of the action it is the end of the cause, and is a final judgment. And as to the sustaining of the action unduly, which is the case you put, or other similar judgments, you have just a choice of inconveniences. It is impossible to devise a court of appeal which shall be absolutely perfect.

5961. You used the expression, 'interlocutors on the merits,' and it was that which I wished explained?—I meant final judgments.

5962. What is your opinion as to making the Sheriff-substitutes in other counties than Lanark members of the appeal court?—The suggestion which I made, I think, was, that by grouping the counties an arrangement similar to that suggested for Glasgow might be made in other districts. But that was a mere suggestion. I put the case for Glasgow on entirely independent grounds. It is as well that uniformity should be preserved if it can be preserved; but if an improvement can be got for the court of so extensive a city as Glasgow, and county as Lanarkshire, I don't think it should be objected to merely because it introduces a court differently constituted from the courts for the other counties of Scotland. In short, utility should not be sacrificed to uniformity.

5963. *Mr. Baxter.*—Would you not prefer an appeal court consisting of two principal Sheriffs, in other counties than Glasgow, to a court consisting of a Sheriff and his substitute?—I think that the latter probably, even for the other districts of Scotland, would be preferred; but I defer to the judgment of those better acquainted with these other districts.

5964. *The Chairman.*—As, for instance, if three counties were grouped together, that the Sheriff, who is the Sheriff of these three counties, should have the assistance of the Sheriff-substitutes of two of them?—Yes.

5965. *Mr. Paterson.*—Would you explain a little more fully the grounds of your hesitancy about the Sheriff-substitute of the upper and middle wards of Lanarkshire being eligible as members of the appeal court? The cases in these two wards are not of the same importance generally?—They are not of the same importance; and there is another circumstance, viz. that we in Glasgow have a large class of cases in which, as yet, they can have had no experience,—for example, maritime cases,—the Sheriff-substitute of an inland division of the county can have no practical experience in these cases.

5966. The character of the cases in the two upper wards is materially different from those in the lower?—Of course the lower ward embrace cases of the same class as the others; but it embraces numerous cases of other classes.

5967. Are there in the two upper wards cases of the same commercial character that you have in Glasgow?—Rarely. But we have cases of importance,—commercial cases connected with the mining interests often there.

5968. However well qualified the Sheriff-substitutes at Lanark, Airdrie, and Hamilton might be, you would hesitate about making them eligible as members of the appeal court?—There would be a difficulty about that, certainly,—at all events at first. After new appointments came to be made, and judges were appointed with the view of taking their share in the appeal court, the same objection might not apply; but the gentlemen who have long held these situations, can of course have had no experience in the class of cases to which you allude.

5969. *Mr. Campbell.*—But if the Sheriff-substitute at any of these three places was a competent lawyer when appointed, and sat habitually in the appeal court, would he not become as competent an appellate judge as any other Sheriff-substitute?—Certainly; and that was what I pointed at in my last answer,—that when new appointments came to be made, the judge who was appointed would keep up his knowledge of these branches of law; but it would be rather too much to expect that gentle-

men who have held for twenty or thirty years the situation of Sheriff-substitute in the inland counties, should have kept up their reading of branches of law which could never by any possibility come before them.

5970. *Mr. Paterson.*—You said that the Sheriff-substitutes' time at Glasgow might be economized by some office details and arrangements: will you explain what these are?—There is one which I believe creates now a good deal of inconvenience and loss of time to every one, and that is, that the whole work is divided, as far as may be, equally amongst them; that is to say, that each takes his share of work of every description. Now I think their time could be considerably economized by appointing one of them to do such duties as taking prisoners' declarations, precognitions, granting *pro forma* warrants, proceedings under the Poor-law Acts, and matters of that kind. A great deal of time is lost by interruptions.

5971. At present the business is distributed without regard to its peculiar character or class?—Yes; substantially that is so. There are attempts made to classify, and to say that one Sheriff-substitute should take a certain duty for a particular day; but practically these rules are every day broken through, and great inconvenience is felt.

5972. The only classification you have just now is numerical?—Yes.

5973. Do you think it could be greatly improved and time saved were the cases classified?—Well, the classification would require to be very simple.

5974. Therefore it could be more easily made?—Yes. One Sheriff should be appointed to do routine and detail work. That should be done by the junior Sheriff-substitute, so that the time of the others might not be wasted by interruptions.

5975. *The Chairman.*—That might not improve his qualifications for sitting as a judge of appeal in the other class of cases?—No.

5976. But he, being the junior, might step on when his turn came?—Yes.

5977. *Mr. Adam.*—Do you think it would be satisfactory to take Glasgow by itself—to separate it from the rest of the county, and provide for it in that way?—So far as the rest of Lanarkshire is concerned, I don't think that the whole duties incumbent on the Sheriff are very serious. I don't think they take up any very large share of the Sheriff-principal's time.

5978. *Mr. Campbell.*—And the commercial interests of the whole of Lanarkshire are very much bound up with the transactions in Glasgow?—Yes; and the mining district, which is growing and spreading over the whole county.

5979. And also the manufacturing interest?—Yes. Of course the Airdrie district is completely joined with Glasgow in its interests, and the mining and public works are spreading now both into the Hamilton and Lanark districts.

5980. The same remark applies to Renfrewshire very much?—Of course it does.

5981. *Sir E. Colebrooke.*—The question as to the division of the county has been occasionally considered, has it not?—I believe it has; but more by the Commissioners of Supply or other county bodies than by us.

5982. You have not heard any complaint made as to the rest of the county being neglected in consequence of the Sheriff's time being absorbed by attention to cases in Glasgow?—No; I never heard any complaint of that kind.

5983. Nor that the Sheriff is at all overtasked to superintend the executive duties of his office in the rest of the county?—No; I cannot say I have ever heard that.

5984. *Mr. Paterson.*—The county is accessible in almost every direction by railways?—It is.

5985. *The Chairman.*—Would you extend the jurisdiction of the Sheriff Court to any class of cases?—There are various classes of cases to which it might be extended. There is one subject which has been a good deal discussed, and I believe even bills have been brought into Parliament about it—viz. the extension of the Sheriff's jurisdiction to certain questions of heritable right. It is a subject that is very difficult to deal with. There is sometimes great hardship in the necessity for having recourse to the Court of Session in questions as to property of small value. On the other hand, it would appear anomalous to give jurisdiction to an inferior judge to dispose of a right to estates of miles in extent. Practically it is impossible to draw a line of demarcation between the two classes of cases, the one shading gradually into the other. The only suggestion which occurs to me is, that the pursuer might be allowed to bring his action in either court; but if the action be brought in the Sheriff Court, that the defender should be allowed at once to transfer it to the Court of Session if he sees fit. Things would thus in practice right themselves, and the cases appropriate to the Supreme Court would be at once transferred to it; in short, the provision proposed would in effect amount to this, that the parties might prorogate the jurisdiction of the Sheriff. On various previous occasions an attempt was to draw a money line; but the objection to that is, that in every case the question would arise, What is the value of the subject?

5986. *Mr. Baxter.*—You say that it is anomalous to allow the Sheriff to have jurisdiction in regard to large estates; but you give him jurisdiction to any extent in moveables. Where is the anomaly?—I did not say the Sheriff, but I said any inferior judge. I refer to matters affecting large territory, where the feeling, both in the profession and I believe out of it, would be against committing the jurisdiction to any court but a supreme court.

5987. But why make the distinction between heritage and moveables?—It is difficult to give a reason for it, but I believe that such is the general feeling.

5988. Would there be any impropriety in giving the Sheriff jurisdiction to a large extent in regard to heritable subjects?—I would not see any impropriety in that; but the extreme cases which I looked at were cases in which large estates of very great extent, perhaps extending into several counties, might be involved, and which cases would be almost certain to go to the Supreme Court in the end.

5989. If the cases extended into several counties, you could not bring the action in one county?—Not at present; but I have a suggestion to offer upon that subject.

5990. I suppose you don't think any such case would be brought into the Sheriff Court naturally?—No; and that is what I meant to convey in my first answer, that between that class of cases and the smaller cases involving moderate amounts, you cannot draw a hard and fast line; but by some suggestion, such as I offer here, the thing might right itself.

5991. Why would you give the defender a privilege in regard to heritage which you don't give in regard to moveables?—Because *prima facie* I think the Supreme Court is the proper court for deciding questions of land; whereas *prima facie* I would say that in commercial questions the judge ordinary is the proper judge in the first instance.

5992. Why do you think the Court of Session is the only court for properly adjudicating on heritable rights?—I did not say it was the only court; I said that *prima facie* it appeared the most eligible; and I believe that the jurisdiction of the Supreme Court of the country has always been mainly the jurisdiction which ruled questions of heritable right.

5993. *Mr. Adam.*—Supposing either party had a right to appeal from a final judgment in a matter of heritable rights, would the ultimate judgment of the Court of Session be affected by the fact that it had commenced in the inferior court? Would the record be deficient?—The record is frequently made up in the short form in the Sheriff Court.

5994. Is it not just a matter of the difference of expense?—Mainly it is so; and therefore I suggest this plan, by which I think matters may right themselves, and the cases appropriate to each court go to each.

5995. *The Chairman.*—There is such a power at present in a certain class of cases under the 40th section of the Judicature Act, by which a party may have his case removed to the Court of Session when a proof has been allowed?—That is for jury trial.

5996. Not necessarily to be followed up by jury trial;

John Naismith.

but that is so far a precedent for what you have suggested?—Yes.

5997. *Sir E. Colebrooke.*—That would take place at an earlier stage in the suit?—Yes.

5998. *The Chairman.*—Before any expense is incurred?—Yes.

5999. You think that the defender should have that right?—Yes.

6000. *Mr. Paterson.*—Is there not a considerable class of persons who prefer that cases of importance, whether heritable or moveable, should originate in the Supreme Court?—I have met gentlemen who take that view, but not frequently.

6001. You don't think it is a prevailing view?—I don't think it is in our community.

6002. Do you consider that questions of feudal law are better understood in the Parliament House, or at least that the lawyers there are more familiar with the practice of them than lawyers in the country?—Of course, seeing that at present the jurisdiction of the Court of Session in that class of cases is exclusive, it is to be expected that practitioners in that court should be more skilled in these particular questions.

6003. Do you attach any weight to the circumstance that you have a greater number of minds applied to cases of that character in the Supreme Court than in the Sheriff Court?—Of course both in the Supreme Court and Sheriff Court the judge of the first instance is one.

6004. *Mr. Webster.*—In the preparation of cases before you come to the judgment in the Court of Session, there are always at least two, the agent and the counsel, and it may be a senior counsel; is there any advantage, in your opinion, in having that sort of assistance in preparing cases for decision?—Of course there must be a certain advantage, and even a considerable advantage; but the question is, whether the public would prefer to want the advantage of many counsellors in order to get justice at a cheaper rate.

6005. *Mr. Baxter.*—That is not an advantage peculiar to cases relating to heritage?—No.

6006. *Mr. Paterson.*—You think, then, it might make a material difference if the procedure in the Court of Session were more economical?—Of course it might; but however much you might reduce the expense of procedure in the Supreme Court, litigation there must remain an expensive matter.

6007. Supposing the expense in the Court of Session, and the despatch, were made all you could wish, do you think the Sheriff Court would still be preferred?—You ask me to assume what can never be the fact. So long as the constitution of the court remains what it is, and the relations of counsel to agents, and of agents to country practitioners, you can never minimize the expense in the Court of Session so as to reduce it to anything approaching the expense in the Sheriff Court.

6008. You consider it needless to give an opinion on an assumption which you think impracticable?—It is quite impracticable.

6009. *Mr. Baxter.*—Are you not in the daily habit of dealing with difficulties of heritable title and conveyancing?—I cannot say that I am; my partners are.

6010. But the agents in Glasgow are?—Yes.

6011. And examining titles?—Yes.

6012. *Mr. Webster.*—Looking at the body of agents in Glasgow, or over the country generally, what is your opinion as to their capability of conducting all cases connected with feudal rights, without the aid of the bar, which is always had in Edinburgh?—I believe that they conduct, to the satisfaction of their clients and the community, the great bulk of the commercial litigation of the country; and if they are capable of doing that, I don't see any special difficulty in Scotch feudal law to render it a matter of impossibility or difficulty for them, when they have once fairly got into the system of it, to conduct the other class of litigations to which you point.

6013. My question had reference to the present state of matters,—whether, at present, the general body of practitioners in the Sheriff Court are, in your opinion, qualified to conduct difficult feudal cases, which in the Court of Session are practically conducted by counsel with the assistance of agents?—Of course I can speak only specially for our own body, and I don't see any difficulty in their doing so. They deal already with questions of at least equal difficulty and intricacy.

6014. *Mr. Campbell.*—And as conveyancers, they are intimately acquainted with the theory on which titles to land rest?—Yes.

6015. And they habitually prepare these very conveyances which would form the subject of discussion in questions of heritable right?—Yes.

6016. *The Chairman.*—Is there any other class of cases to which you think the jurisdiction of the Sheriff ought to be extended?—To consistorial cases.

6017. Of all classes?—Yes.

6018. Declarators of marriage and declarators of legitimacy?—Yes; subject perhaps, however, in these particular cases, to a similar safeguard to that which I suggested in the case of heritable property—viz. that if a defender objected to being brought into the Sheriff Court in an action of that class, he should have the immediate right to transfer it to the Court of Session.

6019. *Mr. Baxter.*—Supposing that a man prosecuted a divorce against his wife, and that she should take it to the Court of Session, do you think he should be mulcted in a sum to cover Court of Session expenses, when he was willing to be content with the Sheriff Court?—That is a hard case; but it is impossible to make a rule which would not involve the occurrence of hard cases.

6020. In humble life, when a case of divorce was brought by a husband, would you allow the woman the power to transfer it to the Court of Session?—That is a power which I should anticipate would be very rarely exercised in such cases as you suggest.

6021. *Lord Barcaple.*—Would you not be apprehensive that the paramour, who may be called as a co-defender, would suggest to the principal defender to take that course?—It might be so.

6022. Is there not a delicacy and a difficulty about that rule applicable to this class of cases, which did not apply to the class of cases which you formerly mentioned?—There certainly is; and therefore I make the suggestion with considerably more hesitancy in the case of divorce. There is one class of cases to which I think the jurisdiction of the Sheriff might be extended without any such provision at all, and that is actions of separation and aliment. The exclusive jurisdiction of the Court of Session must in that class of cases very often operate as an absolute denial of justice; and in cases also where a deserted or ill-used wife is authorized to apply to the court for protection for her earnings against her husband or his creditors.

6023. *Mr. Baxter.*—Questions under the Conjugal Rights Act?—Yes.

6024. Protection to a wife's earnings, and provision to her in case of desertion?—Yes; in England magistrates have that jurisdiction, and it might safely be entrusted to the Sheriff.

6025. At present that can only be done in the Court of Session?—Yes; and that is practically refusing it altogether in the greater proportion of cases.

6026. *Sir E. Colebrooke.*—Is it within your experience that much injustice has arisen in consistorial cases from the want of a power to apply direct to the Sheriff Court?—In the cases of separation and aliment, the way in which the law is evaded in Glasgow is by raising an action which upon the face of it concludes only for interim aliment till the rights of parties should be determined by the sentence of a competent court. Of course that sentence is never pronounced, and in most cases the decree operates as an absolute decree for aliment.

6027. *Mr. Baxter.*—Have you been driven to that as an expedient?—Yes; I believe the agents for the poor raise hundreds of these cases in a year.

6028. *Mr. Webster.*—And practically they serve the purpose?—In some cases they do; in others they do not. It depends upon what defence is set up. If the husband is cunning enough to offer to receive his wife back into his house, of course they won't serve their purpose.

6029. *The Chairman.*—Would you extend the Sheriff's jurisdiction to the appointment of judicial factors and factors *loco tutoris*?—Yes. We think that the local judge, familiar with local circumstances, is the proper person to appoint to these offices; and we occasionally find that the Supreme Court remits to the local judge to suggest a proper party, which is practically delegating their jurisdiction to him. Of course any appointment or decision of the local judge would be subject to the review of the Court of Session.

6030. *Mr. Campbell.*—How would you propose that factors *loco tutoris* should be controlled, in the event of their being appointed by the Sheriff?—They might either be controlled as at present, or they might be under the control of the Sheriff, as trustees in bankruptcy are to a considerable extent; but I prefer that they should be as at present.

6031. *Lord Barcaple.*—Would that imply that application for special powers should necessarily be made in the Court of Session?—No.

6032. Would you allow the application for special powers to be made in the Sheriff Court?—Yes.

6033. By 'control' you mean that in the event of there being any complaint, it should be made to the Court of Session; that is, I suppose, from the accountant being an officer of court?—Yes; and to prevent the possibility of appeals. In such a case as that, it would not be proper that the judgment of the court having control should be liable to be carried from court to court by appeals; and it is very important that, when the accountant makes a complaint, the court to which he complains should be in the position of stepping in peremptorily and saying what should be done.

6034. That is not a very frequent step of procedure, fortunately?—Fortunately it is not.

6035. How would you do as to the ultimate discharge of the factor?—That might be given by the judge who appointed him, on the report of the accountant.

6036. *The Chairman.*—Would you have the factor to account to the accountant of the Court of Session?—Yes, in the same way as a trustee in bankruptcy is subject to the control of the accountant in bankruptcy in Edinburgh.

6037. But you would have the factor to lodge his periodical accounts with the accountant of the Court of Session?—Yes.

6038. *Mr. Webster.*—Who would deal in the Sheriff Court with the matter of caution, which is dealt with in the Court of Session by the Principal Clerk of Session?—It could be dealt with by the Sheriff-clerk, who is probably in a better position to do it than the Principal Clerk of Session, knowing more of who are to be cautioners.

6039. *Mr. Baxter.*—The Sheriff-clerk adjusts bonds of caution now?—Yes.

6040. *The Chairman.*—Is there any other class of matters to which you would extend the Sheriff's jurisdiction?—There is that class of cases in which the jurisdiction of the Sheriff is excluded rather from the form than from the nature of the action, such as actions of suspension, actions of reduction, and the like. Of course, speaking of actions of reduction, I mean not actions of reduction of decrees *in foro*, or even decrees in absence in the Supreme Court; but actions of reduction of writings, or decrees of registration.

6041. *Mr. Baxter.*—And provings of the tenor?—Yes. These differ only in form from the classes of cases which the Sheriff at present disposes of.

6042. What do you say as to the jurisdiction against a foreigner, which is founded at present by warrant of the Sheriff Court?—As to jurisdiction in that way against a foreigner, there is a considerable anomaly about it altogether. A foreigner would decidedly object to be subject to the jurisdiction either of the Sheriff Court or of the Supreme Court; but I see no objection to extending the jurisdiction of the Sheriff Court to questions against foreigners generally, in the same way as it at present extends to jurisdiction against foreigners in maritime cases. The Sheriff already possesses that jurisdiction, and there can be no harm in extending it to other mercantile questions with foreigners, subject perhaps to power to the foreigner to advocate the case at once to the Court of Session, if he prefers doing so.

6043. *Mr. Adam.*—You say you would introduce reductions into the Sheriff Court. There are some cases of reduction which are tried by juries; would you propose to introduce jury trial into the Sheriff Court, or would that affect the question of introducing all reductions into the Sheriff Court?—What I pointed at was merely questions of a similar character to those involved in the generality of actions daily raised and disposed of in the Sheriff Court. The difference is only a difference in form; but perhaps you will be good enough to explain what class of actions you point at as those which must necessarily be tried by jury.

6044. Reductions on the ground of fraud?—I don't see why these should not be tried in the Sheriff Court without a jury, in the same way as other questions where allegations of fraud are made are tried there, without a jury.

6045. *The Chairman.*—Reductions on the ground of deathbed?—Yes, these also. That is a fact which it is generally pretty easy to ascertain.

6046. You would try them without a jury?—Yes. There is one class of cases in which a jury might be introduced with advantage in the Sheriff Court, and that is actions of damages for libel and slander, and perhaps actions of assythment, and actions of damages for personal injury.

6047. *Mr. Webster.*—For what reason would you introduce jury trial in these cases?—Because the verdict of the jury would seem to be the natural and the proper way of ascertaining the amount to be awarded to a party who has been injured in any of these ways.

6048. Do you find that juries, in assessing damages, give more satisfactory, or less satisfactory decisions than you get from the Sheriff in such questions?—I dare say the decisions of a Sheriff are likely to be more satisfactory to a neutral party looking on; but in that class of cases, I think the parties themselves are generally better satisfied by the verdict of a jury.

6049. *The Chairman.*—Do you think the defenders are better satisfied?—Both parties.

6050. Is it your view that both parties are better satisfied?—What I point at rather is, that parties in general look upon that as a natural way of deciding a question of the kind.

6051. It is not so very old an institution as to have become part of the nature of the people of Scotland?—No, it is not; but still the questions involved in cases of that kind are liker those involved in criminal matters, in which the people of Scotland have been accustomed to jury trial for ages.

6052. They have been accustomed, in criminal matters, to have the verdict of a jury as to the fact, but not as to the awarding of the consequences of it?—No.

6053. But this has reference to the consequences of the fact. Do you think that these things are better left to the general feeling of a number of persons than to one mind?—Yes.

6054. Would you apply that to other cases in which damage came to be assessed?—No; because in other cases you have generally got definite principles on which to proceed.

6055. You would extend the Sheriff's jurisdiction to the class of cases you have mentioned, and you would have them tried by jury; you would give the Sheriff power to try the cases with a jury?—Yes; and not necessarily a jury of 12.

6056. What number would you suggest?—Five or seven.

6057. Would you make any provision for a new trial in case the jury went wrong?—Yes; much in the same way as in jury cases in the Court of Session.

6058. Would you give power to the Sheriff to decide whether there should be a new trial?—Either to the Sheriff, or it might be done on a motion to the Inner House.

6059. How would you record the evidence so that it could be submitted to the Inner House?—By the Sheriff's notes.

John Naismith.

6060. In that case you would have the Sheriff sitting as a single judge, trying the question with a jury?—Yes.

6061. With a motion to the Inner House if there was any complaint that the verdict was against evidence?—Yes.

6062. And in the event of there being an objection to law laid down by the Sheriff, what would be the course?—The same.

6063. And as to a ruling in regard to evidence?—The same.

6064. Then you would try cases before the Sheriff and a jury, with a review of that kind by the Inner House?—Yes.

6065. *Mr. Webster.*—Should the jury be unanimous, or how would the verdict be given?—By a majority, after an hour's deliberation.

6066. Would you prefer a verdict by a majority of a jury of either five or seven on a question whether damages were due, and fixing the amount, to the decision of a judge?—I don't say that I individually would do so; but I believe litigants in such cases generally would have that feeling,—I mean before the verdict is pronounced. They might have another idea upon the subject afterwards.

6067. Does it not enter into the question whether there should be such a system, that there is a probability of the parties being entirely dissatisfied after the verdict?—It would be the same thing probably after the verdict, whether the verdict had been pronounced by the Sheriff disposing of the question of damages, or the jury doing it. I speak of the matter of confidence before the verdict.

6068. *Mr. Baxter.*—Without regard to the feelings of parties at all, do you think the case would be better adjudicated on by a jury or by the Sheriff?—In that class of cases it would be at least as well, if not better; because in such a matter a judge has no definite grounds or data to go upon; it must be in great measure a matter of feeling and discretion.

6069. *Mr. Paterson.*—From what class would you select the jury of 5 or 7? From the same class that juries of 12 are selected now?—Say 2 special and 3 common jurymen, or the same proportion out of 7—3 to 4.

6070. According to your theory, the verdict might go by the opinion of 3 out of a jury of 5, or 4 out of a jury of 7?—Yes.

6071. Have you any predilection as between the 5 and the 7?—Well, 5 would be cheaper than 7; but on the whole I would prefer 7.

6072. *The Chairman.*—As to economy, it would be cheaper to dispense with the jury altogether?—Yes.

6073. *Mr. Paterson.*—You have had experience in jury trials?—I am fortunate enough to say that I have not had very much.

6074. *The Chairman.*—You don't approve of jury trial except in cases of the class you have mentioned?—I do not.

6075. *Mr. Paterson.*—Don't you think there might be a risk, with so small a jury, of the result being arrived at rather through management than through the real justice of the case?—I don't see how that is likelier to happen with a small jury than a large one.

6076. You have more minds to convince with the large jury; perhaps that does not weigh in your view?—No; I think 7 is a sufficiently large number.

6077. *The Chairman.*—You say that lookers-on are generally better satisfied with the judgment of the Sheriff than with the judgment of a jury?—Yes.

6078. Does it not follow from that, that they think the Sheriff is right and the jury wrong?—Yes; but in cases of that kind, when it comes to be a man's own cause, somehow he has a predilection, generally speaking, for jury trial.

6079. If you are to yield to his predilection, why limit it to that class of cases?—Because it is only in that class of cases that this predilection exists.

6080. *Mr. Webster.*—Do you find that the predilection exists on the part of defenders, or mainly at least on the part of the pursuers, particularly in cases of personal damage from what may be called accidents and the like, involving matter of principle between master and servant, and such cases? Is it not the pursuer alone who has a predilection for a jury?—Generally speaking it is, and people of the same class as the pursuer: the people of that class would be satisfied with the verdict of a jury, where they would not be satisfied with the adverse judgment of a single judge.

6081. But do you not find, in practice, that in that class of cases verdicts of juries are often given in favour of the pursuer, and oftener set aside afterwards, than any decision by the Sheriff in similar questions?—It may be so; but I cannot pretend to have had any very great experience in that class of cases myself; and in speaking of them, I am speaking more of what I have gathered from others by conversation than from my own experience.

6082. *The Chairman.*—Have you any notion as to whether the judgment of a jury is considered wrong more frequently when it is given for the pursuer than when it is given for the defender, in the class of cases that you have talked of?—I should say most frequently when it is given for the pursuer.

6083. That is, the jury is more favourable to a pursuer than the public think right?—Yes.

6084. *Sir Edward Colebrooke.*—Do you think jury trial is a discouragement to entering causes in the Court of Session?—Probably it is, to some extent; or rather, I should say, it was so some years ago more than it is now.

6085. You have oftener been in favour of the judgment of the Sheriff as against that of a jury. Would not that equally apply to the judges of the Court of Session as against a jury—that your clients would prefer a judgment by the judges rather than by a jury?—And accordingly we find it is so.

6086. Therefore, if jury trial were restricted, the Court of Session would probably be more largely resorted to?—I understand it is, in practice, greatly restricted now. In very numerous cases, the evidence is now taken by a shorthand writer, while a few years ago there would have been trial by jury.

6087. *The Chairman.*—Do you understand that that economizes money?—I cannot tell. That is more a matter for persons connected with the court to state. I may say, however, that in the few cases I have had of that description, the costs have been very heavy, but then they were very heavy cases.

6088. *Lord Barcaple.*—Can you give us any idea of the relative heaviness of the costs as between that system of taking the proof, and taking the proof by commission, which prevailed formerly?—I really cannot.

6089. You said that you think the pursuers, in the main, in a certain popular class of cases, are more in favour of a jury, and the defenders rather dislike juries?—Yes.

6090. Is it not odd, in that state of matters, that the existence of jury trial in the Court of Session should discourage cases coming into the Court of Session, seeing it is the pursuer who must necessarily choose his court?—That applies only to that class of cases.

6091. And that is a considerable proportion of the cases tried by jury?—I believe so.

6092. In regard to cases of a different kind, which have not that element of popularity in them, do you think that the parties are more satisfied with the opinion of a jury, or with the opinion of the court—cases of breach of mercantile contract, for instance?—In that class of cases, I think the parties are better satisfied with the judgment of the court.

6093. And in cases as to the obtaining of contracts or other deeds by fraud, do you think that the parties are better satisfied with the court, or with the jury, as deciding upon the existence of a fraud?—These cases are not so very numerous as to give one any very definite data to proceed upon, but I should think the parties would be as well satisfied at least with the judgment of the court as with that of any jury.

6094. Is there any class of cases that occurs to you,

in which you think there are good grounds for preferring the determination of a jury to the determination of the court?—In that class of cases to which I have alluded, when there are no precise grounds on which a judge can proceed in forming his opinion, and where he must decide just according to his own views of what is right, it really does seem that the verdict of a jury, as representing what might be assumed as the opinion of an average of mankind as to what was right in the circumstances, might be said to be the most proper way of settling such a matter.

6095. Do you confine that to the assessment of damages? Are there not matters of absolute fact where the question is indefinite, as to which you think the same principle would apply?—No. I do confine it to these cases.

6096. Are you aware that the local courts in England assess damages with the aid of a jury?—Yes; I believe they do.

6097. *Mr. Webster.*—But with the fact first ascertained that there is liability, the jury having nothing to do but fix the amount?—Yes.

6098. But your principle is to leave it to the jury to ascertain liability, and also to fix the amount?—Yes.

6099. *Mr. Paterson.*—You think that the value of a jury in assessing damages in the class of cases you mention is this, that they in some measure reflect the feeling or opinion outside; and you think they are better qualified in that respect than a single judge to say what the amount of the damages should be; but suppose you had a very limited jury of five or seven, do you think that would be a safer tribunal for assessing the damage?—I think it would be equally safe with a larger jury. You would have the disadvantage of having fewer minds applied to the case, but you would have the advantage of the fewer minds being directed to the facts with a deeper feeling of responsibility.

6100. *Mr. Webster.*—Would you withdraw from the jury the question of liability, or would you have that fixed first, and leave to the jury only to assess the damages, as is done in England sometimes; or would you prefer to leave the jury to fix the liability, and also to assess the damages?—I would prefer the former course, but for the fact of its involving the necessity of two inquiries.

6101. Where liability is denied, your opinion is, that the question of liability should be decided by the court, if that did not involve a separate investigation?—Yes.

6102. *The Chairman.*—You spoke of another class of cases?—There is a provision which has crept in, I believe, by mistake or accident into the Merchant Shipping Act, 1854. Previous to that Act the Sheriff had jurisdiction in salvage cases to any amount, as he had in other maritime causes; but the 460th section of that Act makes the jurisdiction of the Court of Session privative in cases above £200. It does so in the shape of conferring jurisdiction upon the Sheriff, if I recollect rightly. It has evidently been in the mind of the framer of the Act that he was conferring a power on the Sheriff which he had not before; but instead of doing that, it restricts the Sheriff's jurisdiction to the same extent as that of Justices of the Peace—to £200 in salvage cases.

6103. *Mr. Campbell.*—You think there is no principle for that?—No; and I believe it has crept into the Act by a mere mistake. Then, if the diligence of inhibition on the dependence of costs is to be kept up, I do not see any reason why, instead of raising the action in the Sheriff Court, and passing signet letters for inhibition, a warrant to inhibit should not be included in the Sheriff Court summons, in the same way as it now is in a Court of Session summons.

6104. *The Chairman.*—The inhibition being recorded?—Yes; the only difference would be, that it would save the expense of passing the letters of inhibition under the signet.

6105. *Mr. Paterson.*—Do you think additional facilities ought to be given for the use of that diligence?—That is more a social question. I have not considered it in that point of view.

6106. I suppose there are instances where you have known inhibition and also arrestment to found jurisdiction against a foreigner used oppressively?—I have; and I have also known instances where in no other way could payment of a just debt have been got.

6107. *The Chairman.*—But the question is not quite irrelevant to the present inquiry, because you are going to give a greater facility for the use of inhibition. Now that suggests the propriety or expediency of doing so?—It is merely a pecuniary facility.

6108. But it is a facility?—Certainly.

6109. *Mr. Webster.*—If you were to obtain that facility, what facility would you afford for getting rid of such inhibitions? Would you confer on the Sheriff a power to recall?—Certainly, in the same way as he has power to recall an arrestment.

6110. *Mr. Paterson.*—Have you considered the question whether inhibition is a diligence that ought to be allowed at all on the dependence, or rather a diligence that ought to be confined to the case where there has been a final judgment?—I cannot say that I have considered that question so maturely as to warrant me in stating an opinion.

6111. *Lord Barcaple.*—Do you conceive inhibition to be in any way a more oppressive diligence than arrestment?—In this way, that it affects the whole heritable estate of the party, whereas arrestment merely affects a particular fund.

6112. But does it not affect the whole available fund?—It may do so by accident, but inhibition necessarily does so.

6113. Is it not common to arrest money in bank, which may be all that a party has available for his subsistence?—Yes, there are certainly many cases in which the diligence of arrestment operates harshly.

6114. But the Sheriff has power to recall the arrestment, or to restrict it, and you would give him the same power in regard to inhibition?—Yes.

6115. *Mr. Paterson.*—In cases of arrestment, would you approve of the schedule of arrestment being served upon the debtor, as well as laid in the hands of the arrestee? Should he not have notice of it?—It is desirable that he should have notice certainly; but practically, I suspect, he generally hears of it soon enough—the debtor generally hears soon enough that his funds are arrested.

6116. *The Chairman.*—Have you any further suggestion?—Not under that general head.

6117. *Mr. Paterson.*—Would you approve of actions being served at the commercial domicile of a debtor, as well as at his residence?—Yes, where he has such.

6118. *Mr. Baxter.*—Where he has a known fixed counting-house?—Yes, a counting-house of his own—not a place where he is merely a clerk or servant.

6119. *The Chairman.*—But where he is a partner?—Yes.

6120. *Lord Barcaple.*—May there not be many cases where it is difficult for the public to know that he is a partner? His name may not appear in the firm?—I apprehend Mr. Paterson's question went merely to this, not that that should be substituted for service at the domicile, but that where it was more convenient, the pursuer should have the option of doing so. Therefore it gives him an additional facility.

6121. Have we not had quite a sufficient number of grounds for technical objection to service of summonses? His name may not appear in the firm, but it may be that his name does appear in the firm; and he has transactions in the ordinary course of life with thousands of people that don't know of the existence of the firm?—The question, as I understood it, and the understanding on which I answered it, was, whether an additional facility should be given to a pursuer of calling a defender into court by serving the writ or summons at his place of business, instead of at his dwelling-house, thus giving the pursuer the choice of which plan he should adopt.

6122. *Mr. Paterson.*—Supposing the common case, that a man is sued upon a transaction entered into at

John Naismith.

Glasgow, where he carries on trade, and that that man has his domicile at a distance of two miles, in Renfrewshire, would it not be useful to make a citation at his counting-house in Glasgow lawful?—Yes.

6123. *Mr. Baxter.*—Or take the case of Dundee, where a number of the procurators live in Broughty Ferry and in Fifeshire, would it not be proper in a case of that sort?—Certainly.

6124. *Mr. Webster.*—Suppose a defender held a share in one of the banks?—That is the case of a joint-stock company. I mean the case of a private partnership.

6125. Take the case of a large private partnership, where I presume one or two partners take the active charge, the others taking no charge, and being seldom there; would you think it right to allow such parties, who might have places of business in another part of the world, and live in another part of the world, to be cited at the place of business of the company?—Yes; I think you may reasonably suppose that the partners would take care to communicate it. Certainly the risks of that are much less than the risks under the present system arising from lock-hole executions.

6126. *Sir E. Colebrooke.*—Do you disapprove of the lock-hole mode of serving?—Yes.

6127. What would you substitute for it, if a person has his house locked up?—Of course you cannot altogether dispense with some such system as a last resort. But it might be provided that, in place of serving the copy, whatever it might be, in the lock-hole of the door, that the pursuer should in the first place exhaust every other possible mode of service—for example, the mode of service suggested by Mr. Paterson,—and that where a lock-hole execution was resorted to, it should be necessary also that the pursuer or those representing him should send by post a notice that such and such a document had been served in such and such a way at the locked-up dwelling-house.

6128. *The Chairman.*—Mr. Webster's question, as I understood it, related to the case where the party had no lock-hole within the jurisdiction?—I think I said, and I certainly intended to say, that it might be reasonably expected that the partners of the firm would transmit the copy or give notice to their partner; and I added that a copy in that way was much more likely to find its way to the party for whom it was intended, than if left in the lock-hole of his dwelling-house.

6129. Do you think that where several parties are interested in a cause, and are to be made defenders, they should be brought within the jurisdiction of one Sheriff?—Yes; I see no reason why they should not; but I would suggest the same qualification that I suggested in the case of a question of heritable right, that any defender in such a case as that should have the right to carry the case immediately to the Court of Session, in place of stating a defence.

6130. To carry the whole case to the Court of Session?—Yes.

6131. Have you any suggestion to make as to pleadings and procedure?—Yes; I may say that at Glasgow we have found, generally speaking, the procedure under the Sheriff Court Act, 1853, exceedingly satisfactory; but there are one or two matters which may be amended. The first is the form of the summons, on which the ground of action is stated in the conclusion. Now this seems illogical and clumsy, and it makes it very difficult indeed to state the case in many instances; in short, I see that some gentlemen adopt this sort of form—the summons runs in this way: that the defender ought to be decerned to pay a sum of so and so for the reasons stated, and then they embody a condescendence in the conclusion. That has crept in as a very common practice, and it is almost necessitated by the form of summons.

6132. You don't approve of that form?—No; a very slight alteration would suffice, and make it run more in the form of a criminal indictment, stating the cause of action first, and the conclusion next.

6133. *Mr. Webster.*—Like the old Court of Session summons?—And like the old Sheriff Court summons prior to 1839.

6134. *Mr. Paterson.*—Have you any objection to put in a form of the short summons that you would suggest?—No; but it would just be the present summons transposed.

6135. *Mr. Campbell.*—Might it not be as convenient to put it, 'in respect of the schedule hereto annexed?'—Statements annexed in that way have a great tendency to become voluminous.

6136. *The Chairman.*—Have you anything to state as to the procedure?—On the defence being stated, the Sheriff-substitute should have power either at the same diet, or a subsequent diet, when necessary, to minute a reply by the pursuer to meet any separate case set up by the defender. Suppose the defence is compensation, he should have an opportunity of stating a short reply.

6137. *Lord Barcaple.*—Have you found, in practice, the want of such an opportunity?—Yes, in this way, that it often necessitates orders being pronounced for condescendence and defences which might otherwise be avoided. Then, third, the power to amend the summons and record should be granted subsequent to such conditions as to expenses as may be just.

6138. *Mr. Campbell.*—You mean, should be granted to the Sheriff-substitute?—Yes; and the result of its non-existence at present, that occasionally a good deal of procedure takes place, and then an appeal is taken to the Sheriff, and a motion is made to him to have the record opened up, and an amendment made, and very frequently that affects the intervening procedure. Fourth, I think that documents not specially referred to in the record should be allowed to be produced after the record is closed; but on the condition of paying expenses if any, or such other condition as may be just. By expenses, I mean the expenses which the non-production at a previous stage may have occasioned the opposite party.

6139. *Mr. Paterson.*—You would not apply that to documents which were under the control of the party?—Oh yes.

6140. *Mr. Webster.*—And withheld on purpose?—I don't propose that absolutely, but that it should be allowed under such conditions as may be just as to payment of expenses or otherwise.

6141. *Lord Barcaple.*—Do you propose that the judge is to have a discretion in that matter?—The parties to have an absolute right to produce the documents; but the judge is to say on what terms. The extreme of these terms would be, that he would allow them to be produced on payment only of all previous expenses. In such a case as Mr. Webster points at, that would be the result, whereas he might allow it to be produced in other cases on payment of nominal expenses.

6142. *Mr. Webster.*—I was not pointing at the expense; but that the defender, seeing the case which the pursuer had made on one set of documents, makes his case in one way; whereas if the pursuer had made his case on the documents which he ultimately founds on, the defender would have made his case in an entirely different way,—is it fair to the defender to give the pursuer an absolute right or power of that kind?—You put a very strong case, and one amounting to something very closely approaching fraud on the part of one of the parties.

6143. *Mr. Paterson.*—But put the milder case, that the court was satisfied that the production of the document after the record was closed was equal to a surprise, would you give him power to reject the document?—No; in such a case I think a fair application of the rule would be to allow production of the document; but only upon a payment of all previous expenses, and of course to open up the record, and enable the other party to put on the record any such statement as might be called for under the circumstances.

6144. Would not the risk of all that be obviated under the present rule, that a litigant having documents under his own control, and intending to found on them in the suit, should put them in?—The difficulty is to ascertain what documents should turn out to be really necessary or useful for the purpose of

the case. You must bear in mind that I point in this suggestion mainly to those cases in which the record is closed in the short form provided by the statute, that is to say, closed on the very day after the *inducice* expire by the statement of a short defence.

6145. *The Chairman.*—Would you confine it to that class of cases?—No, I would not.

6146. *Mr. Campbell.*—Are you aware that a change has been made by the recent Act, in the rule of the Court of Session, in reference to the production of documents?—I understand so.

6147. I suppose you think the same facility for production after the closing of the record should be granted in the inferior court which is granted in the Court of Session?—Yes, that is simply what I mean to say.

6148. You can see no distinction between the practice of the Supreme Court and the inferior court in that matter?—No.

6149. *Sir E. Colebrooke.*—And you think it should be a discretionary power?—Discretionary as to the conditions on which the exercise of the power is to be allowed.

6150. Do you apply that remark to the power of amending the summons?—Yes.

6151. *The Chairman.*—Have you any further suggestion to make upon that head?—The second matter as to procedure, which I was asked to call the attention of the Commission to, is the delay which sometimes occurs, particularly in our court, in the conduct of cases, and to notice that that delay is almost invariably occasioned by repeated adjournments of the diets of proof. There is no delay, or very seldom any delay, at any other stage. One cause of that delay is that, as it is interpreted at all events by our Sheriffs, the Sheriff Court Act of 1853 gives them no power to grant commission for the recovery of documents between the period when the record is closed and proof allowed, and the actual proof; the result of which is, that in very many, and these always important cases, the first diet of proof is occupied entirely, or almost entirely, as a diet for the examination of havers. We get, perhaps, a considerable time allowed us by the Sheriff-substitute for taking the proof. We cite a number of witnesses and havers to produce documents, and of course we take the production of the documents first. We find that they put in perhaps two, or three, or fifty, or sixty, or a couple of hundred documents,—letters, invoices, account sales, and the like; and of course you cannot proceed with the proof till these have been examined. The result is an adjournment. Therefore I would suggest that the Sheriff should have power, when allowing the proof, to grant commission and diligence to each party to recover the documents which he proposes to put into process.

6152. How would that save time and expense?—Because we could, in the interval between the date of the interlocutor allowing proof and the date fixed for taking the proof, recover under a diligence, and put into process, all the documents which were in the hands of havers, whereas now we recover them on the first day of the proof. They cannot then be examined; and the result is an adjournment till the Sheriff's next open day for a proof, which may be three weeks, and in some cases has been as long as two or three months after the original diet, the whole intervening time being filled up by other engagements.

6153. You would recover the documents between the time when the judgment is pronounced allowing a proof, and the time when the diet arrives for taking the proof?—Yes.

6154. *Lord Barcaple.*—Would you accompany that with a provision that the documents, when recovered, should be lodged some specific time before the date of taking the proof?—That might be desirable; perhaps three days before.

6155. Your object would not be fulfilled apparently, unless they were lodged so as to be seen by the opposite party?—No, it would not.

6156. *Mr. Paterson.*—The commission would be reported immediately, and the documents put into process, and be accessible to both parties?—Yes.

6157. *Mr. Campbell.*—Do I understand you to mean that the examination of havers, as a general rule, should not take place before the Sheriff-substitute himself, but before a commissioner?—Yes, that the Sheriff should have power to appoint a commissioner. If he has time to take the examination of havers himself, let him do so.

6158. *Lord Barcaple.*—But it is the main object of your proposition, that the opposite party shall see the documents before the proof comes on?—Yes.

6159. Which he would do if there is a day fixed for reporting the proof?—According to our practice, where a commission as matter of necessity is granted, it is made to be reported within a certain number of days or weeks.

6160. You would make it before the proof comes on?—A few days before the proof.

6161. *Mr. Shand.*—Under the present practice, do not the witnesses come to the first diets of proof when it is expected that documents are to be recovered?—They may or they may not come. If an agent knows beforehand that there is a large number of documents to be recovered, and that the time will be fully occupied in that way, he does not cite witnesses to come; but it more frequently happens that the agent calls for an extensive production, and he finds it more extensive than he expected, and that he cannot do justice to his case without looking over the documents. He has then to send away his witnesses, and get another diet of proof fixed.

6162. Is that a common occurrence?—Yes, it is a very frequent occurrence.

6163. In cases where there is not such a recovery of documents required, do the proofs go on continuously from day to day?—No; they can only be continued until the next open day.

6164. Have you only one day allowed for the proof?—Yes. In the first instance the procedure is this: Each Sheriff-substitute keeps a roll of diets to be fixed; that is called each court day; and he asks the procurators of the parties to say what they estimate as the probable time to be consumed in the proof. They say two, or three, or four hours, as the case may be, and the Sheriff gives them that time. If they exhaust that time, or if the diet is cut short in any way from an unexpected occurrence, he has to postpone it to the next day that he has convenient for taking the proof, which varies from a fortnight to upwards of two months.

6165. Is there any arrangement that you could suggest which would save that constant adjournment of proofs?—There is this suggestion, that in important cases, where the parties desired it, I would give the Sheriff-substitute power to dictate proof to a shorthand writer, instead of taking it in his own hand.

6166. That is, to shorten the time?—I don't think it desirable to make that compulsory in any case, or to give the Sheriff-substitute power to say, 'It shall be done;' but I don't think it would do any harm, and it might do great good, to give the Sheriff-substitute power, when both parties concurred in asking it, to dictate the proof in that way.

6167. Do you not think it could be arranged, that where a cause is in possession of the judge, it should go on continuously, and that any other business should stand over until he concluded the particular case, or that another of the Sheriff-substitutes should take it up?—I believe that is impracticable with us. There is such a number of witnesses who are required for these cases continually going on, that we could not get them to attend, or to wait on hour after hour in that way.

6168. Supposing there are twenty witnesses in attendance for a case to-day, and only ten of these are examined, could it not be arranged that the other ten should be taken to-morrow, and that any other business that the Sheriff-substitute had intended taking should stand over until he disposes of the case, he being in possession of the parties for that case?—No. The difficulty is, that the parties to the case the next day would just be thrown back in the same way. It would be merely shifting the inconvenience instead of remedying it.

John Naismith.

6169. *Mr. Paterson.*—And that would be after these parties had made their arrangements?—Yes.

6170. *Mr. Shand.*—Would that not be better than adjourning cases in the middle, or could not the evil be obviated by calling in one of the other Sheriff-substitutes to take the new case?—No; because the time of each is pretty fully occupied.

6171. *Lord Barcaple.*—And the next day does not mean the immediately following day?—No.

6172. But the next day for proofs?—Yes.

6173. *Mr. Campbell.*—In Glasgow it would be an equal chance if the next day was not the Sheriff's ordinary court day, or Small Debt Court day?—Yes.

6174. And neither of these courts could be taken for him by anybody without inconvenience?—That could not be done without throwing the arrangements into confusion. However, there is no doubt that adjournments are too frequent,—a great deal more frequent than they ought to be; and I believe one reason of that is, that adjournments, though they cause delay, really cause very little expense; the result of which is, both that the Sheriffs are apt to give the adjournment with consent, and the parties, or rather agents, are too apt to be good-natured, and to agree to adjournments of consent. Of course the charge for attending proofs is very low; and consequently, as a mere matter of expense, the cost of an adjournment is not great, but merely nominal.

6175. *Mr. Paterson.*—You mean that the agents have more lucrative business to attend to, and they unite in asking the Sheriff to adjourn the proof?—Well, it amounts to something like that in many cases, or one of them has that reason.

6176. And the other obliges him?—Yes.

6177. *Mr. Shand.*—Does the debate occur at the close of the proof?—The cases are exceptional in which it does.

6178. What is the usual interval between the close of a proof and the debate on the merits?—From three to ten days, I should say.

6179. Do you think that in many cases it might be possible to take the debate on the same day as the proof?—Oh yes; but I don't think that really causes any appreciable amount of delay.

6180. *Mr. Webster.*—Or expense?—There is no expense.

6181. *Lord Barcaple.*—Do you get the Sheriff's notes, and copy them before the debate?—Yes.

6182. The debate does not proceed on notes taken by the practitioners themselves?—No; in practice it does not, except sometimes in cases which are particularly urgent.

6183. And where you discuss it immediately at the end of the proof?—Yes.

6184. *Mr. Shand.*—In that case there is the additional expense of copies of the evidence?—That is always required for the debate before the Sheriff-principal; at all events, it is only got a few days or weeks earlier.

6185. And you find that all cases are appealed?—All cases are appealed. I have pretty extensive experience now, and I don't think I could find half a dozen cases that are not appealed.

6186. *The Chairman.*—Have you any other suggestion to make?—I have to suggest that witnesses should be examined in open court in all cases. With us it is a matter of necessity at present, from the deficient court-house accommodation; but the practice has hitherto been to examine the witnesses in the Sheriff-substitute's chambers. The Sheriff sits at one side of the table, the witness opposite him, and the procurators on each side. Now I feel, and I believe indeed, and know that others have felt, that that is a practice which is indefensible, and that the examination of witnesses should be set about with somewhat more formality. Of course there is a number of witnesses that it does not matter how you set about their examination, because they will tell the truth. There are other witnesses who will tell what is not true, or what is convenient for them to tell, under any circumstances. But the greater number of witnesses it is desirable to examine with some degree of formality, and to put in a witness-box.

6187. *Mr. Paterson.*—Do you feel that you have more control of the witness in the box?—Yes.

6188. *The Chairman.*—I suppose no person is excluded from being present?—Nobody is excluded, but the size of the room is a practical exclusion.

6189. *Mr. Campbell.*—But the accommodation in Glasgow is about to be increased?—It is about to be increased; and it was with reference very much to that increase that I make this suggestion. Of course it would have been vain to have made the suggestion but for the hope of that increase of accommodation, because it could not have been practically carried out.

6190. *Lord Barcaple.*—Does the debate take place in court or in chambers?—In court.

6191. *The Chairman.*—Have you any further suggestion?—My next suggestion is, that reclaiming petitions and answers should be altogether abolished wherever there is a resident Sheriff.

6192. Resident Sheriff-principal?—Yes. Then I would suggest that no party appealing be allowed to object to the citation or execution; that is a provision of the recent Court of Session Act which should be extended to the Sheriff Court. There is also a provision in the Sheriff Court Act, to the effect that a cause shall fall if not moved in by either party before three months, and that it may be revived if moved in within three months further; but if not moved in within six months, it falls altogether. Now we object to that provision, as we find it practically operates as a sort of trap. A cause may be allowed for very good reasons to lie over for a period of months; it drops out of sight perhaps; and it is rather hard, after a great deal of expense has been incurred, to hold that it is to fall altogether, merely because the agent of one or other of the parties has not seen fit to make a *pro forma* motion in it once in three months.

6193. What is the remedy you suggest?—Just a simple repeal of that section.

6194. Do you think it would be expedient to allow the opposite party to move for the dismissal of the case, and to require the party who allowed it to stand over to show cause why he should have allowed it to stand over?—Such a proposal might be reasonable or judicious; but if both parties choose to allow a cause to stand over, I don't see why it should not be done.

6195. *Lord Barcaple.*—Would it not happen in many cases, that no cause could be shown why it should have lain over, and yet would it not be a misfortune that all that expense should have to be gone through again? He may have no cause to show, and yet it might be a great misfortune that the whole expense incurred in the litigation should be lost, and the parties obliged to begin *de novo*?—Yes; but it would be good cause to show that throwing the action out would be merely increasing expense to both parties, and doing no good to any one.

6196. You were asked whether it might not be well that the party who had not allowed it to lie over should move for its dismissal, but that the other party should be allowed to show cause why he had not moved in it?—But there must be two parties to allowing it to lie over: either party can move at any time.

6197. But one of them wishes to get rid of it altogether?—Then I would be inclined to ask why he did not move in it.

6198. *Mr. Paterson.*—Does it not come to this, that where the two parties, or even one of them, is in earnest about the case going on, the case can go on with perfect facility and despatch?—Certainly.

6199. So that you find no practical utility in this provision?—Certainly not.

6200. *Mr. Webster.*—Only mischief?—Only mischief.

6201. *Mr. Paterson.*—You must have experienced in not a few cases, that very good reasons existed in the interest of both parties for allowing a case to stand over—a compromise, for example?—Yes, in many cases you could not say that the party has been absolutely blameless, but he had a fair excuse. Take a case—the only case in which I ever was a sufferer myself—a case which had been judicially referred. The judicial referee was laid aside by illness, and during his illness the six

months elapsed. I had not observed that fact, and we therefore lost the whole procedure. The case could not be revived even of consent.

6202. *The Chairman.*—Have you any further suggestion?—Nothing further about procedure in the Sheriff Court.

6203. Do you think that the number of appeals allowed from the Sheriff-substitute to the Sheriff in the course of the procedure is too great?—There are about five different stages at which appeals may be taken.

6204. Do you think that these could be reduced in number?—I don't think it would be judicious to do so. I think that they really tend to save time and to save expense.

6205. There is an appeal upon a preliminary defence, and there is an appeal upon the order for proof; do you think it would be expedient to delay the appeal on the preliminary defence until the order for proof has been pronounced, and then take up the two together?—It more often happens that these two orders are combined into one.

6206. *Mr. Baxter.*—I suppose that, having a resident Sheriff, you get your appeals very summarily disposed of?—Yes; it is seldom that a case is beyond a month.

6207. *Mr. Webster.*—And always on oral hearing?—Yes.

6208. *Mr. Campbell.*—I asked you before as to the amount of satisfaction given by the present method of recording the evidence taken before the Sheriff-substitute. Have you any remark to make on that subject?—No complaint.

6209. Do you think that, where the parties consented to it, it would be desirable that the Sheriff-substitute should have power to employ the assistance of a shorthand writer?—I have said so.

6210. *Lord Barcaple.*—Have you any impression as to the average number of appeals that may be taken in ordinary causes in your court? There is one on the final judgment. Is there generally one or more appeals taken, one case with another?—You might average them at two appeals altogether; but that is a very rough estimate.

6211. You think that would be a fair conjecture?—I think so.

6212. *Mr. Shand.*—Where delay is an object with the defender, do you find that he takes advantage of the power of appealing?—He does, in many cases.

6213. Appealing on a preliminary plea, and again on an order for proof?—In our practice the debate on the preliminary plea and the debate on what proof is to be allowed is one debate, so that there is just one interlocutor.

6214. And that upon the closed record?—Yes.

6215. *The Chairman.*—Have you any observations to make on the mode of bringing cases by appeal into the Supreme Court?—It could not be simplified more than it is probably, except that it has been suggested that a power might be given to the parties in an advocation, instead of printing a long record and proof, to state the facts, if they were agreed upon them, in a joint case. I have a further suggestion to make on this matter: by the recent Court of Session Act, the period within which a decree may be extracted is lengthened to twenty days; we consider that is too long, and that it should be reduced to six, or at most eight days.

6216. *Mr. Paterson.*—Supposing either of the parties to desire an opinion from Edinburgh, as to whether the case should be appealed, would not six days be too short a time?—Yes; but there is a much larger class of cases where the parties never dream of appealing at all, and where, notwithstanding, the pursuer is made powerless in that way not merely for twenty days, but for the period of the running of a charge, fifteen days afterwards. So that at present a Sheriff Court decree is not actually enforceable for thirty-five days after it is pronounced.

6217. *Mr. Campbell.*—Have you had much practice under the Certain Debts Recovery Act?—There has been a considerable number of cases brought in the Glasgow court, but personally I have not had much practice in them, though I have had a few cases.

6218. Do you think the operation of the Act has been satisfactory?—No; I should say it has not. It is an awkward combination of the ordinary court procedure, and of the Small Debt Court procedure. When the parties agree to take the decision of the Sheriff-substitute as final, and do not require him to take the evidence in writing, of course it is satisfactory: you get a more deliberate hearing than in the Small Debt Court, and you get an immediate and final judgment; but I have found that in a great majority of litigated cases the parties require the Sheriff-substitute to take the evidence in writing, the result of which is, that you have just to go through the procedure of the ordinary court, or very nearly so, with this disadvantage, that you are put into all sorts of corners, and treated as in a manner subordinate to the business of the ordinary court.

6219. And the agent conducting such a case, where the notes are taken down, though he has all the trouble of an ordinary action, is paid by a slump sum for the whole case?—Yes.

6220. *The Chairman.*—Is that mode of payment good in principle, in your opinion?—It is thoroughly bad in principle. In a few cases there may be a great overpayment, but in the general case the remuneration is on the very lowest scale. It can hardly be called remuneration for the time occupied.

6221. Then you object both to the principle and to the rate?—To both.

6222. *Mr. Campbell.*—Don't you think it has a tendency to make a busy man slur over his cases, when such a rule is applied as to remuneration?—It is hard to say that; but still there is no doubt that cases of the kind must be carried on to a great extent with a sort of grudge in a man's mind. Though he may conscientiously do his duty to his client, yet he feels that he is losing time.

6223. *Sir Edward Colebrooke.*—If that Act were abolished, would you extend the present small debt jurisdiction?—No, I think it is high enough already.

6224. *Mr. Adam.*—Do you think the smallness of the costs under the Debts Recovery Act induces parties to bring actions when they would not otherwise do so?—I daresay it does. There must be a great many cases where decrees in absence are obtained in that court, which either would not have been brought, or the sum would have been reduced to £12, and the action brought in the Small Debt Court.

6225. Do you think the certainty with which the pursuer knows what he has to pay as costs induces persons to bring actions under that Act who would not otherwise do so?—That view of the matter has not occurred to me. I have not heard any one express an opinion on the subject. It may have a tendency in that way.

6226. *Mr. Harrison.*—Do you consider the procurator's fee for obtaining decrees in absence sufficient?—I really forget what it is.

6227. 7s. 6d. under £25, and 10s. above that?—Well, certainly that is inadequate.

6228. Is there much trouble to a procurator when decree is obtained in absence?—There may, or may not be. There is often a good deal of previous correspondence. Those cases under the Act which I have had, have been principally for clients in England, and I had often a good deal of correspondence before the case came into court.

6229. *The Chairman.*—And perhaps some investigation?—Yes.

6230. *Mr. Paterson.*—Even in moving for decree in absence, is not the detention considerable?—Yes.

6231. You may have to wait a two hours' proof in a previous case?—Yes; you have to wait till the case is called in the roll.

6232. *Mr. Campbell.*—Is it not the practice that the roll is called at the beginning, and decrees given where there is no opposition?—That is done in the Small Debt Court, but not in the other court.

6233. *Mr. Baxter.*—Have you a satisfactory appeal under the Debts Recovery Act? There is no oral hearing?—Yes; we have an oral hearing.

6234. Under the Debts Recovery Act?—Yes; the

John Naismith.

Sheriff puts the case out for hearing as a matter of course. He is certainly not bound to do it, but I presume he is entitled to do it.

6235. *The Chairman.*—Does anything else occur to you about the costs of litigation in the Sheriff Court?—No. Perhaps it might be reasonable that the expense of necessary correspondence should be allowed as betwixt party and party. In short, one does not very well see how, as connected with the actual litigation from the commencement of a suit to the close of it, any distinction should be drawn betwixt legitimate expense as between agent and client, and as between party and party.

6236. By correspondence do you mean correspondence between the agent and his client?—Between the agent and his client, or any other parties with whom he may have necessarily to correspond.

6237. Have you any observation to make in regard to costs in cases appealed to the Court of Session?—The result of the present system simply is, that in all these cases the great bulk of the expense incurred in the country falls to be paid by the winning party to his agent in the country, under the name of extrajudicial costs. Under the present system, double agency is in no way recognised, or rather the services of the agent in the country are in no way recognised. The matter is dealt with on the assumption that the client himself corresponds with and employs the agent in Edinburgh; but of course, almost universally, that is not the fact.

6238. You think that the client is not fairly dealt with, inasmuch as he does not get the expenses of his country agent against the unsuccessful opponent?—Yes; I mean in those cases where the employment of the country agent was reasonable and proper.

6239. *Mr. Baxter.*—I suppose there are not many clients able to conduct their own cases?—Not many, and least of all those who fancy they can.

6240. *Mr. Adam.*—Do you think cases are kept from coming to the Court of Session by the mode in which country writers' accounts are taxed?—No, I cannot say that.

6241. *Mr. Paterson.*—I suppose you are aware that, in your own practice, if a client inclines to go to the Court of Session, you tell him that should he go there and win, he will have to pay something equivalent to a *bonus*, viz. your account?—Yes, of course.

6242. *The Chairman.*—The country agent, having the best opportunity of seeing and communicating with the client, could probably make his meaning more clear to the Edinburgh agent than he could do himself?—Yes.

6243. Have you anything to say as to the privileges of agents?—Nothing.

6244. *Mr. Baxter.*—Has your body an exclusive privilege to practise in Glasgow?—We have.

6245. What privileges has it?—The exclusive privilege of audience in all the courts held in Glasgow, under the reservation of the privileges of the Faculty of Advocates.

6246. What are the qualifications for admission?—They are the service of an apprenticeship—not necessarily to a member of our own body—and I think attendance as a clerk for one or two years, in addition to the apprenticeship.

6247. With whom?—With any practitioner.

6248. In Glasgow?—In Glasgow or elsewhere; and attendance in two separate sessions at any three classes of the Faculty of Arts—Logic being one of these classes,—and attendance on the classes of Scots Law and Conveyancing. I think I am right in saying that these are the qualifications.

6249. Is there any money payment?—There is.

6250. What is it?—It has recently been reduced. Formerly there was a distinction drawn between gentlemen who had served apprenticeships to members of the Faculty of Procurators in Glasgow, under their charter, and strangers; but we have recently abolished that distinction, and all are admitted upon equal terms. I think the total expense at present is something like £170.

6251. Before they are admitted?—Yes, exclusive of stamps.

6252. What is the length of the apprenticeship?—Three years. Of course I have been giving the total payments.

6253. But the party has no privilege of practising till he pays that sum?—No.

6254. *The Chairman.*—By paying, he has other privileges besides practising?—Yes.

6255. *Mr. Baxter.*—But without paying, he cannot practise?—No.

6256. *The Chairman.*—By paying, he has the privilege of your library?—Yes, and of our widows' fund.

6257. *Mr. Webster.*—The exclusive privilege does not apply over the whole of Lanarkshire, but only to courts held within Glasgow?—Only to courts held within the city of Glasgow.

6258. *Mr. Baxter.*—Do you think that a person being admitted to one court should have the privilege of practising anywhere?—I think not.

6259. Why?—Because the qualifications which it would be reasonable to exact from a man before allowing him to practise in Dundee or Glasgow, could not be reasonably exacted from a practitioner in a small village.

6260. You are aware that they are all examined by a central board?—I am aware that that has been so for a short time.

6261. There is no difference in the examination?—I cannot speak to that.

6262. Assume that that is so?—Assuming that that is so, I say that is an experiment which has only been tried for a year or two, and it has not been tested.

6263. You think that, though found qualified to practise generally, they should be excluded from Glasgow?—That is hardly the way to put it. I put it in this way—that your test is too high if it would exclude from practising in small country districts men because they are not qualified to conduct the extensive business we have in our large cities; and, on the other hand, if it is not so high as to be harsh on those first-mentioned parties practising in smaller towns, it is too lax for those practising in large towns.

6264. Don't you think it a hardship to make a person pay £170 before practising?—I don't think so, because he gets other privileges besides that of practising.

6265. He may not desire them?—It is only by keeping up a corporation of the kind that you can have several things which are absolutely necessary for the profession in such a place as Glasgow.

6266. Might you not keep up the privileges of the corporation without comprehending every practitioner?—We don't comprehend every practitioner.

6267. You don't allow them to practise in the courts?—No.

6268. *The Lord Justice-Clerk.*—Does the general examination supersede any examination by your corporation separately?—No; we have a subsequent examination.

6269. And an admission according to the qualification which your corporation thinks necessary for practising in Glasgow?—Yes.

6270. *Mr. Paterson.*—It is a pretty thorough examination?—Yes, and has been for many years.

6271. *Mr. Baxter.*—You don't recognise the central examination at all?—No; we cannot legally do so. I may mention that very careful inquiry was made by the committee of our faculty, a few months ago, into the state of the funds, with the view of endeavouring to do the utmost, consistently with the objects of the corporation, to lower the fees of admission; and it was agreed to lower them by £80 or £90, as an experiment; and if we find that the number of entrants makes up for the smaller entrance-money, we are prepared to reduce that amount still further, as may be prudent, after we have tested the matter.

6272. *Mr. Webster.*—Was not the amount at one time much higher than it is now?—It was.

6273. With a very low scale for the sons or sons-in-law of members?—I believe so.

6274. And a very high scale for strangers?—It was so; a considerably lower scale for the one, and a higher for the other. I entered on the very highest myself.

6275. *The Chairman.*—Now it is the same for all?—It is.

6276. *Mr. Paterson.*—Have you never felt any inconvenience, when business called you into the neighbouring Sheriff Courts of Greenock, or Paisley, or Dumbarton, from finding the doors shut against you there?—Well, I may have felt a little inconvenience in that way; but still I thought, and I think, that that inconvenience is to be borne for the countervailing good.

6277. *Mr. Harrison.*—If a practitioner in Aberdeen finds it convenient to remove to Glasgow, has he to pay the whole of the fees you have mentioned, and to pass an examination in addition?—Yes, if he desires to practise in the courts. In the same way, I suppose, that would be done if a practitioner in Glasgow removed to Aberdeen.

6278. *Mr. Webster.*—With this difference, that a practitioner cannot get admitted in Aberdeen unless he has served an apprenticeship there?—Yes, I believe so.

6279. *The Chairman.*—Are the qualifications prescribed by your faculty the same as those of the General Council?—No; they are higher.

6280. Your prescribed qualifications are higher?—Yes.

6281. What is the difference?—I think the General Council exact no attendance on classes in the Faculty of Arts at the University. We do.

6282. *Mr. Baxter.*—You are aware that the examination of the General Council was sanctioned by the Court of Session after a report from the Sheriffs?—I presume it must have been.

6283. *Mr. Webster.*—Are the regulations of the Glasgow Faculty of Procurators made by the faculty itself?—Yes.

6284. Not subject to any review?—Not subject to any review. Although the charter dates only from the end of last century, I believe it is understood that we are a corporation by prescription.

6285. There have been three litigations, I think, in the Court of Session about the nature and extent of the exclusive privilege, and of the Sheriff's power to admit procurators?—I believe so.

6286. *The Chairman.*—Do you think you are at any disadvantage from not being able to follow your cases into the Court of Session, and to practise there?—I don't think it. We must in any case employ an Edinburgh agent.

6287. Are there any other points on which you have anything to suggest?—There are one or two points connected with the minor courts to which I would call attention. In regard to the Small Debt Court, the Police Courts, and other courts whose judgments are not subject to review, I would suggest that the judge or magistrate in these courts should have power to state cases for the opinion of the Supreme Court on matters of law.

6288. Both civil and criminal?—Yes; particularly criminal. I understand there are cases in which a number of our local police and other courts have taken a different view of matters in regard to the construction of particular statutes, from the view which has been taken by the superior courts in England. In England the opinion of these superior courts has been got in that way; but our police magistrates don't recognise the opinions of the superior courts in England as in any way binding on them, and there is no way in which a party can take the judgment of the Supreme Court in Scotland.

6289. These opinions given in England are not opinions on the same statutes?—Not on the same statutes, but often on the construction of the same words in a different statute—*in pari materia.*

6290. Would you allow parties to be heard by counsel on the case so stated?—If the Court ordered that *ex proprio motu.*

6291. You would not allow it as matter of right to the parties?—I think not. There might be a hardship in that case.

6292. A hardship by reason of the expense?—Yes; very often it might be a very poor man whose interest was involved, although the question at issue might really be of great importance to the community.

6293. *Mr. Campbell.*—There are precedents for the judges of the Supreme Court disposing of questions of law on special cases under the Valuation Act, and some other statutes?—I think there are.

6294. And under some of the revenue statutes, two judges receive the special case, and dispose of it without argument?—I believe so.

6295. *The Chairman.*—Have you any further suggestion?—The next suggestions I have to submit refer to a court of which I cannot speak from personal knowledge. They were suggested to me, however, by a gentleman who has experience in regard to them—I mean as to the Justice of Peace Court. One of them is, that the fees payable by defenders in Justice of Peace Small Debt Courts, on appearance, should be abolished. It seems that that often operates as a hardship to the poor. Before a defender can be heard, he requires to pay the clerk of court sixpence. It also appears that, before a decree in absence obtained in the Justice of Peace Small Debt Court can be opened up, the whole of the principal sum in the decree must be consigned. That also is considered objectionable, and a hardship.

6296. Is there a good deal of business done in the Justice of Peace Small Debt Court in Glasgow?—I really cannot tell.

6297. Do you know whether, generally, the business that is done there is satisfactorily done?—I really cannot tell.

6298. The Justices have an assessor, I suppose?—They have.

6299. A professional gentleman?—A professional gentleman of great experience.

6300. Is he the clerk of the court?—He is.

6301. *Sir E. Colebrooke.*—Is he paid by fees?—He is.

6302. *The Chairman.*—Do the fees go to him, or is he paid out of the fees?—I suppose the fees go to him. They are his property.

6303. *Sir E. Colebrooke.*—The amount of the fees is regulated by statute?—Yes.

6304. *Mr. Campbell.*—Don't you think it very anomalous and objectionable, that the person who is clerk of court, and draws the fees, should also be the assessor?—No doubt of it. It is an anomaly which has existed for centuries; but still it is an anomaly.

6305. It is a favourite pursuer's court, I presume?—I cannot tell. I never was within the walls of it.

6306. *The Chairman.*—Have you any other suggestions?—No, I don't think so.

6307. You have a Dean of Guild Court in Glasgow?—Yes.

6308. Is that a useful court?—It is necessary that some court should exercise its functions; but I am inclined to think that, in the whole procedure in that court, the wrong party is put *in petitorio.* The petitioner applies to the court to give him leave to erect certain buildings; when a defender appears, he lodges defences, just like the defender in an ordinary action. It appears to me that that is to reverse the real and substantial position of parties, and to give the defender of that action what amounts virtually to an interdict, without his becoming responsible in any way in the consequences of wrongous interdicting. I think there is great hardship in that, because the party may state a defence that is frivolous; and by doing so, without incurring any responsibility himself, except for a trifle of costs, he may prevent his neighbour from building for months, perhaps till the building season is over, or it may be for years.

6309. He is maintaining the *status quo?*—He is.

6310. You think that ought to be reversed?—The *status quo* is, that the petitioner in such a case as that is just in the position of a proprietor of any other ground.

6311. It depends on the nature of the application?—I take the ordinary case of an application for leave to erect buildings.

6312. *Mr. Paterson.*—You are supposing the case that a proprietor in good faith wishes to renew his

John Naismith.

buildings; and although he is not to alter the building line, he must go as a petitioner to the Dean of Guild Court?—Yes.

6313. And get permission from that court to exercise that right of property?—Yes.

6314. Have you any method to suggest by which the Dean of Guild Court might be superseded, and its functions performed by some other tribunal?—The suggestion that occurred to me was this, that instead of presenting the petition, the party who desires to build should lodge his plans at the office of the Master of Works, or some other public office, for a certain number of days—ten to fourteen; and at the time he lodges his plans he should give notice to the adjoining proprietors that the plans were to be seen at that place, that the adjoining proprietors should then at their own risk, if they desired it, take action by applying to the judge ordinary or the Dean of Guild Court for interdict.

6315. Might it not be a further improvement if a short notice was given in the newspapers, in a column appropriate to the purpose, that the proprietors had lodged their plans and titles?—It might be. That suggestion did not occur to me.

6316. That would not cost much?—No.

6317. Is there not this much to be said for your plan, that in the vast majority of applications to the Dean of Guild for lining, the lining is granted as matter of course?—Yes.

6318. Whereas the expense may be 40s. or 50s. of presenting the application, paying clerk's fees, and calling the parties?—Your estimate is too low.

6319. But that expense, whatever it is, might be saved in that way?—Yes.

6320. Has it never struck you that there was anything anomalous in the constitution of that court?—Of course there is a considerable anomaly in giving jurisdiction in matters relating to questions of heritable right to the president of the Merchants' House—an elective officer.

6321. Holding office for how long?—For a year, I think.

6322. And assisted by an assessor?—By the town-clerk as assessor.

6323. Who may hold other municipal offices?—He may.

6324. And does?—I don't know whether they are strictly municipal offices, but he holds other offices connected with public bodies in Glasgow. One of the assessors does.

6325. *Mr. Baxter.*—Is there not a council also for the Dean of Guild?—It is understood that they have no power of any kind. They are ornamental. The Dean is the court.

6326. *Mr. Paterson.*—Assisted by liners?—Yes.

6327. And these are taken from the Merchants' House and the Trades' House?—Yes.

6328. Holders of large property in Glasgow?—The Trades' House are, I know, and I believe the Merchants' House is also.

6329. And requiring occasionally to be petitioners to the Dean of Guild Court?—Yes.

6330. *The Chairman.*—Does the Dean of Guild exercise any duty as to superintending the condition of buildings, and ordering dangerous tenements to be taken down?—Yes, he has very extensive jurisdiction of that kind.

6331. How does he exercise that?—Upon the petition of the Procurator-fiscal of his court.

6332. Is there any person whose duty it is to go through the town and examine buildings, to see whether they are in a safe condition?—I presume that is the duty of the Master of Works and his assistants.

6333. Do you think it would be any advantage to have a stipendiary officer who should be the superintendent of buildings, and who should discharge the duties that the Dean of Guild now discharges?—I am afraid that it would hardly be practicable to get a suitable man. The offices are somewhat incompatible—that of the actual inspector or surveyor of buildings, and the judge of the court having a jurisdiction at all approaching to that of the Dean of Guild Court.

6334. Do you think that court should continue as it is, with the alteration in the form of proceeding that you have suggested, or have you any other suggestion to make?—I cannot say that I have considered the matter so thoroughly as to venture to say that the court should be abolished, or that any modification of it should take place further than that which I have suggested. At the same time, there are very extensive powers conferred upon the court by the last Glasgow Police Act, which hitherto, I believe, have only been partially put in operation; indeed, we are only beginning to discover some of them.

6335. Is there a considerable amount of work done by the Dean of Guild Court?—At certain seasons there is a very considerable amount of work done.

6336. *Mr. Paterson.*—You referred just now to large statutory jurisdiction conferred on the Dean of Guild Court—that is, in matters sanitary?—In matters sanitary, and in police generally.

6337. In relation to streets?—And drains.

6338. Have they not got the smoke nuisance on their hands, or is that taken to the Sheriff?—There is a private Act under which the Dean of Guild has jurisdiction in matters connected with the smoke nuisance; but it was found so cumbrous and unsatisfactory, that the procedure under that Act has now been given up.

6339. It was a *quasi* penal Act?—Yes.

6340. And there was power to inflict a fine of 40s. per day so long as the nuisance continued?—It was so.

6341. Do you remember the title of the local statute which conferred that jurisdiction on the Dean of Guild?—I think it was an Act for the maintenance of Glasgow Green.

6342. Has not the statutory jurisdiction now enjoyed by the Dean of Guild Court, flowed to it very much through local Acts of Parliament?—Almost entirely, if not entirely, through Acts in relation to the police of Glasgow.

6343. The additional jurisdiction enlarges the emoluments of the clerks of court?—It must, seeing that they are remunerated by fees.

6344. And the local legislation may have been promoted by kindred municipal bodies?—It may.

6345. *Mr. Harrison.*—Are there any, or many, complaints of the working of the present system, in respect of inconvenience to parties making alterations?—There is a good deal of complaint on the head of delay. Parties don't complain so much of having to vindicate their rights, but here they are tied up in a litigation which proceeds according to the forms of the ordinary Sheriff Court, as these forms stood before the passing of the Act of 1853. They are tied up to a litigation in that form, and which must be disposed of before they can proceed to erect their buildings; and that litigation goes on before a court which sits only once a fortnight.

6346. Do you think the public would prefer that the jurisdiction of that court should be transferred to the Sheriff?—I don't know whether they would or not. I should say they would.

6347. *Mr. Baxter.*—But if it is to exist, should the process be simplified?—It should, somewhat in the manner I pointed out.

6348. *The Chairman.*—You alluded to the constitution of the court as consisting of representatives of certain bodies that have property in Glasgow. Is there any dissatisfaction with the manner in which they exercise their jurisdiction? Is there any feeling that they don't exercise it fairly?—I don't think there is a general feeling to that effect. There may have been, in particular cases, a sort of feeling that the leaning of the court necessarily was in a particular way. For example: the Dean of Guild is a leading member of the Town Council, as well as of the Merchants' House; the Town Council resolve that it is for the public interest that the streets should be widened; the law-agents or chamberlain of the Town Council negotiate with a party, and he is obstinate, and will not give up his right; then he applies for a lining; the Corporation may say he is not entitled to build forward, and may throw obstacles in his way. I have heard complaints of that being done, and I have heard

insinuations thrown out against the court in the matter, as acting under a necessary bias, although inclined to act quite fairly.

6349. Would you suggest any alteration in the constitution of the court? Has anything occurred to you that would be preferable, and practicable?—Nothing has occurred to me further than that which I suggested at starting, as to the procedure in applications for leave to build. The other matters which were suggested by a member of the Commission, I had not considered in such a way as to prepare me for the question which your Lordship puts.

6350. Your suggestions were as to procedure; my question is as to the constitution of the court. You have no suggestion to make as to that?—No.

6351. No other practicable constitution has suggested itself to your mind as better than that which exists?—I believe that to have the functions of that court exercised by a stipendiary magistrate, would be a great improvement; but I cannot suppose that, in the present state of the public mind on the subject, that would be in the meantime agreed to. Besides, it might be said that the work of that court was not sufficient to employ a judge.

6352. And the fees presently exacted not sufficient to pay him?—The fees presently exacted would probably be sufficient to pay him; but my former suggestion was, that the procedure which brings in the greater part of these fees should be abolished.

6353. Have you any other observations to make?—No.

6354. *Mr. Webster.*—Do the Burgh Court and the River Bailie Court exercise jurisdiction in civil matters?—Practically they do not. *John Naismith.*

6355. *The Chairman.*—Practically that has died out?—It has. There is sometimes a stray case in the River Bailie Court. I once had one.

6356. As to criminal jurisdiction, the magistrates act under the Police Act?—Yes.

6357. *Mr. Webster.*—The River Bailie Court is quite separate from the Burgh Court?—Yes.

6358. It has jurisdiction over the Firth of Clyde?—Yes, down to the Cloch Lighthouse.

6359. What sort of causes come before that court? Are they both civil and criminal?—I believe police causes come before it; but in practice the civil jurisdiction is all but obsolete.

6360. Who is the judge of that court appointed by?—By the Town Council.

6361. *The Chairman.*—Are there any Barony Courts in or around Glasgow?—Not that I am aware of.

6362. There are no minor bodies that exercise jurisdiction?—No; all the districts were incorporated with the city by Act of Parliament many years ago.

6363. As to police also?—Yes, they are all incorporated.

6364. *Sir Edward Colebrooke.*—With reference to your suggestion that the Sheriff-substitutes should act as colleagues of the Sheriff in the court of appeal, are you of opinion that the Sheriff should retain the power of appointing his substitutes?—Yes, I do not see any objection to that. Their position is perfectly independent as soon as they are appointed.

FRIDAY, 15th JANUARY 1869.

Members Present:—

Lord Colonsay.	Geo. Harrison, Esq.
The Lord Justice-General.	Jas. Adam, Esq.
Lord Barcaple.	A. B. Shand, Esq.
Sir Edward Colebrooke.	T. Graham Murray, Esq.
Jas. Campbell, Esq.	Charles Morton, Esq.
A. Orr Ewing, Esq.	J. B. Baxter, Esq.

The Right Hon. LORD COLONSAY in the Chair.

David Robert Morice, Esq., examined. *David Robert Morice.*

6365. *The Chairman.*—I believe you are a practitioner in the Sheriff Court at Aberdeen?—I am.

6366. How long have you been so?—Upwards of thirty years.

6367. Have you held any official appointment there?—I am assessor to the magistrates in the Dean of Guild Court, and in the Burgh and Police Court.

6368. Do the magistrates hold a Burgh Court there?—They have held none since I have held the office, except for summary removings, nor, I believe, for many years before.

6369. How long have you been in office?—About three years.

6370. Do they hold a Dean of Guild Court?—There are occasional cases there, but not very many, because the jurisdiction is only exercised in regard to ruinous buildings.

6371. Does anybody sit with the Dean of Guild in that court?—The Dean of Guild and his assessor; no one else.

6372. How do they proceed in regard to ruinous buildings?—It is commenced by a petition to the Dean of Guild at the instance of the Fiscal of the burgh, who, I presume, is Fiscal to the Dean of Guild Court, or more rarely by a private party. A remit is made to an architect to report; and if a contention arises, we proceed under the forms of process prescribed by the Act of Sederunt of 1839.

6373. How long have you been assessor to the Dean of Guild Court?—For nearly three years.

6374. How many cases of that kind have you had within these two years?—Not exceeding a dozen, if so many.

6375. More than half-a-dozen?—Yes, I think so.

6376. *Mr Baxter.*—What is the general nature of them?—Those that are at the instance of the Procurator-fiscal are for warrants to pull down ruinous buildings, but one neighbour may complain against another. In one case, a dispute arose with a party rebuilding his house, as to whether he had a right to interfere with his neighbour's property.

6377. Does a proprietor apply to the Dean of Guild for warrant to build?—No; the plans have to be submitted to the Police Commissioners, under special Act of Parliament.

6378. *Mr. Morton.*—Nor for a warrant to alter existing buildings?—Not necessarily, unless you wish to interfere with your neighbour's property in some way.

6379. *Mr. Orr Ewing.*—Does the Dean of Guild judge of that?—Yes.

6380. When he is interfering with a conterminous proprietor?—Yes.

6381. Have you no cases of that kind?—There has been only one in my time, I think.

6382. Then the duties are more than taking down ruinous buildings?—Yes; the jurisdiction extends further, but it is not often exercised.

6383. *Mr. Adam.*—Did the single case you spoke of arise in regard to taking down a ruinous building?—A man was rebuilding premises; and in the course of his

David Robert Morice.

operations, it appeared that he could not complete them without interfering with part of his neighbour's property; and he applied for warrant to do so.

6384. *The Chairman.*—That, of course, was served on the neighbour?—Yes.

6385. And he resisted?—Yes.

6386. *Mr. Orr Ewing.*—Does the building of a new house not affect the rights of conterminous proprietors?—I presume it does occasionally; but in point of fact, parties are content with the sanction of the Commissioners of Police. There is a special Act requiring the plans to be submitted to them.

6387. *Mr. Baxter.*—Any conterminous proprietor who feels aggrieved, I suppose, is left to his remedy of interdict?—Exactly.

6388. *The Chairman.*—In regard to the Sheriff Court, does the Sheriff exercise any jurisdiction in reference to questions as to conterminous proprietors?—Yes; whenever his intervention is called for. I have known it exercised in cases of disputes about common courts and passages, and so forth.

6389. Or in regard to encroachments he may be applied to for interdict?—No doubt.

6390. In regard to the constitution of the Sheriff Court, as consisting of the Sheriff and his substitutes, have you any observations to make?—Our profession is strongly in favour of the continuance of the double Sheriffship, although we are of opinion that the number of Sheriffs may be reduced with advantage.

6391. What is the plan that has occurred to you about that?—That a number of counties should be grouped in the manner which has been already begun, by appointing the same person Sheriff of several counties, as in the case of Banff, Elgin, and Nairn, and others.

6392. You would have a Sheriff-substitute at each of the places where a Sheriff-substitute now is, or nearly so; and instead of having one Sheriff, say for Aberdeenshire, you would have one Sheriff for Aberdeenshire and Kincardineshire?—Aberdeen, Kincardine, and probably some other county.

6393. Would you have that Sheriff a gentleman resident in Edinburgh, and attending the courts there?—Our wish is, that he should have full occupation from his office as Sheriff. I do not think it matters whether he resides during his spare time in Edinburgh, or any other place where he finds it convenient.

6394. But you think that he should have a district large enough to occupy all his time?—Yes.

6395. In hearing appeals?—In hearing appeals, and in disposing of any other duties that may fall to him.

6396. Such as executive and magisterial duties?—Yes.

6397. Do you think there is any disadvantage arising from his attendance on the Court of Session, and pleading causes there?—Practically, we have not had experience of that, because none of our Sheriffs, though we have had great satisfaction from them, have been in extensive practice; but I understand from my brethren in counties that have Sheriffs largely engaged in business, that they do not find that it facilitates the progress of business.

6398. *The Chairman.*—You mean that their mind is distracted from their business by their practice?—Yes.

6399. Although they have not nearly enough of county business to occupy their full time?—Decidedly so.

6400. You say you have not experienced that in Aberdeenshire, because the Sheriffs you have had in your time have not been gentlemen in great practice?—They have not. They have discharged their duties to the satisfaction of the county; but they have not been gentlemen in large independent practice of their own.

6401. They have generally attended the courts in Edinburgh?—They have.

6402. And they see what goes on in the court; and they are in communication with their brethren?—No doubt.

6403. Have you considered any other mode of disposing of appeals? What would you say as to an appeal direct from the Sheriff-substitute to the Court of Session, without any intermediate court?—I do not think that would be at all satisfactory to the litigants, the expense would be so very great; and it is in very rare cases that parties wish to go further, unless it be to decide some principle, such as in the law of settlement and cases of that kind.

6404. The expense of an appeal to the Sheriff-principal is very small?—Very small.

6405. Do you think it should be continued in that cheap form?—Yes.

6406. Do you consider it also an advantage, that after the resident Sheriff has considered a case, and sifted it, and shaped it, and given his views, another mind should be brought to bear upon it, with the advantage of having before it the views of the Sheriff-substitute?—There can be no doubt that is a great advantage; and there is the further advantage, that the cases are more carefully debated after the views of the resident Sheriff-substitute have been got.

6407. The agents apply themselves to the points which have been indicated as the turning-points of the case, in the estimation of the judge who has considered it?—Just so.

6408. Have you considered any other mode besides that of having an intermediate appeal?—The plan of having two Sheriffs to sit in the appeal court has met with much favour. I cannot say that it has been very much considered by my brethren; but there can be no doubt that two judges would make a stronger court than one.

6409. *Mr. Baxter.*—At present you have an appeal from one judge to one judge?—Yes.

6410. And you think the appeal court would be strengthened if you had two minds instead of one?—No doubt of it.

6411. *The Chairman.*—Have you considered any mode of working out that principle?—I have not. I can see considerable difficulties; and it would require statistics and great consideration to devise a scheme; but I see no insuperable difficulty about it.

6412. Do you understand that those judges would be taken from the bar of the Supreme Court?—I presume so.

6413. And that they would have a certain district of the country assigned to them?—Exactly.

6414. And that they would travel about through that district?—Yes.

6415. Holding courts in different parts of it?—Yes.

6416. And disposing of the appeals at these courts?—Yes, at certain regulated periods.

6417. Would you have the appeals disposed of by oral pleading or by written pleading, or sometimes by the one and sometimes the other?—Decidedly by oral pleading.

6418. Entirely?—Entirely.

6419. Would you have them to review the judgment of the Sheriff-substitute both upon fact and upon law?—I can see nothing else for it, unless we are to have juries in the Sheriff Court.

6420. Would you approve of juries in the Sheriff Court?—I would.

6421. In matters of fact?—Yes; but only in certain cases; not in all cases, at first at least.

6422. In what cases?—Actions of damages.

6423. For assessing damages?—Yes.

6424. In other classes of cases you would rather have the judgment of the Sheriff?—I think in a great majority of them I would.

6425. You would have an appeal from the judgment of the Sheriff-substitute to the two ambulatory judges, if such a plan were adopted; and that appeal upon both fact and law?—Yes.

6426. *Mr. Baxter.*—Would you have a small jury?—I think five or seven would be sufficient.

6427. *The Chairman.*—Would you have the verdict unanimous?—No.

6428. How would you have it?—By a majority. Possibly it might be proper to allow them a certain time for deliberation before taking the verdict of the majority.

6429. You would prefer the verdict of the majority

of a jury of five, to the verdict of the two judges sitting and considering the evidence?—I did not say so. If it were practicable, which I do not see that it is, that the two judges should take the evidence, I think that would probably be a very satisfactory court.

6430. *Mr. Baxter.*—In all cases?—Yes.

6431. *Sir E. Colebrooke.*—Are you speaking of two judges in the first instance?—No.

6432. *The Chairman.*—I meant the judgment of the two judges in reviewing the judgment of the Sheriff-substitute on the evidence?—Yes, I certainly would. I consider the jury would have had the evidence at first hand. The two judges have only the report of what passed, and they cannot judge from the appearance or manner of the witnesses.

6433. Then you think that unless the two judges heard the evidence taken, a jury would be a more satisfactory tribunal?—I do.

6434. *Mr. Baxter.*—But only in these cases?—Yes.

6435. *The Chairman.*—Do you limit it to these cases?—Yes, I think so.

6436. In other cases, not cases of damages, the two judges would review the opinion of the Sheriff-substitute upon the evidence?—Yes.

6437. And that, you think, would be satisfactory?—Yes. I do not approve of the present method of taking down evidence.

6438. What is your objection to it?—The notes are taken down by the Sheriff-substitute without the witnesses or the agents being at all aware of what he is taking down. I have no doubt it is taken down most conscientiously. Yet the parties have no means of checking an occasional error; and when the evidence is read over at the end of the examination, it is read rapidly, and it is impossible to follow it, and to detect at once any slight error that may be made; and a slight error or twist in the evidence is very often the turning-point of the case.

6439. What would be your suggestion to remedy that?—That the evidence should be dictated by the Sheriff either to a clerk or a shorthand writer.

6440. As in the old system of taking proofs by a commission?—The old system of taking proofs was unnecessarily lengthened, and it was taken down too much in detail. It might be a good deal shortened.

6441. To take down every question and every answer would be to load the record with a great deal of matter that had better not be there?—No doubt of it.

6442. Suppose it were taken down by the Sheriff-substitute in the manner you suggest, you would think the judgment of the two Sheriffs upon it would be satisfactory?—I think in the great majority of cases it would be satisfactory.

6443. Are there many advocations to the Court of Session from Aberdeen?—There have been in the last eleven years fifty-five bonds of caution lodged; but upon examination of them, I am satisfied that not one-half of them were followed out. I went through that carefully with the depute-clerk; and, judging from our knowledge of the cases and the reports, we could only make out that there was an average of not three a year. In my own experience in the time mentioned I have had two advocations against me, and only one of them was followed out. The other was abandoned.

6444. You said that the condition of matters in regard to the Aberdeen Sheriffs had been for a long time very satisfactory?—Very much so.

6445. Although the evidence was reviewed by a single judge?—Yes.

6446. He had the benefit, in reviewing it, of seeing what the views were that had been taken by the judge in the first instance?—Yes.

6447. I believe there are a good many appeals taken from the Sheriff-substitute to the Sheriff?—It is very seldom that a case is not appealed.

6448. You have had the good fortune, I believe, to have very efficient judges both of the first instance and of appeal?—Yes.

6449. If counties were grouped in the way you suggest, so that the amount of business would occupy the greater part or nearly the whole time of the Sheriff, have you considered what kind of remuneration a gentleman of experience at the bar ought to have for being Sheriff?—I presume that the united salary of the Sheriffs would supply ample remuneration. £2000 a year or thereabouts ought to secure the services of experienced and good men.

6450. Has anything else occurred to you as to the constitution of these courts?—I think not.

6451. Do you think that the Sheriffs-substitute of Aberdeenshire are sufficiently remunerated for their time, and the position they occupy?—I understand that the salary of the Sheriff-substitute at Aberdeen is under £1000 a year, and probably for a man of his years it is sufficient remuneration; but I think there ought to be some prospect of it increasing. If he continues twenty years Sheriff-substitute, as he may do, it would be rather hard that he should not get an increase, when, if he had remained at the bar, he might have been looking for a much larger return. Apart from any reference to the present holder of the office, its duties are so important that I think we are entitled to the services of a man of considerable ability and experience, who would probably be insufficiently remunerated by the present emoluments.

6452. You think that should be put upon a more advantageous footing, either by immediate increase or by progressive increase?—Yes, where there is really work to do; but in many districts the Sheriff-substitute has so little to do that they are sufficiently paid as it is.

6453. *Mr. Campbell.*—I think the salary of the Sheriff-substitute in Aberdeen is only £900 a year?—Yes; but there are some fees from bankruptcy cases.

6454. *The Chairman.*—In some places the Sheriff-substitute has very little to do; but do you take into consideration that he is excluded from everything else?—So he is; but if a man is willing to accept an office at £500 a year, and enjoy leisure, he is quite sufficiently paid. I think it would be absurd to give him a larger sum.

6455. And you would not, perhaps, require a man of the same qualifications for a small place of that kind?—No, probably not.

6456. The questions might be as difficult as in larger places, but there are not so many of them?—No.

6457. *Sir E. Colebrooke.*—Is there more than one Sheriff-substitute in Aberdeenshire?—There are two—one at Peterhead, and one at Aberdeen.

6458. *Mr. Campbell.*—From your experience, do you think that the Sheriff-substitute at Aberdeen could satisfactorily discharge all the duties of the Sheriffs-substitute at Peterhead and Aberdeen?—I have no doubt that he would, when his duties permit him to remain in Aberdeen.

6459. Then you think it would be a reasonable and economical course in future to appoint only one Sheriff-substitute for the whole county?—I have no doubt of it. In consequence of communication by railways, it is much more convenient for many of the suitors to come to Aberdeen than to go to Peterhead.

6460. *Mr. Baxter.*—Do you mean the suitors in the Peterhead district?—Yes.

6461. *Mr. Murray.*—Would it not be inconvenient in regard to criminal cases?—I think it would be more convenient in these cases to come to Aberdeen. Peterhead is in a corner of the county.

6462. Would it be as convenient for taking declarations, etc.?—I see no difficulty in their coming to Aberdeen.

6463. *The Chairman.*—Is there any police jurisdiction in Peterhead?—The magistrates take the police cases, I presume.

6464. *Sir E. Colebrooke.*—But you speak with reference to the amount of work done by the two Sheriff-substitutes?—I think these duties could quite easily be discharged by one Sheriff-substitute.

6465. Do you speak from the number of the cases, or the extent to which their time is occupied?—When there are few cases, there is a great tendency to spin out those that there are.

6466. *Mr. Murray.*—Was there not a movement in

David Robert Morice.

Aberdeen at one time to have two substitutes resident in Aberdeen?—Yes.

6467. To bring the Peterhead substitute to Aberdeen?—Yes.

6468. Not to give up one of the substitutes?—There would be great advantage in having a supernumerary Sheriff-substitute of some sort or other, because the Sheriff is frequently from home on police business, and so forth, and on Circuit Small Debt Courts; and when that is the case, the whole business of a large town is left in the hands of gentlemen who are kind enough to act as substitutes without remuneration; and it cannot be expected that they should accept responsibility, or even devote much time to it.

6469. *The Chairman.*—You think the preferable course would be to remove the substitute from Peterhead to Aberdeen?—Yes, if two Sheriffs-substitute are to be retained.

6470. *Sir E. Colebrooke.*—Do you think that would be satisfactory to the practitioners at Peterhead?—I believe not.

6471. *Mr. Murray.*—Do you think the criminal business of the county could be equally well managed?—I have no doubt of it. I think it would be better managed. It would be in one hand.

6472. *Mr. Orr Ewing.*—You said that almost all the decisions of the Sheriff-substitute were appealed to the Sheriff?—Invariably.

6473. Are they often reversed?—Not very often.

6474. In what proportion?—It is impossible for me to say. During the last year, in my own practice, which is not very large, I had two reversals.

6475. Will a third of them be reversed?—No, nothing like that.

6476. Still the public are quite satisfied with the decision of the Sheriff-depute, without coming to the Court of Session?—They accept it. We seldom find that an unsuccessful litigant is satisfied.

6477. But they are so satisfied with the decision, that they would never think of appealing it to a higher court?—They think it better to put up with it than to go to the Court of Session.

6478. Because of the expense?—Yes.

6479. *Mr. Campbell.*—If an appeal was as cheap, or about as cheap, to the Court of Session as it is to the Sheriff of the county, don't you think that the decisions of the Sheriff of the county would be as often appealed as those of the Sheriff-substitute?—I have no doubt of it. I think that most likely.

6480. It is the cheapness of the tribunal, and not its satisfactory results, that is generally the reason of the appeals?—The expense is so trifling, that at most it is only an additional £5 that the party loses in the highest class of cases, and it may cost only £2; and they just take the chance.

6481. *Mr. Adam.*—You said you would approve of the introduction of juries into the Sheriff Court. Have you yourself had any experience of jury trials?—I have had the conduct of several jury trials in the Supreme Court.

6482. Do you happen to know the opinion of your brethren about the introduction of jury trials?—The opinion of my brethren is very strongly against the present system of jury trials; so much so, that they resolved to represent that it should be abolished entirely.

6483. Is it a different system you want to introduce into the Sheriff Court?—Very different.

6484. A smaller jury?—A smaller jury, and avoiding the expense of counsel, and printing, and a great many other things.

6485. Then the objection they at present entertain is to the expense, and not to the jury as being the judges of the fact?—My own opinion is in favour of juries, even in the Supreme Court, in the class of cases in which they are generally used; but the opinion of a large majority of my brethren was against them altogether, not only on the ground of the expense, but on the ground of the uncertainty of their finding.

6486. But you do not share that opinion?—I do not.

6487. *Mr. Baxter.*—Have you had any experience of the expense of jury trial in the Supreme Court?—Yes.

6488. Can you give any instance of that?—I can. In a case which was tried before the present Lord President, at the sitting in April 1867, a verdict was given in my client's favour for £566. Of course that carried costs, and we recovered, of taxed costs from the other side, £476. The accounts of the Edinburgh agents for the pursuer, for whom I acted, came to £654.

6489. That was more than the sum recovered?—Nearly £200 more.

6490. *Mr. Adam.*—What was the name of the case?—Milne and Morison *versus* Bartolomeo.

6491. *Mr. Baxter.*—Had you an account of your own?—I had an account of £69, including outlay.

6492. Did you recover it from the opposite party?—Only the expense of the precognitions.

6493. Would that be a small part of it?—Very small.

6494. Then your client would have a considerable sum to pay?—Yes.

6495. What was the nature of the case?—The case arose out of a collision between two ships.

6496. *Lord Barcaple.*—Do you remember how many witnesses were examined in it?—We had four pilots from the south country. I don't think there could have been a dozen witnesses on each side. The defender was an Italian, and the evidence of some of his witnesses was taken on commission.

6497. Where?—In Edinburgh.

6498. Did they not attend the trial?—They had gone away, and we accepted their evidence.

6499. You think there were only a dozen witnesses examined altogether on both sides?—No; on one side. Exclusive of the seamen, whose evidence was given on commission, there may have been six or eight others.

6500. *The Chairman.*—Were any of them men of skill?—Yes; some of them.

6501. *Mr. Adam.*—What part of the expense might have been saved?—I cannot say. When I get into an Edinburgh agent's account, I give it up as hopeless.

6502. *Lord Barcaple.*—How many counsel were there?—Two on each side.

6503. *Mr. Baxter.*—Do you know that clients are very much afraid of juries?—No doubt about it.

6504. *Mr. Adam.*—Then clients don't like jury trials?—They do not.

6505. *Mr. Baxter.*—Have you seen cases settled when they were just about to go to trial?—I was concerned in two cases last year, and both of them went off at the last moment: one after the case was opened, and the other before the jury was sworn.

6506. Was that from the terror and uncertainty of juries?—I don't know, but I presume it was, because they thought it better to settle.

6507. I suppose the whole expense had been incurred in these cases?—In one case the jury were not sworn, and we saved their fees, and probably a second day's expense.

6508. *The Chairman.*—Was it the terror of jury trial that made them settle after the case had commenced?—I cannot answer that. The case was settled by counsel in the Parliament House.

6509. *Sir E. Colebrooke.*—You are not apprehensive that jury trials would be conducted as expensively before the Sheriff Court?—Oh no.

6510. A number of witnesses would still be necessary?—Yes; but they would be near home. It is bringing the witnesses to Edinburgh that is one great cause of expense; and we are often obliged to keep them there for days and weeks. I had witnesses in Edinburgh last summer for a week.

6511. *Lord Barcaple.*—You think that a serious part of the expense?—Yes.

6512. Would that not be got over by having the trial at Aberdeen, whatever court it was before?—Yes.

6513. You used to have trials at Aberdeen?—Not for a long time in civil cases.

6514. But you used to have them?—I don't recollect any for twelve years.

6515. What made you give up having them there?—The court discourages them.

6516. How do you know that?—Our counsel tell us that they do not want to come. They say it is not convenient or desirable.

6517. That is not telling you that the court discourage them?—They say the court does not approve of it.

6518. Did any counsel ever tell you that?—I have a strong impression of that kind.

6519. *Mr. Harrison.*—Do you think the public will have more confidence in the decision of a jury than in the decision of the Sheriff?—Do you mean a jury trial in the Sheriff Court?

6520. Yes?—I think so; probably not at first. It would require a little preparation.

6521. *The Chairman.*—You said the opinion of your brethren was adverse to jury trial altogether?—Yes; of a large majority of them.

6522. They have not the same confidence in a jury that you have?—No.

6523. *Sir E. Colebrooke.*—Do you think that in the opinion of your brethren, there would be an unwillingness to have jury trials under the Court of Session conducted in Aberdeen?—No; if jury trial in the Supreme Court is to be continued, it would be a very great advantage to have it near the residence of the parties interested and the witnesses.

6524. And your profession would be inclined to try that experiment?—They would rather have them there than in Edinburgh.

6525. *Lord Barcaple.*—Do you think the balance of expense would be in favour of that?—Yes.

6526. There would be additional expense for counsel?—Yes.

6527. But you think the balance would be in favour of having the trials in Aberdeen?—Yes.

6528. And you think it would be better on the spot for other reasons?—It would let people understand the working of the thing better.

6529. *Sir E. Colebrooke.*—You stated that you thought that the time of the Sheriff-principal should be fully occupied with his duties?—Yes.

6530. Is that the opinion of the body of procurators whom you represent?—Yes.

6531. Would not the Sheriff in that case have to reside in the county?—I think not. I don't think it matters whether he reside in the county or in Edinburgh.

6532. But if his full time were occupied, must he not reside in the county?—But his full time means a reasonable amount of time, and communication is very rapid now-a-days.

6533. He would not be able to continue his practice in Edinburgh?—No.

6534. Then you would expect that he should give up his practice?—Yes.

6535. But you have not had experience of the combination of considerable practice and the execution of the Sheriff's duties in your county?—Not in our county.

6536. Your opinion is given more with reference to what you have heard in other counties?—Yes.

6537. *Mr. Adam.*—Would you take away all original jurisdiction from the appeal Sheriff?—There are one or two Acts of Parliament where the procedure is directed to be taken by the principal Sheriff. I can see no advantage in that; but, at common law, I presume the Sheriff-substitute has the original jurisdiction in all cases.

6538. But at present the Sheriff may go down and sit in all cases in which the Sheriff-substitute can sit?—It is held not. They decline to sit in the ordinary courts; a party would lose his appeal in that case.

6539. *Mr. Campbell.*—Are you not aware that for a considerable time Sheriff Logan sat as a judge in the first instance in Forfarshire?—I am aware he did, but nobody has followed his example.

6540. But the competency of his doing so was never questioned?—It is questioned.

6541. *Mr. Baxter.*—I believe that he did so to assist a very aged substitute?—I forget the particular circumstances.

6542. *The Chairman.*—Does anything occur to you about the constitution of the court?—No.

6543. Would you extend the jurisdiction of the Sheriff Court in any respect?—My opinion is that the jurisdiction should be extended so as to be co-ordinate with that of the Supreme Court in all respects. I ought to say, however, that the majority of a meeting of our society, called for the purpose, objected to the extension of the jurisdiction to questions of legitimacy, marriage, and divorce. That was the only difficulty that was raised.

6544. Is it your own opinion that it should extend to these?—My own opinion is that it is quite unnecessary, and would lead to hardship, to exclude these cases.

6545. You include cases of declarator of marriage and of legitimacy, as well as questions of divorce?—Yes.

6546. Do you think that the Sheriff should have jurisdiction over parties who are co-defenders, though living in different counties, if one of them is within that particular county?—I think so, if the subject-matter of dispute arises in his county.

6547. Would you have the jurisdiction confined to the Sheriff within whose county the cause of action had originated?—Either that, or follow the party.

6548. In such questions, or in questions of great value—in matters of heritage, and so forth—would you give the defender a power to remove the case into the Court of Session?—Yes, I think so.

6549. At an early stage?—At an early stage.

6550. *Mr. Baxter.*—Would you do that above any limit?—I don't think it should be done in cases of trifling value; but I would be very reluctant to debar a party who considered that his interest was likely to suffer, from going to the Supreme Court if he chose. It should not be in very small cases, because that would lead to oppression.

6551. You don't allow the defender to remove the cause in actions regarding debt or moveables?—You may commence the action in the Supreme Court.

6552. But why would you allow a defender to choose in the case of heritage?—You are entitled to advocate for a jury trial if the value is above £40.

6553. That is when a proof is allowed?—Yes.

6554. *The Chairman.*—Your opinion is that in regard to subject-matter, the jurisdiction of the Sheriff ought to be co-ordinate with that of the Court of Session?—Yes, within his jurisdiction.

6555. *Mr. Baxter.*—Have you any experience of the expense of appointing tutors or factors on small estates?—Yes; the expense is very heavy on small estates. I was appointed factor on the estate of a man some of whose trustees had declined to act, and the rest of them had died, and the only property was a house which I sold for £241. The expense of the appointment of the judicial factor, and the petition for power to make up his title, came to £30, 0s. 10d.; and the amount of the account for getting the factor's discharge was £32, 16s. 2d. in Edinburgh, and £6, 15s. 11d. in the country.

6556. £70 in all?—Yes; and my remuneration as factor was £13.

6557. *The Lord Justice-General.*—Does the £70 include the £13?—No.

6558. *Lord Barcaple.*—Was there any discussion at the discharge?—No, there was not.

6559. Can you tell us in what the bulk of the expense of the discharge consisted?—Principally in intimation to the parties, I suppose.

6560. That would be the same in both?—No; because some of the parties were petitioners. Then there was a remit to an accountant, and a fee to him; and there was printing.

6561. *The Lord Justice-General.*—Have you got the accounts which you paid in that case for the procedure?—Not here.

6562. But you could produce them?—Yes.

6563. Then be kind enough to send them to the secretary?—I will do so.

6564. *The Chairman.*—What was the name of the case?—The name of the man was Riach.

6565. *The Lord Justice-General.*—Do you recollect in which Division it was?—I do not.

David Robert Morice.

6566. About what time was it?—It must be about three years since I was appointed. It did not last above six months.

6567. Then it would be before the Lord Ordinary?—Yes. I do not think it was in the Division.

6568. *Sir E. Colebrooke.*—It was unopposed?—It was unopposed.

6569. *Mr. Shand.*—You are aware that in cases at present it is necessary to print papers and box them to all the judges?—There will be a saving in future, because under the new Titles Act the necessity for a petition to make up titles is abolished.

6570. It may be combined with the application?—Yes.

6571. Don't you think considerable saving might be effected if manuscript petitions were allowed, and if papers were not printed and boxed to the judges?—I don't think there would be great saving if you had to serve a number of copies. The expense of the copies, when the number is considerable, comes to more than the printing.

6572. And you have frequently to serve copies?—Yes.

6573. *Sir E. Colebrooke.*—Are the expenses which you have mentioned such as would be saved in the Sheriff Court?—I think a judicial factor might be very well appointed there for £5.

6574. *Lord Barcaple.*—You would have the same expense of service, I suppose?—Not quite, because the fees of messengers are higher than those of Sheriff officers.

6575. *The Lord Justice-General.*—Is there not a clause in the new Court of Session Act, allowing all services to be made by Sheriff officers?—No; I don't think so. I think that is only in the absence of a messenger.

6576. *Lord Barcaple.*—You would still have the same expense of a report by an accountant on the discharge?—Yes.

6577. But you are satisfied there would be a large saving notwithstanding that?—I am quite sure of that.

6578. *Mr. Baxter.*—The case you mention was that of a lapsed trust?—Yes.

6579. Have you any other instance?—I have another instance of the same kind, where the sum consisted of an heritable bond for £190, and the expense of appointing a factor was £28, 18s.

6580. What was the expense of the discharge?—I was the factor, and I was content with a discharge from the beneficiary, without a judicial discharge; and on producing a discharge from the beneficiary, the bond of caution was given up.

6581. What was the expense of that?—The expense of the discharge and the necessary petition came to £18.

6582. *Mr. Shand.*—If such appointments were made by the Sheriff, do you think it would be desirable that the factor should report his proceedings to the accountant of court?—Decidedly.

6583. You think it would be useful that an officer in Edinburgh should have a supervision of all these proceedings?—I think so; just like the accountant in bankruptcy, who superintends all sequestrations.

6584. *Mr. Murray.*—At present judicial factors are not under that control?—They are not under any control at all till they apply for their discharge. There is an old Act of Sederunt requiring them to lodge their accounts annually; but there is no officer to enforce that, or to see that they do it.

6585. Do you think it would be an advantage to bring all judicial factories under the supervision of the accountant of court?—I think it would be a very great advantage.

6586. *The Chairman.*—Do you think there is any greater publicity given to the proceedings in the Supreme Court, so that all having an interest may appear, than in regard to the proceedings before the Sheriff?—I think not. They never reach the public prints, and they are more likely to attract attention if conducted in a court in the neighbourhood of the parties.

6587. Have you any observations to make upon the procedure in causes before the Sheriff?—I think it would be desirable to abolish condescendence and defences, and to have the record closed by a minute, probably with the addition of a replication by the pursuer. There are very rare cases indeed, where condescendence and answers are really required in Sheriff Court processes.

6588. *Lord Barcaple.*—At present it is the exception to have condescendence and answers?—It is the exception even at present; still, whenever there is a case of any importance, there is almost always a condescendence.

6589. You think the exception is too frequently made in your court?—I think so.

6590. *The Chairman.*—Would you reserve the power to order condescendence and answers?—I am rather inclined to say No; because, when the Sheriff has the power to order it, if the agents feel in any way nervous about the subject, and urge it, it is very difficult for him to refuse if he has the power to allow it.

6591. *Lord Barcaple.*—Can he form any good judgment as to whether it is necessary or not?—I do not think he can,—not from the sort of statements that are made to him.

6592. You think that the parties and their advisers know better about their case in that matter?—Yes.

6593. *Mr. Shand.*—Would you give the Sheriff-substitute power to allow amendments at any stage of a cause?—Decidedly.

6594. Adopting the provision which we have now in the Court of Session Act?—Yes.

6595. *The Chairman.*—Amendments or additions?—Or additions, paying expenses if any expense has been occasioned.

6596. Have you any other suggestion?—I think we have reason to complain of the complication of the forms of process, there being three different Acts regulating it.

6597. *Mr. Baxter.*—You mean the small debt process, the debts recovery process, and the ordinary court process?—Yes; I think they ought to be simplified and reduced to one. I see no objection to one form of summons standing for the whole; and it would depend entirely on the value of the case what steps should afterwards be taken. We are quite clear for extending the small debt jurisdiction in all cases, and not only in the case of 'certain debts.'

6598. What would you do with regard to the Debts Recovery Act?—I would abolish it. The present Small Debt Court should take cases up to £25.

6599. And the cases above £25?—Above that, let them be in the ordinary court.

6600. Would the summons in the Small Debt Court serve for the ordinary court?—I think, with a very slight modification, it might.

6601. The summons in the ordinary court is rather an illogical writ?—No doubt of it.

6602. *The Chairman.*—You would bring the summons of the ordinary court more into conformity with the small debt summons?—Yes.

6603. *Sir E. Colebrooke.*—Can you state whether there is any large number of the causes that come before the Sheriff Court which are undefended?—Yes; there is a large number of decrees in absence.

6604. Could you state the proportion?—No.

6605. But there is a great number?—Yes.

6606. And therefore it is of importance that the first proceeding should be as cheap as possible?—Yes.

6607. *Mr. Shand.*—Under the Debts Recovery Act, it lies with the Sheriff-substitute to state the pleas for the defender, and practically to make up the record. Do you approve of that, or do you think that the agent for the defender should present his own defences?—Our Sheriff-substitute intimated to us that it was the duty of the agents to assist the court, and that he would expect that they should state the grounds of defence themselves; and they always do it.

6608. Does he write the defence?—No; it is handed in to him, and he revises and adjusts it.

6609. Is that the course that you propose should be followed in ordinary actions?—Yes. The theory of the present Sheriff Court Act is, that the Sheriff should frame the minute of defence; but we always do it ourselves.

6610. And that practice you propose to continue?—Yes. I do not think the form of the minute of defence is very successful, but that could be easily altered.

6611. Have you any suggestion to make about

that?—I think some provision should be put in with reference to preliminary pleas. There is no provision made for preliminary defences at present.

6612. *Lord Barcaple.*—How do you deal in your court with preliminary defences when they are stated?—The Sheriff either reserves them, or appoints parties to be heard on them.

6613. But he minutes them?—Yes.

6614. You mean that there is not a stage appointed by the Act at which they are to be disposed of?—There is not; and it is apparently not contemplated in the table of fees. A case I had was thrown out on a preliminary plea, and we found there was no provision for a fee for a debate in the case.

6615. It was debated when the defence was stated?—Yes.

6616. Would it make any difference upon the expense of preparing the summons in an action where there is decree in absence, that it should be in the form of the small debt summons, rather than in the present form?—I do not think it would make any difference.

6617. You would prefer a better form of summons?—A form of summons that would do for all actions. The present form is particularly short.

6618. *Mr. Campbell.*—If you had one form applicable to all courts, it might be printed?—Yes. I admit that an expense of £2 for a decree in absence is too much. By making a printed form, and giving a reasonable fee for it, that would cover all the expense of it, and recover the debt at a trifling expense.

6619. *Lord Barcaple.*—You have various kinds of actions: could you very well throw them all into one printed form?—I think there would not be much difficulty in doing so.

6620. Could you have a printed form that would cover actions of divorce, and that would cover payment of a shopkeeper's debt?—The plan would be to cite a defender to appear on a certain day, with certification that if he did not appear, decreet would be given; and if he did not appear, I do not see why he should not be divorced.

6621. Then you would leave the blank to be filled up with reference to a divorce or with reference to a debt?—Yes; but if you get a man into court, you must explain the ground of the action.

6622. *The Chairman.*—You would not, in the first instance, give any statement of the ground of action?—No; merely enough to make it *res judicata*, so that the party should not be sued a second time for the same thing.

6623. *Mr. Shand.*—Suppose a party appears, should the pursuer give in any other writing?—The defender should state the ground of his defence shortly, and the pursuer should have a replication in the form of a short minute.

6624. But if the summons is in the very meagre shape that you propose, would that be enough, without more special statement by the pursuer?—I do not see why it should not be enough. It ought to be in the power of the judge to require particulars, so that a party should not be surprised at the proof. He should get an intimation of what is going to be proved against him.

6625. *The Chairman.*—In what form would these particulars be given?—Probably by minute, stating that so and so is to prove so and so.

6626. *The Lord Justice-General.*—What is the difference in substance between a statement of particulars and a condescendence?—Very little; but such a statement would be required only after oral proof has been ordered. Besides, a condescendence always gets very lengthened, I do not know whether from inveterate habit, or from what reason.

6627. Whose fault is it that the condescendence becomes so long?—I suppose it is the fault of the agents.

6628. *Mr. Harrison.*—Is there a large proportion of the cases in your court which are actions for the payment of money?—They all, more or less, involve money, except questions of interdict.

6629. *The Lord Justice-General.*—Are they not chiefly actions for debt?—There is a very large number of them actions of affiliation.

6630. *Lord Barcaple.*—And a number of removings?—They are not so numerous now; there used to be at one time a great many of them.

6631. And there are a good many interdicts?—A good many.

6632. *Mr. Adam.*—Are agents paid according to the length of the condescendence?—Yes.

6633. Do you think that paying them so much for a condescendence, irrespective of length, might shorten these papers?—I do not believe it; an agent who is worth his salt won't spin out a paper for the sake of making a few shillings more.

6634. *The Chairman.*—Have you any other suggestion to make?—I think not.

6635. What do you say as to the number of appeals which are competent from the Sheriff-substitute to the Sheriff at different stages of a case? Do you think they might be abridged?—I think so. In point of fact, unless for purposes of delay, they are not used in our court.

6636. *Lord Barcaple.*—Have you any idea what is the average number of appeals which you have—one case with another—in each cause?—I do not believe that in the great majority of cases there is more than one.

6637. But will there be more than two on an average?—I am satisfied there is not.

6638. *Mr Shand.*—But in particular cases there may be five appeals?—I am told that is competent, but I have never seen any instance of it.

6639. Have you seen serious delay arising from the number of appeals in a particular case?—Not very commonly. In the hands of some agents, that may be resorted to for the purpose of delay, but not often.

6640. *The Chairman.*—In the course of leading proof there may be several appeals?—Yes, there are frequently appeals in the course of a proof, but not very many. I do not see why, as a rule, any appeal should be allowed at all during the progress of a cause. They should all be brought up at the end.

6641. Do you think that where a party has stated a defence which would go to throw out the action entirely, no inconvenience would result from his being compelled to go on and take a long proof?—That is the only case in which I can see that there ought to be an appeal, or that there would be any advantage in it.

6642. If there was one appeal allowed, bringing up both a preliminary defence and an order for proof, would that meet your view?—That would be quite sufficient.

6643. Do you think the mode in which appeals are directed to be taken to the Supreme Court under the recent Act satisfactory?—Yes; I presume it is satisfactory enough. I do not believe, however, that there will be many appeals.

6644. *Lord Barcaple.*—You mean you do not think it will increase the number of appeals?—Not materially. It will be used for the purposes of delay.

6945. Just as it was before?—Just as advocation was before. You could lodge a bond of advocation for a trifle.

6646. *Sir E. Colebrooke.*—What do you mean by saying that it is satisfactory, if it can only be used in the way of delay?—It is satisfactory as a mode of appeal. I do not mean that it is satisfactory in the sense that it will lead people to go from the Sheriff Court to the Court of Session with any number of cases.

6647. Do you think the mode of appeal should be simplified?—It is impossible to simplify it. It consists of writing two lines on the interlocutor sheet.

6648. *The Chairman.*—And no caution is required?—No.

6649. It is the subsequent expense in the Court of Session that you refer to?—Yes.

6650. *Lord Barcaple.*—The mere form of taking an appeal for some time back, under the modern note of advocation, has been comparatively simple. There was no expense?—There was not much expense. The copies of the interlocutors that were often prefixed were unnecessary. All the formal interlocutors in the process were copied.

6651. *Mr. Shand.*—Do you approve of allowing parties, after having a case fully litigated in the Sheriff Court, to come to the Court of Session without finding caution?—I am not at all clear about that. I am

David Robert Morice.

afraid that it will tempt people to prolong litigation when they ought not to do so.

6652. *The Lord Justice-General.*—I think you said you did not expect the number of appeals to be large?—I do not.

6653. Then that temptation will not have much influence?—It will operate in cases of people who are desperate, who are not solvent, and cannot pay the costs; and they will run their adversary into unnecessary expense.

6654. *The Chairman.*—You think it gives too much facility to desperate and insolvent parties to litigate?—That is my fear.

6655. As to the costs of litigation in the Sheriff Court, do you think there is any mode in which they might be abridged, or do you think they ought to be enlarged?—I do not know any way in which they could be abridged at present. The expenses are not heavy, and we have not heard any serious complaint of them not being remunerative. There are many rules given in the table of fees in regard to taxation between party and party, which I think are not right; but nobody complains very much of it. For instance, there are the fees for precognoscing witnesses, which is a very important part of the agent's duty, and he is allowed only some 5s. a witness, though he may have to travel fifty miles; and he is allowed his bare travelling expenses, and no remuneration for the time occupied.

6656. You think that is too hard upon the agents?—I think so.

6657. *Lord Barcaple.*—How is that charged as between agent and client?—The Act of Sederunt regulating the fees, declares that that table is to be the rule as between party and party, and between agent and client too. If you choose to charge your client for that, he may pay or not as he likes.

6658. The auditor will not allow it?—He will not.

6659. *Mr. Baxter.*—Have you any objection to the mode in which agents are paid under the Debts Recovery Act?—They are not paid at all. It is not worth anybody's while, whose time is of any consequence, to go into that court.

6660. *Mr. Harrison.*—Have you had many cases under that Act?—Not a great many.

6661. You have not had much experience of it?—No; in most of the cases in which an agent goes into that court, his purpose is to throw them out on an objection.

6662. Do they then go into the ordinary Sheriff Court?—Yes, if the party chooses to go on with the case.

6663. *The Chairman.*—Do you object to the *ad valorem* principle, on which remuneration is given under that Act?—Yes. I think it is not a desirable way to put it; and practically, many of the smaller cases require more time and attention than the larger ones. So that it is not fair.

6664. The agent, you think, should be paid according to the work he does?—Decidedly. If parties do not choose to employ an agent, they may go into the court themselves.

6665. *Mr Harrison.*—Are you aware that the principle of *ad valorem* fees has been in operation in England for many years?—I believe it is in operation in the County Courts; but I understand that it is only between party and party, and that the solicitors charge their regular fees against their own client, and credit him with the amount recovered from the other side.

6666. *The Chairman.*—Have you anything to say as to the privileges of agents?—I would rather answer any questions which your Lordship may put.

6667. Do you think that agents ought to be admitted to practise in all courts?—I do.

6668. Including the Supreme Court?—Yes.

6669. How would you have their qualifications ascertained?—By some central body appointed for the purpose.

6670. Do you think they should be admitted by the Supreme Court?—Probably so.

6671. Would you have the same qualifications prescribed for all?—I think so. I think the country practitioners' qualifications ought to be even higher than those of the agents in Edinburgh, because they have to act for themselves without the assistance of counsel.

6672. *Mr. Baxter.*—Has your body any exclusive privileges?—Well, we claim them.

6673. And you exercise them, I suppose?—We were unsuccessful in an attempt to enforce them in the case of Peterhead.

6674. Before admitting a procurator to practise in the Sheriff Court of Aberdeen, don't you require that he shall serve an apprenticeship to one of your body?—Yes.

6675. For how long?—Four years in the case of a Master of Arts of a University, and five years if he is not so.

6676. Do you require anything before that?—He is required to pass the preliminary examination directed by the Procurators Act.

6677. Is he required to attend college?—Yes; he must attend the University for at least two years.

6678. And four years of apprenticeship to one of your body?—Five years, unless he is a Master of Arts.

6679. Has he to pay anything to a fund before he is admitted?—He pays ten guineas on being matriculated as an apprentice, and about £120 on admission to our body.

6680. You won't allow a party to practise in the Sheriff Court of Aberdeen without all that preparation and payment?—No; not if we can help it.

6681. *Mr. Harrison.*—You think all these provisions and fees should be abolished, if there was a central authority for admitting solicitors?—These fees are the price of admission to a large Benefit Society, a Widows' Fund, etc.

6682. *Mr. Baxter.*—But you make them necessary in order to practising before your Sheriff Court?—Yes.

6683. *The Chairman.*—If the system you suggest were adopted, of a central body to examine and find parties qualified to practise everywhere, your particular regulations of apprenticeship might be overruled?—No doubt; we could not expect to have a privilege in one way, and not give up privileges on the other hand.

6684. Then the privilege of admission to your body would be upon a different footing?—Yes.

6685. There are benefits derived from that, apart from the practising before the court?—Yes; we have funds to the amount of £70,000 or £80,000 accumulated.

6686. And you have a Library and Widows' Fund?—Yes.

6687. *Lord Barcaple.*—Assuming the system which you suggest to be adopted, how would you propose practically to take charge of your causes depending in the court in Edinburgh?—I should not take charge of them. It would never do for a man living at the distance that I do to attend to them personally.

6688. Then what benefit would result from entitling country agents to practise in the Court of Session?—It would enable me to get a portion of the profits.

6689. That is to say, your causes would be conducted by your correspondent here, by an arrangement by which you should get a portion of the profits?—Yes.

6690. But you do not think that you yourself could with any advantage come to attend the causes?—No; not at the distance from Edinburgh at which I live. Agents near Edinburgh might do so.

6691. *Mr. Murray.*—Would there be any advantage to the public from that arrangement?—I think there would. At present the public have to pay me in the country, and also an agent in Edinburgh; and supposing a party gains his case, he does not recover my account. He only recovers a small part of it.

6692. *The Chairman.*—If you are to participate in the agents' profits, probably the agents for whom the table of fees has been prepared as an adequate remuneration for themselves, would also require some increase?—Well, it is possible they might.

6693. Would that be beneficial to the public?—In some respects it would not; but the public would save paying me or any other country agent. In many cases we have the main conduct of the case, and the responsibility of it in some measure; but the auditor allows us almost no fees, and we get no part of the fees, on the

principle of double agency not being permitted. The consequence is, that the expense of the litigation is not diminished, but it is put on the wrong party. It is put on the man who has gained the case, in place of upon the man who has lost it.

6694. *The Chairman.*—That is, he pays his country agent himself?—Yes.

6695. Do you think the fees of the Edinburgh agent should be adequate to pay both him and the country agent?—Not exactly that; the fees of the country agent and town agent should both go into the account. At present the auditor, under the directions of the court, excludes the country agent's account altogether.

6696. But if the fees of the Edinburgh agent at present are considered a fair remuneration for what he himself does, would you take from him a part of that?—No; but I would add my account as part of the expenses in the cause.

6697. But would that not be done simply by permitting the country agent's account to form part of it?—Yes.

6698. Without giving him the privilege of practising?—Yes.

6699. Then that does not arise out of the privilege of practising?—No; but it would come to the same thing.

6700. *Mr. Murray.*—That would make the expense to be paid by a party losing his case greater than it is at present?—No doubt; but I think he is the party who ought to pay, and not the man who gains the case.

6701. *Mr. Shand.*—Do you think, if that system were introduced, business would find its way to the Court of Session, as the court of first instance, which does not find its way there now?—Not a great deal more than at present.

6702. *Mr. Murray.*—You think the general effect would not be to increase litigation?—No; I do not think so.

6703. *Mr. Baxter.*—Does your Sheriff-clerk attend and do his duty in person?—The present Sheriff-clerk attends the court, and reads the motion roll.

6704. Is that all he does?—That is all he does in court.

6705. Has he a depute?—Yes; he has two deputes in Aberdeen.

6706. Does he carry on any business other than the business of the Sheriff-clerk?—Yes; he carries on a general and conveyancing business, and manages estates, and so forth.

6707. He is an agent in Aberdeen?—Yes.

6708. *The Chairman.*—He does not carry on court business?—No.

6709. *Mr. Shand.*—You have a very able depute in Aberdeen, have you not?—A very experienced one.

6710. *Mr. Baxter.*—But the Sheriff-clerk himself does very little?—So far as one can see from his attendance in the office. *David Robert Morice.*

6711. Has he a depute at Peterhead also?—Yes.

6712. *Mr. Murray.*—Are you aware of the mode in which Sheriff-clerks do their work in other counties?—Very few of the Sheriff-clerks, so far as I am aware, do their work at all.

6713. Then there is no specialty in the case of the Sheriff-clerk of Aberdeen?—By no means.

6714. Does the Sheriff-clerk not attend daily at the office?—No.

6715. *Mr. Baxter.*—Do you know what his salary is?—£1200 a year.

6716. *Mr. Murray.*—Out of that he has to pay all the expenses of the office?—Yes.

6717. *The Chairman.*—Have you any observations to make on criminal matters?—No; I am little acquainted with criminal matters.

6718. Is there a Justice of Peace Court held in Aberdeen?—Not a civil court.

6719. Is there not a Small Debt Court?—No.

6720. Does the court grant licences, or review the judgment of the magistrates?—Yes; the Petty Sessions grant licences for the county, and the Quarter Sessions review their decisions.

6721. Does that work satisfactorily in Aberdeenshire?—Well, I see complaints in the newspapers; but I suppose it is only disappointed people that complain. I do not think there are any serious grounds for complaint.

6722. Are there any Barony or Regality Courts in Aberdeenshire?—There must be a number of baronies; but I am not aware that they generally keep up any practice of holding a court.

6723. Is there no Baron Bailie holding a court?—There is a Baron Bailie holding a court in Fraserburgh.

6724. That is a considerable place?—Yes.

6725. Are there magistrates there holding a court?—I think not. I think there are Commissioners of Police.

6726. *Sir E. Colebrooke.*—What cases do the Barony Courts take cognizance of?—I really don't know. I suppose it is mostly police cases.

6727. You have heard no complaints of their jurisdiction?—No.

6728. *The Chairman.*—The magistrates sit in the Police Court in Aberdeen?—Yes.

6729. Does that work satisfactorily?—I think so. If a question of law arises on a point of evidence, they send for their assessor.

6730. Do you sit with them in that court when they send for you?—Yes, if I am required.

SATURDAY, 16TH JANUARY 1869.

Members Present:—

LORD COLONSAY.	JAS. CAMPBELL, Esq.
LORD JUSTICE-CLERK.	GEO. HARRISON, Esq.
LORD BARCAPLE.	JAS. ADAM, Esq.
SIR E. COLEBROOKE.	A. B. SHAND, Esq.
E. S. GORDON, Esq., Q.C.	J. B. BAXTER, Esq.
A. R. CLARK, Esq.	

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

WILLIAM SHIRESS, Esq., examined. *William Shiress.*

6731. *The Chairman.*—You are a practitioner in the Sheriff Court of Forfarshire?—I am.

6732. At Brechin?—I practise in the court at Forfar. I reside at Brechin.

6733. Are there several procurators residing at Brechin?—Several; six or eight.

6734. Have they any society or faculty there?—Not in Brechin. We are all members of the Forfar body, but we have no separate Brechin society.

William Shiress.

6735. The ordinary Sheriff Courts in Forfarshire are held at Forfar and at Dundee?—Yes.

6736. And nowhere else?—Nowhere else—the ordinary courts.

6737. The Small Debt Courts are held in various other places?—In various other towns in the county.

6738. Is there any court under the late Act for the Recovery of Certain Debts held in other places besides Forfar and Dundee?—Yes; they are held at all the circuit towns fixed in the Small Debt Act.

6739. How long have you been a practitioner?—Forty years.

6740. Do you hold any official situation?—No; I hold no official situation just now.

6741. Have you any observations to make upon the constitution of the Sheriff Court, as consisting of a Sheriff and his substitutes?—I find that the appeal to the Sheriff-principal, as at present managed, in consequence of the Sheriff being bound to attend only four times a year in the county, is a great source of delay; and our faculty suggested that if the system of double Sheriffs were continued, it would be the best course to divide Scotland into several districts, and appoint a resident Sheriff over several counties: as, for instance, one residing in Inverness, having all the northern counties; one in Aberdeen, having all the counties in the neighbourhood of Aberdeen; and one in Perth, having Forfar, Fife, Perth, and the smaller counties of Clackmannan, etc.; and by devoting his whole time to his duties, he would be able to attend once a fortnight or so in the seat of every Sheriffship, and there dispose of every appeal which might be taken during the preceding fortnight or so. That is the suggestion which our body made for the improvement of the Sheriff Courts.

6742. Do you contemplate that the gentleman who would have that large district would review the judgments of the Sheriff-substitutes in the different parts of that district?—That was the view that our body entertained.

6743. Would you have him reside in the district, or in Edinburgh?—In the district, and consequently within easy access of all the towns in the district where the Sheriff-substitute sits.

6744. In so large a district as you talk of, what do you mean by residing in one town in the district, with easy access to all the places?—There is no difficulty in travelling from Perth to Forfar, Dundee, Cupar-Fife, Dunblane, or any other place where the Sheriff-substitute sits. It is only a two hours' journey from Perth or any of the central towns to the seats of the various Sheriff-substitutes.

6745. When you say easy access, do you mean access by him to the place?—Yes; he would then come just as our Sheriff does, sitting in the county town, or other town at which the Sheriff-substitute usually sits, and there hear the appeals in the same manner as the principal Sheriff does just now. The principal Sheriff is at present only bound to hold courts in the county four times a year. If he is resident in Edinburgh, practising in the Court of Session, he cannot conveniently do more; but if we had a man devoted to judicial functions, having no practice, and no other occupation for his time, he could, residing in the district, occupy his time in travelling to the various seats of the Sheriff-substitute's court, and despatch all the business there immediately, or nearly so, very much as the Sheriff of Glasgow does. There is a resident Sheriff-principal in Glasgow, and I understand that appeals are disposed of very rapidly there. Of course Glasgow has a large population, and it is reasonable that a resident Sheriff should be there. In the smaller towns we could not expect a resident Sheriff for each county; but taking a cluster of the counties, we think that a similar arrangement to that which exists in Glasgow would be the best method of having justice administered in the Sheriff Court. That was the view of our faculty when this Commission was first issued; but, since then, it has been suggested that the court should consist of two appeal Sheriffs, and I believe our general view is that that is an improvement, if it could be accomplished. We did not suggest two at the first, but we are inclined to yield to the recommendation of those gentlemen who do advocate the two. The one would be a great improvement in the way we suggest; but if two could be obtained, that would be still better.

6746. How often would you contemplate that the appeal Sheriff or the two appeal Sheriffs should sit in each place?—Once in two weeks, or once in four weeks during session time. Of course there would be the usual vacations, though there is not much vacation in Sheriff Court practice. We must have a resident Sheriff, and there are always summary matters requiring to be attended to, even in vacation.

6747. Would you have him to go to the different places where there are seats of Sheriff-substitutes, in order to dispose of the appeals there, or would the appeals be brought to one place?—We contemplate that he should sit at the seat of each Sheriff-substitute, and there hear the causes, in the same manner as the principal Sheriff does just now.

6748. The object you have in view in that is expedition?—Despatch.

6749. Do you contemplate that that gentleman should be a member of the Scotch bar?—We would expect that, but we don't think that he should necessarily be so. We expect that he would be of the same class out of which Sheriffs-principal have hitherto been selected, which has generally been from the bar, and from among the senior members of the bar; but we don't think it indispensable that he should be a barrister.

6750. Have Sheriffs-principal been selected from any other body but the bar?—Not within my experience.

6751. You said generally?—I believe a writer to the signet may be a Sheriff, or even a Lord of Session, though in practice it never occurred. I believe a writer to the signet, and probably also a practitioner in the inferior court, might be appointed to these high offices. We, the procurators in the inferior courts, don't think we get justice in regard to promotion, and we have some grumbling amongst us that all appointments, even of Sheriff-substitutes, are now given to the bar, rather to the prejudice of our body. We think our experience in inferior court practice entitles us sometimes to be promoted to such offices.

6752. Sheriff-substitutes are sometimes appointed from local practitioners, and from the writers to the signet?—They are, sometimes; but, generally speaking, it is members of the bar that are appointed to all these offices.

6753. Recently?—Recently.

6754. *Mr. Campbell.*—Have you considered the appointments made within the last ten years in reference to that remark, because there have been a good many appointments of gentlemen as Sheriff-substitutes within the last ten years who were not members of the bar?—Not in our neighbourhood at all events. I cannot say that I have scrutinized the appointments in other counties very much; but we have had no Sheriff-substitute in our county who was not a member of the bar since the late Mr. Robertson, who was an Aberdeen agent. The first Sheriff-substitute appointed at Dundee was an advocate; and all the Sheriff-substitutes since appointed, both at Dundee and Forfar, have been barristers.

6755. In Fife you are aware that the Sheriff-substitute is not a member of the bar?—Yes; I believe at Cupar that is the case.

6756. In Tain the gentleman recently appointed, Mr. Taylor, is not a member of the bar?—I am not aware of that.

6757. In Stirling the present Sheriff-substitute, appointed a few years ago, is Mr. Sconce, who was a Procurator-fiscal?—I am not aware.

6758. *The Chairman.*—Are you aware of any statute that regulates the qualification of a Sheriff-principal?—I understand there is a statute.

6759. You had overlooked that?—Probably so.

6760. Would you allow appeals to the Sheriff whom you suggest, or the two Sheriffs, whichever it might be, in all cases?—In all cases, after final judgment at any rate.

6761. By the resident Sheriff?—Yes, from the re-

sident Sheriff to the appeal Sheriff or Sheriffs after final judgment in all ordinary actions; of course not under the Small Debt Act.

6762. Would you allow these appeals upon matter of fact and upon matter of law?—If the matter of fact was ascertained in the present form upon the Sheriff's notes of the evidence, then I would allow it on matter of fact as well as on matter of law; but if the facts were ascertained by a jury, or in any other manner than by the Sheriff himself, I should say there was no occasion for appeals on questions of fact.

6763. You say by a jury or in any other manner. What do you allude to?—I have always maintained that the best method is to have the facts ascertained by a jury; but part of my neighbours maintain that it is best, where the facts can be ascertained, and the sum is of a limited amount, say under £25, that the judgment of the Sheriff taking the proof should be final and conclusive. That is what I allude to, that if there was any enactment to the effect that the finding of the Sheriff taking the evidence shall be conclusive upon the import of the evidence, then there would be no room for an appeal.

6764. Do you think it would be expedient to have the judgment of the judge in the first instance final upon fact?—I think that in small cases that would be the better way, on the whole. I don't like the idea of an appeal on questions of fact, because the appeal Sheriff, unless he were to re-hear the evidence, cannot appreciate the value of it so well as the judge who takes it; for evidence is not merely the words spoken, but the manner in which they are spoken, the gesture, the appearance, and the character of the witness. There are so many ingredients that go into the value of testimony, which only a judge taking the proof can ascertain, that I have always great hesitation in saying that a judge reviewing facts on mere notes of evidence, can arrive at so good a judgment as the judge who takes the evidence.

6765. You have expressed an opinion with reference to small debt cases; would you extend it to cases of large value?—There is great demur to doing that, certainly.

6766. Do you think that in cases of large value, the risks that you refer to of a miscarriage by the review of a judge who has not heard the evidence is of less consequence than in cases of small value?—I cannot say it is of less consequence; at the same time, it never appeared to me a satisfactory method of ascertaining facts, to have a review of the facts on the mere notes of evidence taken by the judge. I cannot see any reasonable method of making a finding on facts final unless a jury is interposed, and then they must see that the judge does not do gross injustice to either of the parties litigants.

6767. What number of jurors would you have?—From seven to nine. Seven or nine would be the number that I would recommend for the trial of causes in the Sheriff Court.

6768. Would you require unanimity from these jurors?—No, I would not; I would say two-thirds of them, at all events, should be sufficient to return a verdict.

6769. Would you have any mode of correcting an erroneous verdict upon fact?—You must have leave to move for a new trial on any such ground as new trials may be moved for just now—that the verdict is contrary to evidence, or that the judge has misdirected the jury, or any other causes that are reasons just now for a new trial.

6770. You would extend that to the Sheriff Court?—Yes, that is my own view; but my view is not popular among my neighbours, and I can find very few gentlemen in the county who adopt it.

6771. *Mr. Baxter.*—Would you extend jury trial to all cases of disputed fact?—I am very much disposed to extend it to all cases of disputed fact. Then the facts are finally determined. If they are wrongly determined, it is a pity; but if finally determined, there is no more litigation on questions of fact. Questions of fact are so difficult to determine, that I think it highly important that the fact should be fixed at as early a stage as possible.

6772. But you find yourself in a minority in that opinion?—In a very decided minority.

6773. *The Chairman.*—Supposing jury trial not to be adopted in the Sheriff Courts, you think it would not be satisfactory that in important cases the judgment of the court in the first instance should be final?—No, because the judge of review may order further evidence. If it is a case nearly balanced, the other party asserting that further evidence should be adduced, the judge of review might allow further evidence.

6774. But suppose the judge in the first instance happens to take an erroneous view of the true import of the evidence, either from misapprehension or throwing the balance in the wrong way, and that the judge to whom the appeal is made takes a different view, and points out his reasons so clearly as to make it plain that there has been an error on the part of the judge in the first instance, would you not allow that to be corrected?—Certainly I would, but I would leave it optional to the party then losing the case to adduce further evidence if he can.

6775. But what I am referring to is not the want of sufficient evidence, but an erroneous conclusion from the evidence?—Well, probably an erroneous conclusion from the evidence may be a sufficient cause for upsetting the verdict; but it has occurred to me in practice, that the judge has clearly indicated in the course of taking the evidence, at least shown sufficient indications to enable us to judge, that he considered our case was then fully proved, and that therefore we were loading the record with unnecessary evidence when we were examining more witnesses; and then, of course, we take the hint from him, and don't lead more evidence. But the judge of review takes a different view, and says this fact is not made out; and then we lose the benefit of all the evidence, which we might have adduced, but for the presiding judge at the time having indicated his opinion. That is a hardship; and when a judge overturns a judgment on matters of fact, I say, if the party who is losing the case has further evidence to give, he should be allowed to adduce it.

6776. Upon matter of law, you would have an appeal to the single judge, or to two judges?—Yes, on matters of law.

6777. Would you have their judgment final?—Up to a certain amount, I think it should be final; up to £50 in value, at all events.

6778. And above that, you think the dissatisfied party might appeal to the Court of Session?—Yes.

6779. *Mr. Campbell.*—At present the judgment of the Sheriff-substitute is final as to fact, in cases under the Certain Debts Act, up to £25, where he has not been asked to take a note of the evidence?—Yes.

6780. Is it common, in the practice of your court, that the Sheriff-substitute is not asked to take a note of the evidence in these cases?—He is asked to take a note of that evidence in every case now.

6781. *The Chairman.*—That is done as a matter of precaution?—Yes; we ask it as a matter of precaution.

6782. *Mr. Baxter.*—Do you ask that uniformly now?—Yes; we made a mistake at the first in not doing it, and the Sheriff said he would not make a note of the evidence unless we asked him to do so. We always ask him now.

6783. *Mr. Campbell.*—You gave your opinion as to the propriety of dividing Scotland into districts; but you commenced by saying that that was on the assumption that the double office was to be preserved. Did you come to the conclusion that it ought to be preserved?—Yes, for the sake of this appeal. We consider it of the utmost importance to have an appeal within the Sheriff Court.

6784. *Mr. Shand.*—Do you not think it would be satisfactory to the country, that the appeal should be direct from the resident Sheriff to the Court of Session?—I don't think that would be satisfactory.

6785. Why?—In the first place, because going to the Court of Session necessarily involves the case going out of the local agent's hands. The local agents, we

William Shiress.

think, should have the opportunity of first debating the case before the appeal court. He has to debate it before the Sheriff-substitute in his court; and then we apprehend it is of the utmost importance that the two local agents shall have the debate also before the appeal court. When it goes to the Court of Session, it goes wholly out of our hands; we are obliged to employ a new staff of agents and counsel, which we want to avoid if we can.

6786. Is it the expense to the litigant that you wish to avoid?—That is one very great consideration unquestionably. We cannot get a case discussed in the Court of Session without a great deal more money than we can do it for in our own court.

6787. Do you think that if an intermediate appeal was not to be had in some shape, it would be a denial of justice in a great many cases, on account of the expense.—Yes.

6788. You think the appeal Sheriff should reside in the district?—That is my opinion. Still I ought to say that a number of other gentlemen think there is no occasion for that; and that if the necessary number of appeal Sheriffs are appointed, they may equally well reside in Edinburgh and travel over Scotland, sometimes in one district and sometimes in the other. It is thought that that would produce a more equal administration of justice than if the same two were always presiding in the same court.

6789. Don't you think it would be an advantage to the appeal judge to reside in Edinburgh, and see the daily practice of the Court of Session?—No, I don't think it is of the least moment now-a-days, when all the cases are duly reported; and we understand the proceedings of the courts of law, by means of the legal publications, as well as if we were on the spot.

6790. *Mr. Baxter.*—But you have no objection to their residing in Edinburgh?—No; if it can be done with equal economy and despatch.

6791. *Mr. Shand.*—You contemplate that they shall give up practice?—Yes; we expect that the Sheriff shall devote his whole time to his judicial functions, and that he shall be paid adequate remuneration, and that he may be still in the way of higher promotion if such should occur.

6792. *The Chairman.*—You mean promotion to the bench?—Yes; we think that an appeal judge, after having satisfactorily discharged such duties as an appeal judge would have to do for a number of years, may be very fitly promoted to the bench.

6793. You said you thought these appeal judgeships should be open to members of all the professions—writers to the signet and procurators in the Sheriff Courts?—Yes, I think so. I think they should be open to all members of the profession.

6794. *Sir Edward Colebrooke.*—You said it was your opinion that the Sheriff-principal should be resident. Is that opinion not shared by the other members of your faculty at Brechin?—It is, at Forfar; we generally came to that conclusion, that it would be proper to have a resident Sheriff; but at that time the idea of two Sheriffs had not been started. Our view at that time was, that one Sheriff only was the proper appeal court.

6795. *Mr. Baxter.*—In an enlarged district?—Yes.

6796. *Sir Edward Colebrooke.*—The other view, of having the appeal to two or more Sheriffs, has not been under the consideration of your faculty?—We have not discussed it at any meeting.

6797. Is there any reason to complain that under the present system the Sheriffs-principal don't devote their full time to the cases before them on appeal?—I cannot say that I have heard any complaint of that in our county.

6798. What is the advantage you think there would be in having the principal Sheriff always resident, instead of a person who is a practitioner in the Supreme Court?—The reason is that of despatch. At present the Sheriff is only bound to come to his county four times a year under the statute, and he may fix his own periods for that purpose; consequently, supposing him to divide the year into equal quarters, we have to wait three months sometimes for the determination of an appeal. That is a great obstruction to justice. If we could get a case decided in ten days or a fortnight, as I am told they do in Glasgow, all that time would be saved to the litigant.

6799. *The Chairman.*—Do you think the discussion on appeals ought to be entirely oral?—I do.

6800. Whatever be the nature of the question?—Of course. I would say that the Sheriff, on cause shown, after seeing the case, if he saw that a written debate would be more suitable, might have power to order such, but I would not put it in the power of the litigants to have a written debate.

6801. *Mr. Baxter.*—You would anticipate, I suppose, that a written debate would be very exceptional?—I should think so. In matters that involve figures and accounting, it might be sometimes necessary to have the view of the parties stated in writing. Sometimes you cannot understand figures so well from an oral statement as from a written statement. I can imagine such cases to occur, as that it would be highly satisfactory to the judge to have the statements in writing.

6802. *Mr. Shand.*—If it were provided that the Sheriff should go to his county to hold sittings once in four weeks, would that meet your view so far as despatch is concerned?—It would; but in summary cases that is hardly enough perhaps, and sometimes delay is a temptation to a man to take an appeal.

6803. How many cases would be waiting the Sheriff as a rule, suppose you had sittings once in four weeks at Forfar?—If an appeal was confined as I suggest, it should be to the final judgment, there would not be very many—not perhaps above two or three, or perhaps not so many, at the end of four weeks.

6804. You think three would be the outside of it?—Yes, I fancy so, of final judgments.

6805. And that embraces a pretty large district, does it not?—Yes, it does. We count that we have 180,000 inhabitants in Forfarshire, 90,000 of whom are in the Dundee district.

6806. *Mr. Adam.*—Are many of the cases appealed in your court?—Almost every case is appealed. At one stage or another, almost every case in which there is any serious litigation goes to the Sheriff.

6807. *Mr. Baxter.*—Would you confine your appeal to the decision on the merits?—Yes, or to the interlocutor allowing a proof. You may save a proof by taking an appeal at that stage.

6808. Suppose a good preliminary defence, which might dispose of the case?—Well; if the Sheriff dismisses the case, the pursuer must have an appeal.

6809. But suppose he repels it?—If he repels the preliminary defence, I don't know that it is of much consequence to have an appeal at that stage.

6810. It might decide the case, and save a proof?—It might.

6811. *The Chairman.*—If there were two judges in the ambulatory court, do you think there would be any inconvenience as to their having the papers before them? Would it not require a copy of the papers for each of them?—I think that might be arranged without having copies of the papers for each of them. Probably, however, it might be convenient to have copies of them.

6812. Copies of all the important papers?—Yes.

6813. Would you expect them to decide the case before they left the town?—They could not well do that in all cases. I think they must have leave to take the case to avizandum, because there may be authorities referred to in a debate, which they could not at the time refer to.

6814. You would not expect a case to be so well disposed of instantly in the court, as by a judge who had time to consider it deliberately in his library, and to refer to authorities?—I should say not. He should have time to make up his mind deliberately.

6815. He would probably like to have the papers with him?—Yes; of course he must.

6816. And that would make it desirable that he should have a copy of them?—Yes.

6817. Copies would be required for each of the

judges, if there were two, if they had to take the case to avizandum and consider it carefully?—Yes.

6818. Would you have counsel practising before these judges?—Not usually. Our object is to exclude counsel as far as we can, and to manage all our matters ourselves, unless we are obliged to go to the Court of Session, in which case we are obliged to have counsel.

6819. Your object is to keep things to yourselves as much as possible?—As much as possible.

6820. Would you extend the jurisdiction of the Sheriff Court to other classes of cases than those which are now competent in it?—We consider it an absolute denial of justice in many cases, that we have no opportunity of bringing actions in the Sheriff Court as to husband and wife, and in regard to heritable rights. An heritable right of small value is often lost, simply because the parties cannot afford to risk the expenses of a Court of Session lawsuit.

6821. You would extend the jurisdiction to questions of heritable right?—Yes.

6822. Would you extend it to questions of heritable right of any amount?—Yes; but I would give the defender an option to take the case to the Court of Session. I would not say that a pursuer has a right in every case to choose his court. Supposing there to be two courts of co-ordinate jurisdiction, the Sheriff's Court and the Court of Session, the pursuer selects the Sheriff's Court; but I should say the defender has an equal right to choose the court; and if he can show the Sheriff that the value is considerable, say £500, then I think he ought to have a right to ask the Sheriff to remit the case to the Court of Session.

6823. With what object?—To have it tried, because the defender chooses that court. There are two courts of co-ordinate jurisdiction provided by law: the pursuer selects one, but that may be an unfavourable selection, and the defender may think so; and he says, The other court of co-ordinate jurisdiction is a better court for the decision of this case, and I ask you, the Sheriff, to remit it there at once. I think that is reasonable.

6824. Would he have to show cause to the Sheriff why it should be remitted?—If it were of a certain value, I should say no.

6825. Then that is allowing the defender to choose the court as against the pursuer?—Yes; I think he has as good a right to select the court as the pursuer.

6826. He would have the sole right to select in that case?—Yes.

6827. The pursuer begins, and the defender says, 'I won't have that court; I choose the other,'—is that not giving the defender the selection of a court?—Yes, it is enabling him to decline the Sheriff's jurisdiction.

6828. It is giving the defender the selection of the court?—He has that just now.

6829. You talked of it as if it were giving the parties equal right to select the court. Is it giving them an equal right to select the court, if one of them can take it to another court?—I don't mean to say that it is. I am pleading for an alteration of the law. At present the parties have only the Court of Session to go to in such cases. I say, if anybody thinks it a hardship to be obliged to go to the Sheriff Court, let him still have the power to go to the Court of Session if he prefers it.

6830. Then it comes to this, that if both parties choose to have the Sheriff Court, you would let the Sheriff have the jurisdiction?—Yes, it comes to that. I would only give that option to the defender when the case was of a certain value.

6831. What value would you suggest?—£500 was the sum talked of in our body at Forfar. We said that it appeared to be reasonable to allow the defender in cases above £500 to go at once to the Court of Session. We may debate the case in the Sheriff Court; but I have made up my mind not to be contented with the Sheriff's judgment, and therefore we will go to the Court of Session at once. That is the argument used, that where a party sees he will be driven in the long run to the Court of Session, the right being of importance to him, and a question in which he would not be content with the Sheriff's judgment, he says he will go to the Court of Session at once.

6832. That would be in cases of large amount?—Yes.

6833. In cases of smaller amount you would not allow that option?—Not, in cases which did not exceed £500 of value.

6834. At the close of such case not exceeding £500, would you allow him an appeal to the Court of Session?—I would.

6835. Is there any amount to which you would limit the right of appeal to the Court of Session in matters either heritable or personal?—Not except under the Small Debt Act. I don't want any appeal under the Small Debt Act. Some of my friends wish that, but I have never advocated it, and I don't think it would be expedient. But I am not disposed to exclude review of the Sheriff's judgment by the Court of Session in any cases except those under £12 value.

6836. *Mr. Baxter.*—In regard to giving the defender the power of going to the Court of Session, why would you restrict that to cases of heritage?—I am moving for an alteration of the law; and when we are doing so, we must meet half-way the views on the other side. I wish to take what is practicable if possible, and I am showing that it is no hardship; because, if the party still prefers the Court of Session, he can have it.

6837. *The Chairman.*—Are there any other classes of cases to which you would extend the jurisdiction of the Sheriff Court?—I would extend it to the conjugal actions particularly, and to protection of a wife's earnings under the Conjugal Rights Act, to actions of separation, and I think also actions of divorce. I don't see any reason why we should not have actions of divorce in the Sheriff Courts, and actions of legitimacy. The law of Scotland, prior to the Acts of 1830 or 1831, was that actions of divorce were tried in the Commissary Court, and it was the inferior court practitioners that practised in that court. Till the Commissary Court was abolished, actions of divorce were not competent originally in the Court of Session. There is no reason to doubt that a practitioner in the inferior court could conduct actions of divorce as well as they are conducted in the superior court.

6838. Would you allow actions of declarator, of legitimacy or bastardy, or marriage, to go on in the Sheriff Court?—I would; we have agreed that that would be desirable.

6839. Rescissory actions, and actions of reduction?—Actions of reduction, which are accessory actions. If you extend the Sheriff's jurisdiction to questions of heritage, these are merely accessory actions.

6840. Reduction of a settlement?—Reduction of a settlement on the head of deathbed, or any other ground involving heritable right.

6841. Declaratory actions?—Yes; these are accessory actions.

6842. Are there any actions to which you would not extend it?—Yes; there are actions against judges and magistrates, against church courts, and against Officers of State, and actions of that sort. I would not like to have anything to do with the presbyteries.

6843. That is the class of cases to which you would not extend the Sheriff's jurisdiction?—Yes.

6844. But to questions of debt, or right of property, or declarator of right,—to all such classes of cases you would extend the Sheriff's jurisdiction?—All cases coming under the term of common pleas, relating to rights of property, and forming questions of claim by one man against another. We excepted from the cases which we said the Sheriff's jurisdiction should be extended to, cases against the Sovereign or Officers of State, against judges or magistrates, including Church Courts, and against foreigners, or persons residing beyond the territory of Scotland.

6845. Do you concur in that resolution?—I do. In regard to the question about foreigners, I think it would be indispensable, for the purpose of explicating the Sheriff's jurisdiction, that he should have the right of reconvention against foreigners suing in his court. I happen to have seen lately, that there is a great incon-

William Shiress.

venience from my not being able to raise an action against a foreigner in the court of Forfar, while he could raise an action against me there. I cannot constitute a claim against him there, and I think the right of reconvention should be granted to the Sheriff's Court against a person resident abroad, if he is suing in that court.

6846. Would you extend the jurisdiction of the Sheriff territorially, to parties connected with actions in his court?—We had that matter under consideration, and the resolution we came to was:—'It would be improper to admit of a single defender or a set of defenders all resident beyond the territory of the Sheriff, being cited to a Sheriff Court. But if there are three or more persons whom it is necessary to call as defenders in an action, and one or more of these resides beyond the Sheriff's territory, your committee are of opinion that it should be competent to call the non-resident as well as the resident defenders into any Sheriff Court. If these non-resident defenders, however, shall be able to show to the court in which they are called, that they are put to any disadvantage in their defence by being called into the court of that particular county, and that their co-defenders would not be put to disadvantage by the case being tried in another county, then the Sheriff should remit the case to the court of that other county. In cases of actions upon contracts, the *locus contractus* is generally the most suitable for the case being tried; and though, where all the parties concerned are resident in another territory, it may be suitable and convenient to have the case tried in that territory, yet where other parties are interested, it should belong to the judge to determine in what territory the case should be tried. At present, where a number of defenders resident in different territories must necessarily be called to an action, the action must be raised in the Court of Session, however small the value at issue, and however suitable in other respects the case may be for the determination of the Sheriff. But there is no greater hardship in citing a defender to another county town than in citing him to Edinburgh; while, under the provisions suggested by your committee, it would always be in his power to get his case remitted to his own County Court, if he can show that a trial there would give him any facility in making good his defence, without injury to his pursuer or to his co-defenders.'

6847. If you have appeal judges who exercise appellate jurisdiction over a large territory, would you allow the party to remit it from one part of that territory to another?—If the judge saw cause—if cause was shown—certainly.

6848. And you would allow persons not residing within that district of Scotland to be cited within it if there were several defenders?—Yes.

6849. *Mr. Adam.*—Who are the 'we' whose opinions you are representing?—The Faculty of Forfar—the eastern district of Forfarshire.

6850. *The Chairman.*—Including Montrose?—Including Montrose, Arbroath, Brechin, Kirriemuir, and Forfar; it includes the professional men resident in all these towns.

6851. *Mr. Campbell.*—Can you tell us the number of members of that faculty?—About sixty.

6852. *The Chairman.*—Would you extend to the Sheriff the power of appointing curators and factors?—We think it highly desirable that that should be done in the Sheriff Courts.

6853. And trustees on lapsed trusts?—Yes.

6854. *Mr. Campbell.*—You said that you did not think the judgment of a Sheriff should be final in any case except in small debt cases?—Yes.

6855. Do you think that the present provision, which renders the judgment of the Sheriff final in cases under £25, ought to be abolished?—Yes, I do. I think an appeal should be allowed in such cases. Formerly we could advocate such cases, and we had also a very convenient appeal to the Circuit Court of Justiciary in such cases.

6856. *Mr. Adam.*—Do you think that requiring the judge to grant leave to appeal would be sufficient protection against improper appeals?—Do you speak of appeals to the Court of Session?

6857. Or to the principal Sheriff, even under £12, under the Small Debt Act?—You suggest an appeal with leave of the judge. That would be quite a sufficient protection; and if the judge saw that the matter was a difficult one, it is reasonable that he should allow an appeal.

6858. You would not object to an appeal in small debt cases where the judge certified that it was a proper case for an appeal?—No, I would not. That would indicate that he himself was doubtful of the judgment; and in such a case it is quite right that he should allow another judge to apply his mind to the case.

6859. *Mr. Harrison.*—Do you think your opinion in favour of the right of appeal is shared by the people of Forfarshire, or is it only your personal opinion?—I am satisfied that the bulk of the people of Forfarshire, who understand the question, would like an appeal from the Sheriff-substitute to the Sheriff-principal, or some other appeal judge.

6860. Even in cases under £25?—Yes.

6861. *Lord Barcaple.*—Under £12?—Under £12, with leave of the judge.

6862. *The Chairman.*—Have you any suggestion to make upon the style of pleading in the Sheriff Court?—I have always had great hesitation in coming to the judgment which the Court of Session came to in regard to the Act of 1853, by which they found it was necessary to libel a relevancy. I consider that the Act of 1853 enabled us to libel our summons without necessarily including relevant grounds of action. At the time the Act was passed, we framed our summons in the same manner in which a Court of Session summons is framed, containing merely the conclusions, and adding a condescendence containing the reasons. This Act abolished the condescendence annexed, and I don't think that necessarily inferred that we were to put the condescendence into the body of the writ. Therefore I thought that, when the Act was passed, we should have no longer occasion to libel a relevancy in order to get the summons into court; and that, if the case was defended, we had to state, in the shape of a condescendence, the ground of action. But it was determined by the Court of Session, in the case of Cameron, that we were obliged to put the relevancy into the summons, even under the new law; and when the Court of Session fixed the fees for framing the summons, they gave a high fee—much larger than we formerly had for framing a summons—which virtually nullified the effect of this Act, as far as the mercantile community was concerned, by making the expense of decrees in absence a great deal larger than before; and consequently the mercantile community, finding that the Act had proved abortive in reducing the expense of law proceedings, chiefly in decrees in absence, agitated and got the Debts Recovery Act passed. I think that Debts Recovery Act is a very awkward Act. If it be determined that the relevancy must be libelled, of course the present forms of summons must remain; but I should think the better method would be to bring an action into court, specifying merely the sum concluded for, without assigning the reasons; and if decree passes in absence, there is no further allegation. If appearance is made, then a condescendence may be lodged, and the fees in consequence would be much modified for a decree in absence.

6863. You complain that the fee is too high at present for libelling a summons?—I think so, unless we are obliged to put the relevancy in. If we are obliged to put the relevancy in, our fee is not too high.

6864. At whose instigation was the fee fixed, do you know?—I do not know.

6865. *Mr. Adam.*—You don't think that the fees are too high for the work, but you think that the work is unnecessary?—I think the work is unnecessary.

6866. *The Chairman.*—What would you put into the writ?—It should just be a formal writ, containing the conclusions specifying the amount of money or demand, and generally the ground—the amount of account or bill.

6867. You would state the amount of account or bill?—Yes; or the sum due upon a bond.

6868. Would you describe the bill?—I would not make that indispensable, nor the title on which the parties acquired it.

6869. If there was an account, would you indorse it on the writ?—Yes.

6870. *Mr. Campbell.*—Some care would be required to identify the debt, so that a dishonest pursuer might not twice take decree for the same sum?—Yes.

6871. *The Chairman.*—Does not that come very near a small debt summons?—Very near it. The small debt summons appears to me to be unnecessarily cumbersome. It might be considerably shortened and made much more purpose-like, and much more information given to the defender in regard to his course of defence, if he intended to state such. In the County Courts Act in England there are instructions printed in the notice served on the defender, giving him notice what course he is to follow in case he wishes to settle the debt. He is warned that if he pays before the case comes into court, he will only have so much of expenses to pay; and if he intends to take a defence of such and such a character, he is bound to give notice. I think these are very valuable instructions, and that similar instructions ought to be printed in our small debt summons.

6872. Would you assimilate the small debt summons to the summons under the Debts Recovery Act, and the ordinary action summons?—Yes, I would assimilate them, but I think they are all capable of improvement; and one improvement I certainly would put in all summonses—viz. specifying the amount of expenses to be decerned for in case of decree passing in absence. That should be indorsed on every writ, in case of the defender failing to make appearance. The writ should make him acquainted with the whole sum, principal, interest, and expenses, which he shall have to pay.

6873. Would you still preserve three forms of summons?—There is no occasion for that; one form should be enough.

6874. You think one form should suit all questions of debt?—Yes.

6875. But you have ordinary actions which are not mere questions of debt. Do you approve of the present form of procedure as to these?—I approve of the form of procedure to a certain extent, but I think it might be amended. For instance, in an ordinary case where defender enters appearance, the Sheriff is required to take a note of the defence. 'If satisfied that no further written pleadings are necessary, he shall cause a minute to be written on the summons setting forth concisely the ground of defence.' It does not say the ground of any reply to that defence. In all cases where compensation or payment is set up, the pursuer has a reply or explanation of the ground of defence. The Sheriff is not ordered, nor apparently permitted, to make any memorandum of that; and when a case of that kind occurs, he must either order the record to be made up by condescendence and defences, or he puts the pursuer to the injustice of his pleas not being recorded. The defender's pleas are recorded, and not the pursuer's; so that we are driven to make up the record by condescendence and defences.

6876. You would allow the pursuer to make a statement which would be minuted in like manner as the defender's statement?—Yes.

6877. At what stage would you allow that?—The rule of the statute is, that the defender shall state his defence at the first calling of the cause, or at an adjourned calling not more than eight days after. If a defence is stated which the pursuer heard of for the first time at the calling of the cause, his procurator could not reply to that; and he must have an adjournment of six days if he asks it, to enable him to do so.

6878. And that would dispense in many cases with condescendence and answers?—Yes.

6879. And it would save expense?—Yes.

6880. And time?—Yes.

6881. Is there any other improvement on the form of pleadings that you would suggest?—I would suggest that, in all cases in which interdicts are applied for, they shall not be granted except on caution found, or such other precautions as are adopted in the Bill Chamber in Edinburgh. I think interdicts are too hastily granted in the Sheriff Courts. I think a man is as much bound to give caution in the inferior court as in the Supreme Court. Before an interdict is granted, the Sheriff should order caution to be found, unless he saw special grounds for not doing so.

6882. Would you apply that to an interim interdict?—Yes, or any interdict.

6883. It may be very urgent?—Yes; and if cause is shown, I would allow the Sheriff to grant it without caution; but, as a general rule, I should say that he ought to exact caution before granting interdict.

6884. Have you any further suggestion?—I think that actions of removing, in all cases where the rent is under £30, should be brought in the Small Debt Court, in the same manner that removings from temporary occupancies are brought just now. I don't see the use of having a formal summons of removing in the ordinary court, for the purpose of having a man removed out of a house or small possession. The expense of removings is generally money thrown away.

6885. *Mr. Shand.*—What would you substitute for that?—A printed form the same as under the Act. There is a provision that removings from subjects temporarily held under £30 of value shall be brought in the Small Debt Court. That form is annexed to the Act of 1 Vict.

6886. You would adopt that form?—I would adopt that form, whether the occupancy be a temporary occupancy or a permanent occupancy. The form attached to the Act of 1838 is applicable only where the party occupies for a shorter period than a year; but I see no reason for not extending it to occupancies for the whole year. All actions of removing under £30 should be brought in the Small Debt Court under that form. There is no other improvement in the form of process that I am prepared to suggest.

6887. *The Chairman.*—Have you anything to suggest as to the costs of litigation in the Sheriff Court? Do you think there is any mode of abridging them?—There is not very much expense of law proceedings in the Sheriff Court, if the condescendence and defences are carefully framed. In regard to the costs of condescendence and defences, we are allowed a particular specified fee for a summons, no matter what length it is. We get no additional fee for making a long summons, and I don't think we should get any additional fee for making a long condescendence either. I think a fee should be fixed for condescendence and defence, and let the agent make them so long as he likes; but the length should not add to the cost of them. My idea is, that matter is unnecessarily spread over a number of pages in condescendence and defences; and I don't think the agent should get any profit out of it.

6888. You don't think the fees should be affected by the length of the pleadings?—No.

6889. Or by the importance of the subject of the pleading?—We must be paid higher for cases above £100 than for cases below £100. There are three scales of fees—under £25, under £100, and above £100. The procurators must be paid higher fees for sums exceeding £100; but I have no idea of their being paid according to the length of the pleadings.

6890. But you think it should be a fixed fee for each of these three classes of cases?—Yes; just the same as it is for the summons. At present it is a fixed fee for the summons under £25, under £100, and above £100. If we have got that fee for our summons, the pursuer's agent has not much pretence for asking a fee for a condescendence which ought to be just a repetition of the summons.

6891. In a question of heritable right,—of large property,—the condescendence may require to be considerable?—It may, and consequently some discretion must be left to the judge in such cases; but, as a general rule, I should say that a man should not be paid by the length of his pleadings.

William Shiress.

6892. You would put the exception in the power of the judge?—I would.

6893. Do you think that if that change is not adopted, the fees as they are at present regulated are proper fees?—Yes; I think the fees as at present regulated are fair enough. There is a matter, certainly, in which the agents suffer some hardship in discussing preliminary defences. Unless the Sheriff orders a debate, the agent has the whole duty of discussing the preliminary defence, and that without any fee being provided. He only gets the fees for attendance at closing the record, and the record may never be closed if his preliminary defence prevail. He gets no fee in that case at all for debating a good defence. If he prevails, he cuts himself out of his fee.

6894. You think that is not a sound principle?—I think there is a defect in the Act of Sederunt in that particular. The fee for debating a preliminary defence should be allowed where the preliminary defence prevails.

6895. Has your attention been directed to the principle on which costs are regulated under the Debts Recovery Act?—It has.

6896. Do you approve of the scale and the principle, or do you disapprove of either of them?—I disapprove of the principle. It is impossible to say that a fixed sum can be reasonable compensation in a case where there may be half-a-dozen diets of proof, and twenty or thirty witnesses to precognosce. To say that you are to get the same for that as for precognoscing only one, and attending the diets of court throughout, is unreasonable. But at present there is just a slump sum allowed, no matter what the trouble may be. You may have a lengthy and intricate proof, and you get no compensation for it; while, on the other hand, you may for a very trifling amount of trouble get just the same.

6897. *Mr. Gordon.*—Are there many cases of that kind in which there are four or five diets of proof?—No; I suppose there are not many cases. But there are occasionally cases occurring in which we are obliged to have adjourned diets of proof.

6898. Have you known of one case under the Debts Recovery Act, in which there have been four or five diets of proof?—I knew only one case in which I had to attend the court at least half-a-dozen times before I got a judgment, owing to proofs, and debates, and adjournments of one kind or other. I cannot give the details from recollection, but I had a great amount of trouble before I got the judgment.

6899. Do you adjourn proofs in your court, or do you exhaust the proof of one or both parties before adjournment?—We exhaust the proof if we can before we adjourn, but cause is sometimes shown for adjournment quite unexpectedly. The witnesses may be unable to attend, or a witness may become necessary in consequence of something which has been brought out.

6900. In the case you mention, was there any adjournment for proof?—There was one adjournment of proof, because the pursuer showed he could not attend on that particular day to give his evidence. That was the only adjournment, I think. I went to Forfar to attend the proof, and it was not led because the pursuer could not attend. I was for the defender, and he was with me, but I don't think I had any other witnesses. I would have got the expenses of the witnesses, but I would have got nothing for my own fee. It appears to me impossible to regulate the fees by a slump sum. They must bear some proportion of the trouble bestowed, particularly where you are to lead proof. You can fix fees for formal judicial proceedings, but you cannot do so for proof. It depends on the amount of evidence necessary.

6901. *The Chairman.*—That must be paid by time?—That must be paid by time, or by the number of witnesses, or by some other criterion different from a mere slump sum. At present we are just allowed a certain sum for precognoscing witnesses. It may be a short precognition or a very lengthy precognition. Some of my brethren say that we should be paid by the length of the precognition; but I think the present rule operates, on the whole, nearly fairly, and that no benefit would be attained by making long precognitions any more than long papers in other cases. Therefore I maintain that a slump fee for precognoscing a witness approaches as nearly to justice as we can expect.

6902. *Mr. Adam.*—Do you think the principle of that Act in assessing costs might be applied with advantage in all cases where there is no proof? Your objection to it is, that in cases where proof is led, you can have no estimate of the cost of them. Do you think the principle of giving a certain fixed sum, where the litigant knows exactly what he has to pay, might be applied with advantage in cases where proofs were not required?—Probably it could. I don't see so much objection on that ground. I think the litigant is quite entitled to know what a law-agent's fees are to be, and to be able to say that they cannot exceed a certain sum supposing no proof to be taken.

6903. Your objection to that system of taxing the costs would not apply to cases where there is no proof?—No, I think not.

6904. *Mr. Harrison.*—Have you had many cases under the Debts Recovery Act in your own practice?—Not many; but I have had several.

6905. You mentioned one exceptional case; but in the other cases has the remuneration been sufficient?—Oh yes; in several cases I have had, I should say the remuneration was sufficient.

6906. Are you aware that a principle very similar has been in operation for a number of years in the English County Courts?—I am aware that something similar to it has been in operation; but I am not familiar with it.

6907. I believe there is a provision in the English County Courts Act, by which, if a client under his hand agrees to pay further costs or charges in exceptional cases, such as you have mentioned, it is legal; would you think such a provision a proper one to introduce into Scotland, by which, where there is extra labour, a client may agree to pay further expenses?—I don't see any objection whatever to that.

6908. *The Chairman.*—Does anything further occur to you as to costs?—Nothing further.

6909. In regard to privileges of agents, have you anything to suggest?—We complain of our services being entirely ignored by the Auditor of the Court of Session. He does not recognise our charges as any part of the expenses of a Court of Session lawsuit. Necessarily we have to gather the information out of which the action has to be raised in the country, where the cause of action has arisen, and we must communicate that to our Edinburgh agent. The fee for that is not recognised as any part of the expense of the case in the Court of Session.

6910. You think that is a hardship upon your client?—We think it is; and, of course, it deters us from recommending parties to go to the Court of Session. We have no temptation to do so, because we are obliged to tell our client that it is to be a sure loss to him. He cannot recover from the other side any part of our charges at all events. There is always a hardship in such a case, and we have a feeling of reluctance to put him to an obvious expense which he cannot possibly recover from the other side.

6911. Your suggestion would be, that the country agent's account should be allowed as part of the costs of the suit in the Court of Session?—The necessary expenses of getting up the information for raising the action should be allowed as part of the expenses in the Court of Session.

6912. The theory is, that the party can give that information himself, is it not?—The theory is so; but the practice is very seldom that.

6913. If he can give it to his country agent, he can give it to his town agent?—Yes.

6914. Is that an unsound theory, that if he can give it to one agent, he can give it to another?—I am not prepared to say that it is. There is certainly ground for concluding, that if he is able to instruct his country agent, he is able to instruct his town agent too. But

in general, country people are not able to instruct either; and the country agent has to ferret out the information partly from his client, and partly from other sources.

6915. And it requires some one near the spot to accomplish that?—Yes, on the spot.

6916. And it would be more expensive to the client, if the Edinburgh agent had to ferret out that information, than if he employed the country agent to do it?—A great deal more.

6917. That is the ground on which you think expenses should be allowed?—Yes. In point of fact, it is the cheapest method of doing it.

6918. Have you anything further to say as to the position of agents?—Nothing further on the privileges of agents, so far as I am aware.

6919. Do you think agents should be allowed to practise in all courts?—I don't see any objection to that; at the same time, I am not maintaining it. The matter has not been under the consideration of our faculty. It would be a facility; but I don't know that it would be of much practical benefit. It is obvious that I could not practise in the courts of Aberdeen or Glasgow. I have enough to do practising at home; and if I require business to be done in another county, I must employ another agent there, the same as I must do in Edinburgh.

6920. Supposing you had not been so successful as you have been, and wished to transfer yourself to another Sheriffdom, to try your fortune there, would you consider it a hardship that you could not commence business there?—No, I would not. I would say I should not be allowed to practise elsewhere without first being admitted by the Sheriff of the county. The Sheriff must have some voice in the appointment of the procurators of his own county; and because I choose to leave Forfar and go to Perth, I would not say that the Sheriff of Perth would be bound to recognise me, unless I can show him that I am a person of good character, and qualified to practise.

6921. But supposing the Sheriff has no objection to it, and that there is a qualification prescribed by the general body of procurators in Scotland, do you think that, in that case, the procurators of the other town should have a right to exclude you?—No; if I can satisfy the Sheriff of the county, that having been admitted a procurator in another county, I am qualified to practise in his county, he should at once admit me, and he would do so as matter of course. But if I had misbehaved myself in the county in which I originally started, and am obliged to change my residence, and go, say to Ayrshire, and I produce my admission as a procurator in Forfarshire as giving me a right to practise in Ayrshire, that might be a great abuse.

6922. I am not putting the case of misconduct, but that of right,—whether stamping a man as a procurator by passing the examination required by the Society of Procurators should entitle him to go and practise in any court he likes?—I don't think it.

6923. You are not favourable to that?—No. I think the head of every court should have a certain amount of discretion in regard to who should practise before it. The Sheriff of every county should have that discretion, and therefore a man admitted in Perth has no right to go to the adjoining county and say he has a right to practise there.

6924. *Mr. Baxter.*—Supposing you went to Aberdeen, and wished to be admitted a procurator there, do you think it would be right that the Corporation of Solicitors at Aberdeen should be entitled to say to you, that because you had not served an apprenticeship with one of their body, they would not allow you to practise?—No. I object to all these monopolies. There are just the Aberdeen and the Lanarkshire procurators that have monopolies of that kind, which are undoubtedly grievances.

6925. You object to them?—Decidedly. I would leave the admission to the discretion of the head of the court. But I don't see that anybody has a right of monopoly.

6926. *Mr. Harrison.*—It is only to the head of the court that you would give the right to object?—Yes.

6927. *The Chairman.*—Do you see any good to be attained by authorizing the procurators in the country districts to follow their causes into the Court of Session, and be the agents in them there themselves?—I think that would be quite satisfactory. I don't know that practically it would be operative, except perhaps in the counties immediately adjoining Edinburgh; but in counties at a distance, I believe it would not do much good. Still it would be satisfactory if we had the right to do so.

6928. In what respect would it be satisfactory? Is it unsatisfactory that you have not the right?—A number of my brethren complain of it. They complain that, when they are forced into the Court of Session, they have to employ an Edinburgh agent. If we were able to attend the case ourselves, I believe that we would all employ Edinburgh agents in the long run; but being obliged to do so is the thing we complain of. It would come about, I think, that the Edinburgh agents would be employed, probably under some arrangement for a division of the fees.

6929. That would be the object?—And that would be the result. If we were entitled to practise in cases in the Court of Session which we had previously conducted in the Sheriff Court, we would say to our Edinburgh correspondents, 'We are not to give you the whole of these fees; we are entitled to have them.'

6930. That would be an indirect mode of compelling a distribution of the profits of the business?—It would.

6931. The Edinburgh agent drawing these emoluments, according to the present table of fees, has the proper remuneration for his own services. You think the country agent should have a right to deprive him of part of them?—Yes; that would be the way of it.

6932. In that view, would not the town agent's remuneration be smaller than was contemplated when it was fixed by the court?—I presume it would.

6933. Then should it be increased to meet that?—I should hesitate very much about that; for the general complaint throughout the country is that the expenses in Edinburgh are so large that we cannot afford to increase them.

6934. I am assuming that the table of fees for the Edinburgh agent is a suitable table. You say the country agent ought to be entitled to abstract from the Edinburgh agent a portion of these fees?—Yes.

6935. Would that not leave the Edinburgh agent with a remuneration less than was contemplated as sufficient for him?—It would.

6936. Do you think that would be a fair thing towards him?—It would remove so much of his responsibility. He would not have the responsibility of conducting the case; he would not have the same responsibility as he would have without the country agent.

6937. Responsibility in what respect?—In the proper conduct of the case. He gets his fees just now, not so much for his own services, as for the order and regularity with which he conducts the proceedings.

6938. You would leave him to conduct the proceedings?—We would instruct him to do so. He would be our hand, doing it on our behalf. If we had a clerk resident in Edinburgh, he could do a great deal of the work for us which an Edinburgh agent does.

6939. But do you think the Edinburgh agent ought to be merely a person to do what you desire him, and to exercise no judgment of his own?—Yes, if we made the arrangement to that effect.

6940. He is responsible to the court before which he practises for the regularity and efficiency of his performance?—But on the supposition that I was entitled to practise in the court in Edinburgh, I would be responsible to the court also.

6941. Though you left him as the nominal agent?—I would not leave him as the nominal agent; he would do the work in my name.

6942. Then it would be this, that you would be entitled to the fees which he now gets, and you would allow him a portion out of them?—That would be the way of it.

William Shiress.

6943. You think that would be a good arrangement?—I understand that some such arrangement as that is practically in use in England. I understand that the local agent in England communicates with his London agent, and the London agent must do the work at the seat of the court; but the fees are divided betwixt them in certain proportions. I am not familiar with the practice, but there is a division of fees between the country agent and the town agent in England; and I don't see why the same rule should not prevail in Scotland.

6944. *Mr. Shand.*—That applies to the gross fees for the business in the town and in the country?—Quite so; but we are speaking here merely in regard to such cases as have originated in the Sheriff Court, and have been appealed to the Court of Session. I am not claiming the right to practise in the Court of Session in other cases.

6945. Do you think that if the privileges of agents were extended, so as to enable country agents to practise in the Court of Session, it would promote arrangements of that kind?—I do.

6946. Do you think it for the benefit of the public that there should be such arrangements?—It would certainly relieve clients, to a certain extent, of the country agent's account. We can get no part of the fees in this court, and in that case we would be entitled to them, and would have no further claim on our client.

6947. You don't propose to add to the expense of litigation by allowing charges in future which are not allowed now?—No.

6948. *Lord Barcaple.*—You limit that to cases that have begun in the Sheriff Court?—I am not claiming a right to practise in the Court of Session in other actions.

6949. Not in cases brought by clients of yours who have consulted you, where you have been the medium of communication with the Edinburgh agent whom you have selected for your client?—I think the Auditor of the Court of Session ought to recognise our services in getting up the information necessary for the institution of the action; but if that is allowed, I don't want to begin to practise in the Court of Session.

6950. Are your charges for getting up the information necessary for the institution of the action allowed to you in the Sheriff Court?—No; but it is understood the fee for the summons covers it. We are allowed no fees for attendance with clients in the Sheriff Court, but we get a large fee for preparing the summons, which is understood to cover all previous investigation.

6951. *Mr. Gordon.*—What is the amount of the fee?—15s. for a summons under £25, £1 between £25 and £100, and £1, 10s. for a summons above £100.

6952. *The Chairman.*—Would you consider that sufficient remuneration in reference to a cause in the Court of Session?—Much depends upon the nature of the cause. It is impossible to say whether that is sufficient remuneration or not. I might have to go ten miles to the country to make inquiry.

6953. It is the remuneration at present in the Sheriff Court?—Yes, unless I can show special cause to my client. It is the remuneration between party and party, but it is not the remuneration between agent and client. If I am called on to go ten or twenty miles away from home to inquire into the facts, I must have an extra fee.

6954. If the Auditor of the Court of Session allowed you that sum, he would allow you the sum you would have got if you had brought the action in the Sheriff Court?—Yes; the sum I would have got from the other side.

6955. Do you think that the present division of the county of Forfar is a good arrangement—the one Sheriff-substitute being at Forfar, and the other at Dundee?—Yes; I think it is about as convenient as could be well adopted. I am aware that the people of Arbroath and Montrose say that these towns are larger than Forfar, and that the court ought to be held in one or other of these towns.

6956. Which of them?—The Arbroath people claim it for Arbroath, and the Montrose people for Montrose.

6957. But you don't claim it for Brechin?—No.

6958. The communication between Brechin and Forfar is not difficult?—No; it is quite easy.

6959. The communication between Arbroath and Forfar is not difficult?—No; it is quite easy.

6960. Is there any reason why you should go to Montrose rather than to Forfar?—None, except that the population is larger at Montrose and Arbroath.

6961. But when you have to go to attend court, is it equally convenient for you to go to Forfar?—It is as convenient for me to go to Forfar as to Montrose, and it is much more convenient for the interior of the county; it is much better served by having the court at Forfar. I think Forfar is quite a suitable place for the seat of the court.

6962. As to criminal matters, have you anything to say?—We think the Sheriff's jurisdiction should be extended; and if a principal Sheriff was appointed, having a large district such as we alluded to, he would virtually be nearly in the position of a Lord of Justiciary, and might take all or most of the cases which the Lords of Justiciary at present take. The quorum of the Court of Justiciary is just one judge, and he would be that one judge representing the Court of Justiciary. We therefore came to the result that, if a principal Sheriff such as we suggest were named, having a considerable district attached, he should have criminal jurisdiction in all causes which did not involve capital punishment or penal servitude for life.

6963. *Mr. Clark.*—What do you mean by not involving capital punishment?—Capital crimes; crimes for which a man may be sentenced to death.

6964. A man can be sentenced to death for three acts of theft?—Then he would be tried before the Court of Justiciary.

6965. You mean all cases where the legal punishment is a punishment of death?—Yes.

6966. Would you not limit the jurisdiction of the proposed judge very much in that view?—We would limit him, of course, to the inferior class of crimes, and we don't intend to abolish the Circuit Courts of Justiciary. We contemplate that these would be required.

6967. *Lord Barcaple.*—Does he not at present exercise as large a jurisdiction as you propose to give him?—He does not sentence anybody to penal servitude.

6968. Was your first answer not rather to the effect that you would give the Sheriff jurisdiction in all cases which are not practically capital?—Yes, certainly; it comes to that.

6969. Excluding murder, and high treason, and such other crimes?—Yes; such crimes as involve capital punishment.

6970. *Mr. Shand.*—Excluding pleas of the Crown, I suppose?—For high treason you have a special law.

6971. *Lord Barcaple.*—You would not exclude robbery?—No.

6972. *The Chairman.*—What is the benefit you would expect to derive from that extension of the power of punishment to the Sheriff?—The benefit would be, that the great bulk of the crimes would be tried in our own county, not requiring the witnesses to come to Edinburgh, or to go to Dundee or Perth. The trial would take place at Forfar, and not at the seat of the Circuit Court; and they would take place in every county.

6973. You think that would save the expense of the witnesses?—It would save expense of witnesses to the Crown, and save trouble to jurors attending from a distance.

6974. *Mr. Baxter.*—And the trial would be more speedy?—Yes.

6975. *Mr. Gordon.*—Would it not be likely to cause more expense to take the witnesses from Dundee to Forfar, instead of giving their evidence at Dundee, where the great bulk of the crime of the county is to be found?—The Sheriff would sit in Forfar for the crimes in the Forfar district, and at Dundee for the crimes in the Dundee district.

6976. *The Chairman.*—And the Circuit Court would sit at Dundee for what?—For such crimes as the Sheriff could not try.

6977. For cases of murder and treason?—And fire-raising and other serious offences.

6978. Have you any other suggestion to make in regard to criminal business?—It occasionally occurs in Forfar that a jury is summoned where there is only one case to try. Forty-five men are called from various parts of the county, though there is only that one trial. I was instructed to suggest that, where only one trial is set down and a jury requires to be summoned, the jury shall be balloted at the first diet. A list of the jurors is always served on the panel before the first diet, and it would be no hardship to him that the jury should be balloted on the first day, and then only the necessary number summoned to form the jury, with such a margin as to meet contingencies. I think the 15 who are to try the case should be summoned, and 2 or 3 more, to avoid any risk of any of the 15 not attending. That would not be practicable if there were three or four trials set down for the same day; but it frequently occurs at Forfar that there is just one jury trial, and there is no necessity for 45 men being brought, while only 15 are required.

6979. That would be an advantage also if the number of causes to be tried by the Sheriff was increased?—Yes; if he had three or four cases to try at the same time, the necessary number of jurors must be summoned.

6980. But if the number of cases to be tried by the Sheriff, by extending his power of punishment, was increased, jurors would be more frequently summoned to attend?—Yes.

6981. And in contemplation of that also, you would suggest this mode of relieving them from the additional trouble which they would then have?—Yes.

6982. *Mr. Clark.*—Is there any advantage in having so many jurors as 45 summoned? Could the panel be diminished advantageously?—It depends upon the number of parties. You may have three men accused of one crime: each has a right to challenge 5 jurors; and if each exercised that right, there would be 15 jurors challenged by the prisoners, and 5 might be challenged by the Crown. That cuts off 20.

6983. But take the ordinary case of there being a single prisoner to be tried under the indictment; do you see any advantage in having so large a jury as 45 summoned?—No; I think the panel might be reduced.

6984. What number would you suggest, or have you considered that?—I have not considered the question very much; but if the jury is to consist of 15, as hitherto, you have 15 to provide, and 5 for peremptory challenges by the panel, and 5 for peremptory challenges by the Crown, besides the other contingencies of non-attendance, and so on. It appeared to us that the best method was to ballot the jury at the first diet without their attending, with a sufficient margin to cover any contingency, or ballot 20, and let it be understood that the first 15 shall serve; but if any of them are unable to attend, then take the next in order, or allow the judge to make up the necessary number by a *tales*, if any one was not able to attend.

6985. What is your opinion as to the number of a jury that should sit in the Sheriff Court in criminal cases?—I think 9 in the ordinary case is quite enough.

6986. Is there to be one number for all cases of one class, and another for a certain other class of cases?—I should say one jury for one class, and another for another class, would be nearer the justice of the case. I don't think you could make an equal number for all cases; 15 is an unnecessarily cumbrous jury, but there may be instances in which it may be an advantage to have a large jury.

6987. *The Chairman.*—Do you think the distinction between special jurors and common jurors is of importance?—We had a general impression that the jury are summoned from a class rather too low in life. A liferenter to the extent of £5 a year is liable to serve as a juror. Now we thought a man in that position is hardly fit to be a very intelligent juror in the common run of cases, and we think the qualification of jurors should be raised; but we did not contemplate doing away with the distinction between special and common jurors. We would rather have it, that a man should not be liable to serve unless he is owner of heritage to the extent of £10 a year instead of £5, or in possession of personal property of the value of £300, or something more, instead of £100 or £200, which I think it is at present. But we think the qualifications of common jurors should be raised, and that they should not be taken from so low a class of society as at present.

6988. You would retain the special jurors?—Yes.

6989. Giving a certain infusion of people of a higher class?—Yes.

6990. *Lord Barcaple.*—Would you propose to raise the qualification of the special jurors?—We did not contemplate that.

6991. *Mr. Clark.*—Do you find the jury list in your county well made up, so as to divide the labour equally among the jurors liable to serve?—So far as I am aware, it is pretty well made up for that purpose.

6992. Both as applicable to the Circuit jury and to the Sheriff's jury?—Yes.

6993. Is it done by the Sheriff-clerk?—The Sheriff-clerk nominally does it, but it is the schoolmasters in the country parishes that do it, and in the town it is a Sheriff-officer or constable generally.

6994. He gets the names to be inserted in the list?—Yes, and reports them to the Sheriff-clerk.

6995. *The Chairman.*—Have you anything further to suggest as to criminal matters?—We complain very much of the fees of the Clerks of Justiciary in suspensions and appeals in criminal cases as being very oppressive; and we think the rule of the Act 9 Geo. IV. cap. 29, by which no fees are payable to clerks by accused persons, unless they form part of the sentence of the court, should apply to cases where the panel becomes appellant or suspender in the Justiciary Court.

6996. *Mr. Shand.*—Can you tell us what these fees are?—I think the Clerk of Justiciary claims £1, 14s. for lodging an appeal with him, and he claims something for attendance during the discussion. His fees are heavy. It is a considerable time since I paid them, but another gentleman told me he had paid them within the last twelve months. I never could find any authority for exacting these fees.

6997. *The Chairman.*—Is there any Justice of Peace Small Debt Court held at Brechin?—There is.

6998. Frequently?—Once a month.

6999. Is that a jurisdiction that gives satisfaction?—There is very little business in it generally now.

7000. It is convenient, is it?—Very convenient for the recovery of small debts.

7001. Is it the magistrates of Brechin that sit on the bench?—Occasionally the magistrates of Brechin, but we have generally local Justices. Several of the principal inhabitants of Brechin are on the Commission of the Peace, and attend in the Small Debt Court.

7002. Do they discharge any other judicial functions?—There are occasionally applications made to them under the Master and Servants Act, and they have a good deal of duty to do in judging of road offences and poaching, and other statutory crimes. Occasionally they have to determine questions as to frauds on the revenue. A good deal of business comes before the Justices of the Peace.

7003. Is it, upon the whole, satisfactorily done?—Yes, I think it is.

7004. Is there any part of it you think ought to be taken away from them?—I have some doubt as to whether they are the best judges under the Master and Servants Act, but I don't see that it is possible to remove that jurisdiction from the Justices of the Peace. I think it must be maintained for the sake of the police of the country.

7005. Poaching cases?—Poaching questions under the Night Poaching Act are not brought before the Justices of the Peace, though they have jurisdiction in them to a certain extent; but under the Day Poaching Act cases are constantly brought before the Justices of the Peace.

7006. Are these considered to be well-decided cases?—There is some grumbling about them, but I don't think it is of any material consequence. I don't know that it would be any material relief to the country to transfer them all to the Sheriff, as has been proposed.

7007. Do they grant licences for public-houses?—

William Shiress.

Yes, certificates to enable the parties to keep public-houses.

7008. Do they sit in Petty Sessions to do that?—Yes.

7009. That is reviewable by the Quarter Sessions?—Yes; that applies to the country district. The magistrates of Brechin grant certificates within the burgh, but for the country the Justices of the Peace do so.

7010. Is that duty satisfactorily done?—Yes, on the whole I think it is.

7011. You think the review by the Quarter Sessions is a good check upon the jurisdiction exercised by the magistrates and by the Justices in Petty Sessions?—Yes, I do. I think there must be some review, and the Quarter Sessions seems a suitable enough review of the licensing system.

7012. There are other revenue cases that come before the Justices of the Peace in Quarter Sessions—evasions of statutes?—Yes, evasions of revenue statutes occasionally.

7013. I believe that is satisfactorily done?—I think it is. They are generally small fines for keeping dogs without licences, and so on. They are trifling offences generally, though sometimes there are pretty heavy penalties attached to the evasion of revenue statutes.

7014. Do the magistrates of Brechin exercise criminal jurisdiction in any matter?—Except in the Police Court, I don't think any criminal jurisdiction has been exercised in Brechin since the Police Act was adopted. Prior to that they used to exercise jurisdiction.

7015. They have no separate Police Act of their own?—No; they have adopted the General Police Act.

7016. Is that duty satisfactorily done?—Yes; there is no complaint about it, that I am aware of.

7017. Are there a Provost and Bailies?—Yes, a Provost and two Bailies.

7018. Do they hold a Civil Debt Court?—They have the usual jurisdiction of the Burgh Court in civil cases, but practically it is inoperative. No actions for debts are brought before them, but there are numerous actions of removing. They have a form of summons for removing tenants which is practically adopted, and very useful. They remove tenants at very small expense.

7019. Have you a Dean of Guild?—We have.

7020. Does he exercise any jurisdiction?—He does. No buildings can be pulled down or new buildings erected without the Dean of Guild's warrant. He has to examine the plans of all buildings that are proposed, and he has to sanction their being erected, or any building fronting the street pulled down. He holds Building Courts for that purpose.

7021. Does he exercise any superintendence over buildings, to see whether they are ruinous or dangerous, or not?—He does, at the instance of the police. The surveyor of the police watches the chimney-tops and dangerous houses; and if, after he complains to the proprietors, a remedy is not applied, the Dean of Guild is called on to interfere.

7022. Have you any Barony or Regality Courts?—None at Brechin. There is a Barony Court at Kirriemuir. The chief magistrate of Kirriemuir is the Baron Bailie of Kirriemuir, and he exercises police powers, but no other sort of authority that I am aware of.

7023. Does your Sheriff-clerk reside in the county?—He does.

7024. Does he do duty in person?—He does occasionally. He sometimes acts in Dundee, and sometimes in Forfar. He has two offices, one in Dundee and one in Forfar; and he sometimes appears at the one, and sometimes at the other.

7025. Has he a deputy at each?—Yes.

7026. *Mr. Baxter.*—The deputy mainly does the duty?—He does, and must necessarily do so, because the Sheriff-clerk cannot be in two places at once.

7027. *The Chairman.*—Is the duty satisfactorily done at Forfar?—Yes, generally speaking, I should say it is. I don't recollect any reasonable ground of complaint.

7028. You cannot speak as to Dundee?—No.

7029. *The Lord Justice-Clerk.*—Was the Burgh Court at Brechin formerly very much frequented as a civil court?—It was a good deal frequented, and cases were frequent in it prior to the Act of the first of the Queen—the Personal Diligence Act. Prior to that time we could not enforce a Sheriff's decree except by horning, when the party was beyond the Sheriff's territory; and we cannot enforce a magistrate's decree yet, except by horning. We have frequently resorted to the Burgh Court for the purpose of obtaining decrees in absence, and even *in foro* in litigated cases, where their decree was as good as the Sheriff's decree against the party. But now the Sheriff's decree is so much better than the magistrate's decree, in consequence of its being enforceable in any county, that the Burgh Courts have virtually become inoperative.

7030. You attribute the falling off of the business in these courts?—To the greater facility of carrying Sheriff's decrees into execution.

7031. Would you recommend that a similar facility should be given for carrying the decrees of magistrates in Burgh Courts into execution?—If it be desirable to continue the Burgh Courts, and to render them operative and useful in the administration of justice, that could be done.

7032. Is it your opinion that that should be done?—In ordinary civil cases I should say not. There are certain cases in the Dean of Guild Court in which he has a privative jurisdiction: questions of possession in regard to buildings must come before him. According to the existing law he has a privative jurisdiction, and the Sheriff has not a cumulative jurisdiction with him in that respect. We so interpret the law, and we must have decrees of the Dean of Guild; and in local and possessory questions the magistrates' decrees may be important. But in ordinary actions for the recovery of debts, we are better before the Sheriff.

7033. Is there any reason in the particular forms adopted in the Burgh Court which operate against that court being resorted to?—I don't think it. The form required to be used in the Burgh Court is a form under the Act of Sederunt of 1851, not under the Act of Parliament 1853. But the forms are just the same as we practised in the Sheriff Court prior to the passing of the Act of 1853, and there was no difficulty in carrying them into effect.

7034. Then you don't attribute anything to the Act of 1853 as altering the resort to these courts?—No; I think the business of the Burgh Courts, not in Brechin only, but in Arbroath and Montrose also, died away after the Act of 1838, rendering the Sheriff's decree so much more easily operated upon, giving it execution all over Scotland on simple indorsements and warrants of concurrence.

7035. *The Chairman.*—And that you consider a great facility and advantage?—Yes.

7036. Have you any other suggestion to make?—There are two matters which my brethren recommended me to mention. Persons in custody applying for liberation on bail should in like manner be liable in no fees to the clerks or officers of court in respect of their petitions or bail-bonds. Poor prisoners applying for the benefit of the Act of Grace should in like manner be exempted from all fees to clerks or officers of court. An applicant for the benefit of the Act of Grace should be dealt with as on the poor's roll *ab initio*, in the same manner as an applicant for parochial relief under the Act of Sederunt of 12th February 1846.

7037. *The Lord Justice-Clerk.*—Are the fees paid in those cases, and the fees you spoke of as payable in cases of suspension in the Court of Justiciary, paid into the pockets of the clerks?—If the application for bail is made in the Sheriff Court, the fees are paid to the Sheriff-clerk, but he accounts for them to the Exchequer; if the application is made for bail, or for the Act of Grace to the Burgh Court of Forfar (the prison being within the burgh), they go into the pocket of the town-clerk.

7038. In what way are the fees in the suspensions and in the Circuit Court disposed of?—I do not know. I should have said, in regard to the form of process in the Sheriff Courts, that we find the clause in the Act of 1853, declaring that an action becomes dismissed if parties do not move in it for three months, to be a great

obstruction in practice, as many classes of cases require to be brought in the Sheriff Court in which we cannot reasonably move for three months. For instance, a sequestration for rent *currente termino*, if we bring it in December in respect of the rent falling due at the previous Martinmas, and to fall due at the ensuing Whitsunday, we cannot reasonably move in it till after Whitsunday. Consequently the three months have elapsed before that time, and it is dismissed. We don't think that produces any practical good. It is a mere trap and pitfall. Of course it keeps us alive, and makes us take care to get in some formal way the case moved in; but if there is no necessity for actually proceeding in it, these are mere additional expenses for no purpose.

7039. *Lord Barcaple.*—It causes additional expense either by moving when there is no practical object in doing so, or by taking steps to get the process revived?—Yes.

7040. *Mr Adam.*—Has it any effect in making cases be faster proceeded with?—I don't think so.

7041. *Mr. Shand.*—Does the judge not object to these renewals from time to time?—He does.

7042. Has that no effect?—I don't know that it has very much. There is always some excuse for the case lying over. If there really is delay in the case, it has effect; but where the delay is inevitable, it is of no benefit. *William Shiress.*

7043. *The Chairman.*—If the delay has been mutual, then the parties agree to some step?—Yes; to save the nominal dismissal of the action.

7044. Do you find there is much delay in the Sheriff Court of Forfar, from parties accommodating each other with time in implementing orders?—We find a good deal of delay on that account.

7045. Unnecessary delay?—Sometimes we reckon it unnecessary. I cannot say that I think there is much unnecessary delay. I think that, unless one agent satisfies the other that there is really some reasonable cause, he does not consent to the delay.

7046. Would it be a reasonable cause that the agent making the application had once consented to his getting delay?—I daresay there is giff-gaff in that way, but there is not much of that.

MONDAY, 18th JANUARY 1869.

Members Present:—

Lord Colonsay.	James Adam, Esq.
The Lord Justice-Clerk.	A. B. Shand, Esq.
Sir E. Colebrooke.	T. Graham Murray, Esq.
E. S. Gordon, Esq., Q.C.	J. B. Baxter, Esq.
A. Orr Ewing, Esq., M.P.	Adam Paterson, Esq.
George Harrison, Esq.	

The Right Hon. LORD COLONSAY in the Chair.

Robert Neill, Esq., examined. *Robert Neill.*

7047. *The Chairman.*—You are a practitioner before the Sheriff Court of Renfrewshire at Greenock?—I am.

7048. I believe you have considerable acquaintance with Admiralty and maritime causes?—I have. I have been a procurator since 1846.

7049. Your attention has been a good deal directed to the subject that I have alluded to?—It has.

7050. Have you any suggestions to offer to the Commissioners with reference to such causes?—I may explain that we have always had great doubts as to the extent to which the maritime jurisdiction was transferred to the Sheriffs with regard to foreigners, owing to the expression that was used in the amending Act, that the Sheriff was to have jurisdiction, provided the defender was amenable to the jurisdiction upon any legal ground of jurisdiction. The main question was this—Did the statute authorize the Sheriff to entertain actions against foreigners where the jurisdiction was created solely by arrestment of the debtor's effects? Up to this time we have never been certain whether or not the Sheriff had that jurisdiction, although there have been two decisions by Lords Ordinary—one by Lord Ormidale, and the other by Lord Barcaple, sustaining the Sheriff's jurisdiction where arrestment was so constituted. I have looked into this question pretty narrowly, to see if I could find any authorities from the Supreme Court bearing upon it; and I find that, in the case of *Bernard* v. *Connor*, 11th June 1811, F. C. 275, the Court of Session sustained the jurisdiction of the River Bailie, who had inferior Admiralty jurisdiction, where the jurisdiction had been constituted solely by arrestment of the ship. From that time there seems to have been no case bearing on the inferior court's jurisdiction until the year 1836, when I found, on looking into the authorities, the case of *Kennedy* v. *Muir*, 10th March 1836. That case was one regarding the jurisdiction of the Sheriff in *cessio* matters, where the creditors to a certain extent resided furth of Scotland. The objection was taken in that case, that the Sheriff could have no jurisdiction over foreign creditors, as these were subject solely to the jurisdiction of the Court of Session. The case came before Lord Medwyn, I think, on a suspension, and he ordered cases on the point; and with the leave of the Commission I would read a short passage from his opinion on the cases, showing where the difficulty lay, and what he thought of it. He said in his note: 'When the jurisdiction of the Admiralty Court as a separate court was abolished and transferred to the Court of Session and to the Sheriff Courts, considering the nature of that court, having reference chiefly to foreigners, it was necessary that they should be made subject to the new jurisdiction, as by the law of nations they had been to the old and original jurisdiction, and accordingly the jurisdiction is expressly conferred on them.' The case was considered by the First Division of the court, which at that time consisted of Lord President Hope, Lords Gillies, Mackenzie, and Corehouse; and they consulted the five Lords Ordinary—Lords Fullerton, Cockburn, Moncreiff, Jeffrey, and Cunninghame; and the First Division decided that the Sheriff had the jurisdiction over the foreigners in the *cessio* case; and they said: 'As there is a large class of mercantile cases (Admiralty causes), in which, by the 1st Will. IV. cap. 69, Sheriffs have an undoubted jurisdiction over foreigners, that example alone is sufficient to show that Sheriffs ought, even under a literal construction of the above clause (in the *Cessio* Act), to have jurisdiction in cases of *cessio*.' Then I found that in 1837 there had been a case before the Sheriff Court of Ayr, where an Irish vessel was arrested.

7051. What do you bring all this to?—It is just to show this, that, according to the decisions as they have been given, there is a tendency in favour of the Sheriff

Robert Neill.

having jurisdiction over foreigners, where the jurisdiction is created by arrestment; but still there is an uncertainty hanging over the matter, because the decision of the Lords Ordinary lately have not been taken before the Inner House.

7052. But the uncertainty is not caused by these decisions of the Lords Ordinary; on the contrary, these decisions go in the same direction?—Yes.

7053. Well, they don't raise any uncertainty?—No. But we have waited for a decision of the Inner House to confirm these decisions; and then, of course, we should feel satisfied that we may bring the case before the Sheriff, where the jurisdiction has been constituted by arrestment. In the meantime, we feel that there is a doubt, and that there would be a considerable responsibility resting upon an agent who arrested a vessel upon such a jurisdiction.

7054. Might you not have had such a decision as you wish if that case you have referred to, or if any other case, had been brought before the Inner House?—No doubt; but the cases were not appealed.

7055. *Mr. Baxter.*—Have you confined your observations at present to maritime causes?—I have. There is one reason why this matter should now be settled with regard to such arrestments; and it is this, that the number of foreign vessels coming to our Scotch ports is very much on the increase. In my own experience as a notary, I find that from June 1850 till June 1862, out of 1030 protests I noted, 230 were of foreign vessels; but from 1865 till December 1868, three and a half years, out of 683 protests, 304 were foreigners, or about one half. Under foreign I do not include either English or Irish, or, of course, Scotch vessels.

7056. You refer merely to continental vessels?—Yes.

7057. *Mr. Gordon.*—Should English vessels not be included?—Yes; but as they are nearer home, we do not find so much necessity with regard to the arrestment of these vessels.

7058. *The Chairman.*—Do you mean that you do not proceed so frequently to arrest them?—We are not in so much doubt as to the recovery of our debt; because in the case of a Spanish, or a Portuguese, or an Austrian vessel, they may happen to come to this country only once; and if they are not arrested at the time, it is probable they will never be here again.

7059. *Mr. Gordon.*—Were these arrestments used chiefly for claims at the instance of inhabitants of this country, or were any of them used at the instance of the crews of the vessels?—In the cases I have referred to, the first was at the instance of a seaman; and the others were at the instance, partly of members of the crew, and partly of home subjects.

7060. Were there several foreign creditors who pursued in this country, or were the foreign creditors entirely members of the crew?—They were members of the crew.

7061. Then there was no foreign creditor who pursued in this country?—No.

7062. What I refer to are the arrestments which were used by you, and not the particular cases to which you before referred?—I have used arrestments at the instance of persons belonging to this country, and also, it may be, of foreign creditors who have happened to have claims against their debtors in this country.

7063. That is, for foreign creditors who have claims against ships belonging to foreign debtors?—Yes; for example, I have arrested a vessel belonging to subjects of Hamburg, at the instance of creditors residing there.

7064. Are there many such cases?—No; I could not say that there are many. The chief cases are cases at the instance of residents in Great Britain, against the subjects of foreign countries.

7065. *Mr. Baxter.*—Have you a good many of these?—Yes.

7066. *Mr. Gordon.*—Were they for claims of debt contracted within Scotland, for furnishings to the vessel; or for what kind of claims were they?—They were generally for furnishings to the vessel in British ports. Where the debt is of large amount, I usually advise the parties to go at once to the Court of Session; but when the amount is small, we would like to have the privilege of going to the Sheriff Court.

7067. *Mr. Baxter.*—Is it your opinion that it should be competent to prosecute such claims in the Sheriff Courts?—Yes.

7068. Would you confine that to maritime claims, or would you extend it to all kinds of debt?—I would extend it to all cases, of any amount. I think, with regard to all matters of common debt, the Sheriff Court jurisdiction should not be restricted more than it is just now; but I do not agree with the opinion that the Sheriff should have universal jurisdiction.

7069. My question was confined to actions against foreigners founded upon arrestment: would you give the Sheriff jurisdiction in these cases, whether the cases were maritime or not?—I only spoke of maritime cases.

7070. But what about cases other than maritime—other claims for debt?—I don't think there would be any danger in giving the Sheriff jurisdiction, where the jurisdiction was created by arrestment for any kind of debt. Then I wish to bring before the Commissioners this fact, that just now, in order to effect security for the debt, there must be two arrestments: one arrestment, first, to constitute the jurisdiction, and then the arrestment of the vessel, or the subject to secure payment of the debt sued for. Of course, in any case of a debt for a large amount, supposing the doubt was to remain, I would certainly feel that I was bound, in order to keep myself safe, to apply to the Court of Session for the summons; but I think that, in order to expedite matters, the constitution of the jurisdiction and the securing of the debt should be effected by one writ—by a petition to the Sheriff setting forth the debt shortly, and stating that the petitioner intended to sue the debtor, and that the debtor had effects within the Sheriff's jurisdiction, and craving a warrant to arrest *jurisdictionis fundandæ causa*, and also in security of payment of any debt that might be found due in any action to be raised within a certain time after the date of the arrestment.

7071. *The Chairman.*—Then one arrestment would be all that would be used?—One arrestment would be all. Just now, supposing we have to sue before the Court of Session, we have first to apply to the Sheriff, by petition, to issue a precept. Then, having got his warrant, we have to get a precept from the Sheriff-clerk. Then the vessel is arrested. We get the execution of the arrestment *jurisdictionis fundandæ causa* from the officer; send it on to Edinburgh with the account; then we get the summons signeted; and having got it thus to the place where the vessel is lying, we then put it into the hands of the messenger to arrest. That may involve two or three days; and just now the common belief is, that the vessel is not arrested in such a way under the first arrestment as to secure payment of the debt.

7072. *Mr. Baxter.*—Within what time, in that case, would you raise your summons?—I think, if my suggestion was adopted, the pursuer should be bound to raise his action within either one or two months of the date of his arrestment.

7073. Would you keep a vessel lying for two months before raising an action, supposing you arrested her? Would it not be better to have the warrant of arrestment in the conclusion of the summons?—Well, that would serve the same purpose, if it was declared that the arrestment on the summons was also to comprehend arrestment to found jurisdiction. Just now, also, when the vessel is arrested under a Court of Session warrant, the arrestment is not loosed except under an application to the Court of Session. Now that involves considerable delay; and I know a case, within the last month, where there was a delay of nearly fourteen days in discussing as to the arrestment. That was a case of arrestment *ad effectum*. I have found a copy of the commission in favour of the Admiral Depute who held authority at Greenock under the old court. It is dated in 1815; and I find in it that the local Admiral Depute had power not only to loose arrestment laid on under his own warrant, but also arrestments laid on under warrant of the High Court of Admiralty. I think,

therefore, that if the power was extended to the Sheriff to loose arrestments laid on either by himself or by the Court of Session, you would simply be following out the practice that was followed before the transfer of the jurisdiction. The words are these: 'The power of loosing arrestments of vessels and goods at sea or in the harbour, the said arrestments being on depending actions, and being loosed always on sufficient caution found to make the subject arrested forthcoming; and this power is given whether the said arrestments have been laid on by the High Court of Admiralty, in virtue of precepts authenticated and issued from that court, or have proceeded on warrants granted by the said Judge Admiral-Depute himself upon summary applications.'

7074. *The Chairman.*—What is the authority by which that is issued?—It is a commission granted by the Right Hon. James Wolfe Murray, Judge of the High Court of Admiralty in Scotland in 1815, to Claud Marshall, who was then his depute.

7075. That is an authority which he gave to his own depute?—Yes. I have further to explain that it is a great necessity that summary power of arrestment should be given to the local judge, not only where a debt is sued for, but where there is a conclusion in an action for delivery of a subject. For example, where goods have been shipped, and the master of the foreign vessel, or the vessel, refuses to give bills of lading, except, perhaps, on his own terms. I have known cases where we have obtained an interdict against the master of the vessel, against his sailing, until he did give the bills of lading; but although the interdict was served upon him, he just went away, and paid no attention to it. In these cases, just now we don't know of any recognised or sanctioned form by which the judge is authorized to stop that vessel; and I think that he might be authorized, on a summary application, to grant a warrant to arrest the vessel, and to dismantle her, until the goods were delivered up, or until the bills of lading were signed; otherwise a foreigner may just steal away, and leave the merchant without the proper voucher for his goods. I have also known a case of a vessel lying at Glasgow under an interdict of the Court of Session, but removed from Glasgow and taken away to an English port, and thus the proceedings against her were defeated.

7076. *Mr. Paterson.*—The power of dismantling is not understood to attend an interdict as it does an arrestment?—No.

7077. *The Chairman.*—Have you any further suggestion to offer on this matter?—I wish to refer to a change that I would suggest with regard to the mode of trying actions arising out of collision, or for salvage, or for shipmasters' wages, and my remarks under this head may, perhaps, apply both to the forms in the Sheriff Courts and to those in the Court of Session. Just now, actions of damages for collision are generally—I believe invariably—tried before a jury, and there is considerable dissatisfaction felt with regard to the decisions of juries on such questions. The change I would suggest would be this, that actions of collision should be tried by the judge himself, assisted by two experts, as the judge of the Admiralty Court in England tries such cases there.

7078. That is with the assistance of the brethren of the Trinity House?—Yes. I would also suggest that only the question of liability should be tried in the first instance, and that the details as to the amount of damage which the injured vessel has sustained should be left to be ascertained by one of the clerks of court, assisted by two experts, as is done in the Admiralty Court in England, because I think that greater justice would be done to all parties by a quiet ascertainment of the amount of damage in that way than by having a number of witnesses brought up before a jury, and their evidence taken under the present system. Then, with regard to salvage cases, I think that they also should be tried before the judge, with the assistance of two experts, and that the judge should have the power to decide not only as to whether it was a salvage service, but also as to the amount of salvage payable. Just now the Sheriff or two Justices have the power, by the latest amendment of the Merchant Shipping Act—that of 1862—to try all questions of salvage up to the value of £1000. At first jurisdiction was given to the Sheriff and to the Justices only up to the extent of £200—that was in 1854; but when they amended the Act in 1862, they extended it to £1000, showing that the policy of the law just now is to extend the jurisdiction of the Sheriff in such cases. Then, with regard to actions for the payment of wages claimed by masters, and for the balance of their disbursement accounts, I think that these would be very well tried also by the judge, if the employment is admitted, and it is only the amount that is disputed, by his remitting to the clerk of court, or to a special commissioner or other person who may be named, to be assisted by two persons well acquainted with shipping accounts, who would go over and check them, and have the matter speedily disposed of. Under the present system there is a great deal of delay in getting payment of shipmasters' wages and disbursement accounts, because they involve so many questions regarding payments at foreign ports; while generally you find that shipowners who have had vessels in the same trade are so well acquainted with the usual charges that they are able, by a careful examination of the items, and by comparing them with the vouchers, to know at once whether the accounts are fairly stated or not.

7079. *Mr. Paterson.*—Before you leave that question of collisions, you point at having separate trials I think, one to settle the merits of the collision, and the other to assess the damages?—Yes.

7080. Would you apply that to all cases of collision, or do you not think it would be better, in order to save time and expense, that you should limit that to collisions above a certain amount?—I would prefer that, in all cases, the amount of damage should be ascertained in the way I have suggested.

7081. Supposing a case involving no great amount of money, would it not be a hardship on the parties to dispose of the case at two diets if one would suffice?—Of course it might be. But looking at the matter as a whole, I think, by having the investigation as to the amount before the clerk of court, and two persons acquainted with the items that form the claim, it could be settled very cheaply and very expeditiously.

7082. Do you find that there are cases of collision which are not complicated, and do not involve much money?—In any cases of collision that we have had, I think the most expensive witnesses we had to bring to the court were those to speak to the extent of the damage.

7083. *The Chairman.*—With reference to those experts who are to sit with the judges in trying the merits of the case, do you mean that they should be entitled to vote on the merits of the question?—No; simply to sit with the judge, in order that he might have their advice and assistance on any matter with which he is not so well acquainted as they are.

7084. Would you have them paid for their services?—I think so; a rate should be fixed by the auditor of the court.

7085.—Would you have them to be fixed officers of the court?—Yes.

7086. So that they would be the same persons coming in in various cases?—Yes.

7087. Then, with regard to an examination of the accounts, would you have them to decide anything, or would it be the clerk of court who should decide?—I think the clerk of court would be the person to decide; but I should have added that his report should be subject to the review of the judge, on any question of principle, the same as is the practice in the Admiralty Court in England. I think the rule there, with regard to the costs, is, that if there be one-third deducted, the claimant must pay the costs of the remit.

7088. Then, as to damage, would these experts have any voice as to the amount of damage to be fixed?—I think the clerk of court should be the judge, assisted by these experts, with regard to the question of the value of the ship that was lost.

7089. But you think the clerk of court should be

Robert Neill.

the judge?—Yes; or whoever might be the person to whom the remit was made.

7090. What would be the purpose of making a remit?—I mean a remit by the court to the clerk of court, or to any special commissioner, to examine and to decide that point.

7091. You say the most expensive witnesses in a trial of collision generally are those as to damage; would these witnesses be all called before the clerk of court then?—No, I think not. You would require to have merely one or two witnesses to speak to any point that might arise; but then, these experts being there would be able to test the value of the evidence given, in a much better way than the clerk of court or the judge could do.

7092. Do you not think the experts, who have sat at the trial of the merits and heard the case, could do it with as few witnesses, and as well, as if it were to come afterwards before the clerk of court?—I think not.

7093. *Mr. Gordon.*—Probably you anticipate that the attendance of many of the witnesses necessary at a jury trial could be dispensed with if there was an investigation before the clerk, assisted by these experts?—Yes, I do.

7094. You think that their skill would enable them to estimate the amount of the different articles, and that parties would rest contented with their estimate?—I think they would very generally do so.

7095. Therefore they would only call for the attendance of witnesses in matters upon which they were not able, in point of skill, to form an opinion themselves, or where it was a matter of fact more particularly requiring the examination of witnesses?—That is my opinion of the matter.

7096. *The Chairman.*—Would you have the experts dealing with the damages to be the same persons who had heard the case on the merits?—I think they would require to be of a separate class. The experts on the merits would be shipmasters.

7097. Then you think a different kind of skill would be required in questions relating to accounts?—Yes, a different kind of skill would have to be brought to bear there; and I may say that I have often cases of collision, in which we endeavour to choose a person who is not only acquainted with nautical affairs, but who also has a knowledge of the cost of repairs, and the value of vessels. When such a person can be got, we like to have him as the sole judge, in order that we may, in that way, have his skill brought to bear upon the question of liability and the question of amount at the same time, without requiring to call many witnesses.

7098. It must be a very particular case where you can get such a man?—Yes. There is one question regarding the jurisdiction in maritime cases that I have experienced a little trouble with, and that is where the owners of a Scotch vessel reside in different counties. If the case is of small amount, of course we would desire to have it brought in the Sheriff Court; but in such a case, according to a decision of both our Sheriffs, we cannot bring it in the Sheriff Court, however small the amount may be. We must go to the Court of Session, even for a £50 or £60 debt. Now, I think that jurisdiction should be conferred on the Sheriff of the county, either where the contract has been made, or where it is to be executed, or where the majority of the owners may happen to reside. There is a provision in the Act of Parliament which transferred the jurisdiction, to the effect that where any of the defenders reside out of the Sheriff's jurisdiction, these defenders might be cited under an indorsed warrant; but that provision was thought not to give the power of such citation, unless these defenders were amenable to the jurisdiction of the Sheriff otherwise.

7099. *Mr. Adam.*—Do you mean the majority in numbers or the majority in value?—The majority in value is what the law treats of.

7100. Do you not think it enough that if any one owner resides in any county, the others should be bound to come there too?—I should be quite satisfied with that.

7101. *Mr. Paterson.*—Would there be any practical hardship in citing owners by leaving a copy with the shipmaster on board the vessel?—There would not be any hardship in that; and I may say that in the Merchant Shipping Act there is a provision to that effect, which only applies, however, to cases brought under it.

7102. Is not the shipmaster very often a contracting party on behalf of the owners?—He is.

7103. And yet at present you find that contracts he has undertaken for the owners cannot be enforced without going to the owners in different counties?—Yes.

7104. *Mr. Orr Ewing.*—Have you not generally what is called a ship's husband who contracts for everything?—There is a ship's husband also. Sometimes he takes charge, and sometimes the shipmaster does so. The ship's husband is generally the managing owner.

7105. *Mr. Gordon.*—Is it not generally the case that, where the vessel belongs to a particular port, you have the ship's husband at that port?—Yes.

7106. For foreign vessels there are no ships' husbands?—No; but with regard to foreign vessels we have now got this advantage, that it has been decided by the Supreme Court that the master may be sued as representing the foreign owner, and that has relieved us from a great difficulty which we used to experience. We were always a little uncertain as to whether we could sue the master as representing the owner, but now that has been decided.

7107. *Mr. Paterson.*—Is not the ship's husband virtually a factor doing the ship's business on shore?—Yes.

7108. He does not frequent the ship or belong to the ship?—No, not in the sense of the section to which I have referred. With regard to other questions, as to extending the jurisdiction of the Sheriff, my impression is, that in questions regarding heritable title, that jurisdiction might be extended up to cases of the value of £1000. I would not say that the Sheriff's jurisdiction should be extended to questions of all amounts. I think when the change is to be made, it should be made by degrees, to see how things will work under the altered system.

7109. *Mr. Baxter.*—Is that your reason for limiting it?—It is. Then I think also that all declarators of marriage or legitimacy, and actions of divorce, should still be reserved to the Supreme Court.

7110. What is your reason for that?—Because they are of so great importance.

7111. Don't you think it a very important thing for a poor man, who cannot pay the expenses of an action in the Court of Session, to get a cheaper remedy?—Yes; and I think that some provision might be suggested to meet the cases of poor persons. The provision I would suggest would be this, that if the judge, in any of these cases, found or was satisfied that either of the litigants, from his or her poverty, was unable to bear the expenses of a case, he should have power to call upon the counsel and procurators for the poor to conduct the case for the poor litigant, even although the litigant was not suing *in forma pauperis*. I think, also, that with regard to the evidence to be taken in these cases where either the pursuer or defender is poor, the court should have it in their power to remit to the judge ordinary of the bounds to take the evidence, because I believe that the great hardship to poor persons, with regard to such cases, lies chiefly in getting their witnesses forward.

7112. Do you think there is any peculiar difficulty in the questions that arise in divorce?—I think there is.

7113. What is that peculiar difficulty?—It is a very important thing to annul a marriage, and therefore I think that such a matter as that should be one for the court which is supposed to possess, and which I believe does possess, the greatest knowledge of the laws of the country.

7114. Do you know that at present, in consequence of the expense of divorce being so great, the remedy is not sought by poor people, but that they take the

remedy into their own hands, which is productive of considerable immorality?—I may say that I never knew a case of that kind in all my experience.

7115. *Mr. Adam.*—Would you extend the jurisdiction of the Sheriff to cases under the Conjugal Rights Act?—I think, with regard to applications by married women for the protection of their estates in cases where they have been deserted by their husbands, the Sheriff should have power to grant the protection, because those who most need the protection are generally those in humble circumstances.

7116. *Mr. Baxter.*—Do you think the Sheriff should also have power to make provision for her in case of desertion?—Yes.

7117. *The Chairman.*—Though you would not give the remedy of divorce in the Sheriff Court, would you object to giving the minor remedy of divorce *a mensa et thoro*?—I would be inclined to keep the divorce cases in the Court of Session altogether. I may mention, with regard to the question of protection, that the expense as I have found it amounts to about £30 or £40. I had a case recently where the sum was £200, and the expense of obtaining the protection was between £20 and £30. That included the expense of witnesses.

7118. *Mr. Baxter.*—Was that for the protection of a wife's earnings?—It was for the protection of a small sum she had succeeded to.

7119. Have you had any experience as to the expense of divorce in the Court of Session?—I have not. I have had only one case in my experience, and it was abandoned.

7120. Do you know that among the first things done in such an action there is a decree against the husband to pay his wife's expenses?—I know that a decree may go out against a husband, but I am not aware that it is the first thing. Another matter which I wished to mention is this: we often find that in contracts of copartnery and other such deeds, there has been an agreement between the contracting parties that in case of any dispute, where the referees have not been named, the Sheriff or some other court should name the referees; and I think it would be useful that the Sheriff in such cases should have that power. I believe, under the present state of the law, the Sheriff has not power to name arbitrators or an oversman where the parties have not named them themselves; and I think it would be very useful and beneficial in practice if the Sheriff or the Court of Session had that power vested in them.

7121. *The Chairman.*—Do you mean that where parties have agreed to refer, there should be a power in the Sheriff to make that an actual reference, by himself naming the arbiters?—Yes, where either party refuses.

7122. *Mr. Baxter.*—Do you mean that should be so in such cases as those of leases?—Yes; leases, contracts of copartnery, and such like.

7123. *The Chairman.*—Would the decision of such arbiters named by the Sheriff be final, as if the parties had submitted their case to them themselves?—Yes.

7124. *Mr. Paterson.*—Do you see no difficulty in deputing to the Sheriff power to select arbiters without the parties having selected them for themselves?—No. I think the Sheriff's selection would generally be one that would be satisfactory.

7125. And you would only give him that power where there was a foundation for it in the contract?—Yes; only in that case.

7126. *Mr. Baxter.*—That is, where parties had agreed to settle certain matters by arbitration?—Yes; where parties, before the dispute arose, had agreed to settle it by arbitration, but had not named the referees. I think the party who so binds himself should not be allowed to get out of that agreement by the effect of our present law. Then I wish to make another suggestion. Just now, the Act 1 and 2 Vict. cap. 114, allows a poinding creditor, or any other creditor, to purchase poinded goods; and, of course, just now there is no limitation as to the extent to which goods may be poinded, showing that the Legislature have given the selling creditor power to buy the goods himself—it may be £100, or thousands of pounds worth.

7127. *The Chairman.*—That is at a public sale?—Yes, at a public sale. But at present the mortgagee of a vessel, or the mortgagee of land, or the creditor in the action of sale of a vessel, cannot buy the subjects sold. In an action of sale, the sale is a public one, conducted in open court, by a person authorized by special warrant of the court; and yet, in that case, the creditor is not allowed to purchase the vessel; and it often happens that the vessel is sacrificed, and goes for a much less price than the creditor himself would have been disposed to give. Then, again, under mortgages of ships, the mortgagee cannot buy although the sale is public in most cases. I think in such cases it should be in the power of the court to grant warrant to authorize the sale in a public manner, and to allow the creditor or the mortgagee to buy at that public sale. I think the warrant of sale could be so fenced as to prevent any suspicion that the vessel or the subject was sold at a less price than could have been otherwise obtained for it.

7128. Do you say the same as to land?—I think the same provision might be extended to land.

7129. May there not be some room for this distinction between poinded effects and such subjects as you mention, such as a ship or land, that in the case of poinded effects the creditor generally wants his money, and does not covet the subject; but in the other case he may be coveting the subject, and may be harsh and unkind to the owners in order to drive them to a sale?—That might be said; but I think that any suspicion that the creditor would act unfairly, or could act unfairly, could be removed by proper precautions, by the sale being put under the management or the conduct of a neutral person. I think in many cases the creditor, in order to have the transaction wound up in a satisfactory way, would be willing to sacrifice the cost of such a sale in order to have the privilege and the power of competing with ordinary buyers.

7130. Do you think that by enlarging the sphere of competition, it would probably result in bringing a higher price?—I think it would.

7131. *Mr. Paterson.*—Would you empower that neutral person, who should manage the sale, to fix the place of sale and also the upset price?—Yes, I would; either the person who is conducting the sale or the court.

7132. You would never think of combining the creditor's permission to purchase in such an action with a power to fix the time, the place, and the upset price?—No; I would take the place, and time, and advertising entirely out of the control of the person interested.

7133. *Mr. Baxter.*—That is to say, you would take the articles of roup out of his control?—Yes; the conditions of sale generally.

7134. *The Chairman.*—Have you any further suggestions to offer?—Another suggestion I have to make is: according to the law, as I understand it to be at present, where goods have been bought, and the purchaser refuses to implement the contract, the seller must raise his action before he can obtain warrant to resell the goods that have been refused. I know from my own experience that that has been found to be a hardship, in this way: it may be that the subject sold is one of great value, it may be sugar, or cotton, or anything else—say a commodity of the value of £10,000. Well, the seller may not be disposed all at once to make up his mind to go to law against the repudiator, but he would wish to have the goods turned into money, because he may not be in a position to spare £10,000 locked up for any time; yet, just now, he would require at once to bring his action, and then incidentally in that action apply to the court for leave to sell the goods. Now I think the course should be altered in this way, that the seller should be allowed to apply to the court for a warrant to sell the goods, and then that would enable him to get his money back to a certain extent, and put him in the position of being obliged to sue only for the loss on the transaction. I know that in many cases where goods were repudiated in that way, the seller, rather than run the risk of having his money locked up for a time through the litigation that may ensue, and the opposition that his

Robert Neill.

application for sale may meet with, has just chosen to pocket his loss and let the repudiator away. Now, I think, that if the seller were permitted to apply to the Sheriff or to the Court of Session for warrant to sell the goods publicly, and thereafter to sue for the loss, that would do justice to the parties and put things on a better footing.

7135. Would you not require some evidence of the transaction, before you allowed the party to get such a warrant?—I think not. If I say that I sold to A. B. £10,000 worth of sugar or cotton, and that A. B. refuses to implement that contract, and that I intend to raise an action for payment of the loss, but wish in the meantime to sell the goods, and if notice is given to A. B. to attend and hear the application, then I think that the seller is entitled to obtain his warrant. If the buyer intimates his readiness to take the goods, and admits the bargain, of course the application would be refused; but if he still maintains that he has not made a bargain, then he is out of court.

7136. *Mr. Adam.*—Would you think it necessary to take means for preserving evidence as to the state of the goods before they were sold?—I think, supposing the dispute was as to conformity to order, the pursuer, for his own safety in future proceedings, would do what has been suggested; he would have a survey of the goods, and a report obtained and kept as to their state at that time, so that it might be produced in evidence when the question came to be settled.

7137. But would the defender not require a similar power to keep evidence as to the state of the goods?—Of course the defender, on getting notice of the application for sale, would also have the power to get such an inspection made.

7138. *Mr. Orr Ewing.*—Would you have the goods to be sold then by public auction, or by private treaty?—By public auction.

7139. *Mr. Paterson.*—Is it not the case in practice just now, that a party interested in repudiating goods takes means to have the goods seen by witnesses, and to ascertain their condition without any judicial proceedings?—Yes.

7140. Then, as I understand it, the object of these applications to the Sheriff to sell repudiated cargoes would accomplish two objects—the one is that the goods are realized and turned into money, and on comparing the proceeds of the sale with the invoice cost, the probable loss is ascertained?—Exactly.

7141. With regard to the first of these—to sell the goods, in order to turn them into money,—is it not the practice that you in Renfrewshire, as in other sheriffdoms, can present an application to the Sheriff for a warrant to sell?—No.

7142. Is it not so, supposing the goods to be perishable, or about to be subjected to great charges?—If the goods are of a perishable nature, the Sheriff has power to grant such an application; but that leaves open the question for an obstinate litigant to dispute that averment, and to say the goods were not perishable, and do what he can to keep up litigation. My proposition is just to prevent a defender being allowed to stop the sale when he repudiates.

7143. But supposing repudiation to have taken place of a cargo of sugar, and that these sugars are put into store, and they incur storage rent, and insurances, and other charges, and supposing you to apply to the Sheriff at Greenock for a warrant to sell, does he not in these circumstances give you a warrant before inquiring into the facts? Do you require to aver that the goods are perishable?—We would require to aver that, and that, as I have said, would leave the question open. Besides, the Sheriff might think that the cost of storage, and the cost of insurance on the sugar was of such a small amount as compared with its value, that he might be inclined to say, I will not give you a warrant just now.

7144. Do you know any defect in the Sheriff's jurisdiction to entertain an application of that kind?—No; I know of no defect where the subject is perishable. When the subject is perishable, he has the power to grant the application; but, as I have stated, the question is open to dispute—what is perishable, and what is not.

7145. Suppose the averment of perishable to be out of the case, and that you have a cargo which the purchaser won't take, and which the seller won't resume, do you know any defect in the Sheriff's jurisdiction in these circumstances to entertain an application to sell before an action is brought?—Yes; it has been decided in the case of Jackson, 20th June 1848, that the Sheriff could not grant such an application.

7146. *Mr. Baxter.*—Would you enlarge the Sheriff's jurisdiction in the case of suspension of charges on bills?—There might be no harm in enlarging it to questions of greater value; but I may say, from my own experience, I have had only one suspension under the present Act. I know most of the cases that happen in Greenock, and I don't believe there have been half a dozen altogether since the Act passed.

7147. What do you say with regard to actions of reduction of deeds and titles, and of declarator? Would you give the Sheriff the same extent of jurisdiction there that you would give him in regard to heritable rights?—With regard to reductions, I would keep all actions of reduction based on allegations of fraud, or lesion, or such like to the Court of Session.

7148. Would you keep provings of tenor there also?—Yes.

7149. Are you much in favour of jury trial?—I think it should not be allowed in the Sheriff Court in civil cases. In the Court of Session, I think it should still be preserved for cases of slander, and libel, and actions for breach of promise of marriage and seduction, and questions of insurance on either life, or fire, or marine policies.

7150. *The Chairman.*—That is where these arise upon questions of fraud?—Yes; but all questions of ordinary contract debt might, I think, be well tried by the judge, the evidence being taken by a shorthand writer.

7151. *Mr. Baxter.*—What do you say as to the appointment of factors, and curators, and tutors, and such matters as that, on small estates?—I think the jurisdiction should be extended to the Sheriffs—perhaps to estates under £500.

7152. Would you not be inclined to go beyond that?—I think not, not at the beginning.

7153. *The Chairman.*—Have you anything further to suggest with regard to the jurisdiction of the Sheriff?—No; I think these exhaust the points I have to mention with regard to the constitution of the Sheriff Court. My opinion as to the Sheriffs is in favour of the present system, because I think it affords, on the whole, a satisfactory mode of appeal, suitable to the class of cases that usually come before the Sheriff Courts. You may say that the Court of the Sheriff-principal is always open.

7154. Do you find the system to work well?—As far as my experience goes, I have always been satisfied with it, and have always found that in any case requiring great despatch the Sheriff was as ready to hear the parties, and to dispose of the cases, as they were to be heard.

7155. *Mr. Adam.*—Does that observation apply to the Sheriff-principal as well as to the Sheriff-substitute?—It is the Sheriff-principal I am referring to just now.

7156. *Mr. Baxter.*—Do you not experience any delay in appeals to the Sheriff?—There is no doubt there is this delay—that the cases have to abide the Sheriff's hearing; but I have never found, in my experience, that where delay was allowed, it was attended with any inconvenience. If in any case, as I said before, there was to be a loss by delay, we have simply to make an explanation to that effect, and the Sheriff is ready to do justice to us. I may give an instance of that. In an application for the delivery of the engines of a steamer under a contract, where the Sheriff-substitute granted a warrant to the petitioner to get the engines upon consigning a certain sum, the opposite party appealed. I was for the respondent, and was anxious to acquiesce in the interlocutor; and upon that being made known to the Sheriff, he fixed the hearing at

once. The appeal was heard within, I think, a very short time—I suppose within a week or so, and the matter ended there.

7157. *The Chairman.*—Are the appeals in your court heard by the Sheriff orally, or does he consider them upon written argument; or is it sometimes the one way and sometimes the other?—It is sometimes the one way and sometimes the other. The Sheriff can generally form a very good idea from the interlocutor that has been appealed against whether the case is one requiring instant attention; and when he sees that it requires summary action and immediate attention, he orders a reclaiming petition, particularly if he can discover from the case that the party is appealing for delay.

7158. If, upon the reclaiming petition, he is satisfied that the appellant has not made out a good case, does he require an answer?—No.

7159. *Mr. Paterson.*—Does the reclaiming petition generally tend more to expedition than the oral hearing?—In certain cases it does. If the interlocutor happens to have been pronounced shortly after the Sheriff has been down at his usual sittings, a reclaiming petition does tend to expedition; and, in my own experience, hearing by petition and answers generally brings us much closer to the case than when we have to argue it orally.

7160. Is the written argument had more recourse to in Renfrewshire than oral hearings on appeal?—No. I would hardly think it was more; but our present Sheriff has more hearings by written argument than our former Sheriff had, because whenever he sees that delay will be injurious, he orders a reclaiming note.

7161. *Mr. Baxter.*—How often does your Sheriff come down to hear appeals?—I could not be positive as to whether he comes oftener than the statutory number of times or not, but I rather think he does.

7162. Are you satisfied with the manner in which the Sheriff-substitute takes down evidence just now?—On the whole I am satisfied that the Sheriff-substitute does take down the evidence very fairly; but I am greatly in favour of the evidence being taken by a shorthand writer, because, as the day gets on, the Sheriff, of course, gets a little more tired, and he generally inclines to cut the evidence a little short. I think, on the whole, it would be a right thing to do, both for the Sheriff and for the parties, that the evidence should be taken by a shorthand writer. In that way I believe that the evidence would be gone through much more quickly and more satisfactorily for all parties.

7163. *The Chairman.*—Would you have the Sheriff to dictate to the shorthand writer, in the hearing of the parties, what was to be put down?—I would prefer the shorthand writer taking it down himself. I may mention that, under the Certain Debts Act, we have had several proofs taken by shorthand writers, and in these cases the Sheriff has dictated the evidence. I have found that it is a great advantage to the litigants to have the evidence taken in that way.

7164. If the Sheriff did not dictate, but if the shorthand writer took down every question and every answer, would not that make a most voluminous record?—It would.

7165. Would it not also cause great additional expense by the fees for writing it out afterwards, and for the time?—In return for that, we would have the advantage of having the very words of the witness, while, by the other mode of the evidence being dictated, we have only a kind of diluted evidence.

7166. But additional expense would be caused in that way?—Yes, there would be additional expense.

7167. *Mr. Baxter.*—Do you think that instead of the Sheriff simply taking down his notes and reading them over at the end as a whole, it would not be more satisfactory if he were to dictate the answers as they were given in the hearing of the agents, so that they might know what was going on?—There is no doubt that what you suggest would be an advantage. It would be well that we should hear what was being written down as the proof went on; but of course we are taking notes all the time ourselves, and when we hear the evidence read we can generally detect if anything of importance has been omitted; and if we ask the Sheriff to read any particular part of what he has written, of course he is quite ready to do so.

7168. Have you considered the proposition that has been made of grouping the Sheriffs into two, and making the appeal court consist of two Sheriffs—two minds instead of one?—I have read of the suggestion, but it is not very definite. It is suggested that there should be a moderate number of Sheriffs. If I knew the number of Sheriffs that were proposed, I would be better able to answer the question.

7169. My question was, whether you would have an appeal court of one Sheriff, or of two?—Certainly, in matters of review, two Sheriffs would be better than one; but if the present system is to be changed, I should like to know what the change is that is to be proposed before I could say whether the one was preferable to the other. I may remark that at present in England the Lord Chancellor singly reviews the Vice-Chancellor's judgment.

7170. The two Lords Justices also review the Vice-Chancellor's judgments?—I know they have a concurrent jurisdiction with the Lord Chancellor; but I know that the Lord Chancellor, a single judge, also reviews the Vice-Chancellor's decisions.

7171. But you consider the Lord Chancellor to be the very highest legal officer?—I do.

7172. But what do you say of the Sheriffs of our counties?—I consider the Sheriffs, so far as I have had experience of them, to be very able lawyers.

7173. Would you think the appeal court would be strengthened or improved by having two minds instead of one?—There is no doubt that two minds would be better than one.

7174. *Mr. Orr Ewing.*—Suppose the two were to differ, how would you arrange to have the case settled?—I suppose the rule would be followed, that where the two differed, the judgment would stand.

7175. *The Chairman.*—It would then stand, because the court had no power to alter it?—Yes.

7176. And then it would just be as it was before?—Yes.

7177. *Mr. Orr Ewing.*—Would three not be better in such a case?—I think that three would be still better.

7178. *Mr. Baxter.*—In the case of three appeal Sheriffs, might you not have two minds to two, while in the case of two appeal Sheriffs, there would only be two to one?—I go upon this, that if we think the Sheriffs are going wrong, we have got the Supreme Court to fall back upon.

7179. *Mr. Adam.*—Do you think that in your district the present system gives satisfaction?—I believe that in our faculty a change is desired to the two Sheriffs.

7180. *Mr. Baxter.*—Have your faculty had that matter under their consideration?—They have; but I was not present at the meeting, and my own opinion is what I have stated.

7181. *Mr. Adam.*—Do you know what the opinion of the community is, apart from the profession?—I think the community have never considered the question.

7182. You think they know nothing about it?—I think so.

7183. *Mr. Murray.*—Are they finding fault with the present system?—I have never heard any fault found with the present system.

7184. *Mr. Baxter.*—Do you not know the judgment to which your faculty came upon this matter?—I believe it was in favour of a change, something like the views that have been expressed by the General Council of Procurators.

7185. *Mr. Paterson.*—In your own experience, which I believe has been pretty extensive, have you ever found a client, where he really felt aggrieved by the Sheriff's judgment, deterred from taking it to the Court of Session by the matter of expense?—Yes.

7186. Does that frequently occur?—I cannot say frequently. Where the case was of small amount, the disappointed litigant in the inferior court would hesitate before he took the matter to the Court of Session.

7187. What has been your experience in cases where the amount was considerable?—Where the amount was considerable, I think the party would not hesitate.

Robert Neill. I may say, with reference to my own experience, that since I began to be a practitioner, I have had only one advocation. That occurred recently, where both Sheriffs decided against me. I was instructed to advocate the case, and the advocation was raised; but I was afterwards told to withdraw it.

7188. *Mr. Baxter.*—I believe you consider you have a very excellent Sheriff?—Both of them are good Sheriffs; but there is no doubt that the expense of the Court of Session is feared.

7189. *The Chairman.*—Especially by a person who has already incurred the expense of the Sheriff Court?—Yes. I have one or two remarks to offer on the forms of process in civil cases. With regard to the summons, I think that, as it at present stands, it is as short as it can very well be. I think the *inducicæ* should be made shorter. At present it is six days. In orders for intimation for appearance in summary causes by our Sheriffs, the *inducicæ* is forty-eight hours, and we find not the smallest difficulty in having appearance entered within that time. I therefore think that the *inducicæ*, in ordinary cases, might very well be shortened to three days.

7190. *The Chairman.*—Do you think that would do in all parts of Scotland?—Perhaps it would not do far north.

7191. Would it do far west?—I don't know whether it would do in Jura.

7192. There is an exception just now with regard to Orkney and Shetland, but only with regard to Orkney and Shetland, and there has been a uniformity as to all other places. Do you think that that is a proper thing?—Perhaps in the Highland districts, where the distances are very great, the time might be extended; but in our own town, and in other large towns, I think the *inducicæ* might be much shorter.

7193. Would you have a dissimilarity in the rules applicable to different districts, or would another exception serve the purpose you have in view?—There is at present a dissimilarity with regard to the times at which the Sheriffs are to attend in their counties. In the Highland districts I think they require to go three times in the year; to our county they must come four times. Then with regard to the citing of parties in other counties where the Sheriff has jurisdiction over them, or where arrestments are being used in different counties, I do not see the necessity for the warrant being indorsed. I do not know any good purpose that is served by getting the warrant of the Sheriff indorsed. I think the warrant of the Sheriff of Renfrewshire could be very well executed in Lanarkshire, or Argyleshire, or Ayrshire, without requiring the Sheriff-clerk to put his marking on the back of it.

7194. Would you have the Sheriff-officers of every county empowered to give effect to the warrant of the Sheriff of any county?—Yes; because we get the indorsation as a matter of course. We simply go to the Sheriff-clerk's office, and he marks the concurrence, and we pay the fee. It simply causes delay and expense, although the expense is not great.

7195. *Mr. Baxter.*—Is there any use in the concurrence at all?—I do not see any necessity for it. Then with regard to the time for lodging condescendence and defences, the pursuer just now is allowed 6 days. The *inducicæ* is 6 days, and the Sheriff may call upon the party to state his defences within 8 days—that is 14 days altogether. Then if a condescendence and defences are ordered, the pursuer has to lodge his condescendence in 6 days, and the defender his defences in 10 days, being 16 more, or about 30 days altogether, before you get the defences in. Now I think that 4 days would be quite sufficient for each of these, unless the Sheriff-substitute should see it necessary to extend the time in any particular case. For example, supposing the defender was living in the Highlands, or the pursuer was living in England or Ireland, the agent might wish time to correspond with his client, after hearing from the defender the nature of his defence, and to get a little information from him in order to meet the case set up by the defender; but I think that matter of the extension of time should be left to the Sheriff-substitute, and I do not think he would be likely to allow the parties too much indulgence, thereby causing delay. Then with regard to the section in the Sheriff Court Act about actions falling asleep: I think that should be abolished, because it really does not expedite the case a bit. We generally manage to have them awakened before the end of the six months. I think that that provision has done no good, and it has been decided that consent of parties is cause within the Act of Parliament. I think that provision might very well be abolished, and the matter left in the hands of the court and of the procurators. If an agent is found to be at all of a dilatory disposition, and is not pushing on his cases sufficiently, his clients will very soon find that out, and will be apt to seek a more diligent agent.

7196. *The Chairman.*—That was an enactment for the purpose of preventing delay in cases, but you think it does not practically accomplish that object, and that it entails other evils?—I think it does so. Then with regard to the power of appealing against a Sheriff-substitute's decisions, I think the limitations of the present Acts of Parliament are sufficient. Such appeals are limited just now to appeals against interlocutors repelling or sustaining dilatory pleas, interlocutors sisting process, interlocutors allowing proof, and interlocutors with regard to the admissibility of evidence. I think that, on the whole, these are sufficient limitations, and that we are the better of having the power of appealing to the Sheriff-principal with regard to these points.

7197. It has been suggested that the appeal disposing of a preliminary defence, and the appeal allowing a proof, which is probably the next step in a case, might be taken up and argued together in one appeal, and thus you would get the preliminary defences disposed of without incurring the expense of the proof, and you would save the time of an intermediate interlocutor. What do you say to that suggestion?—I would be quite disposed to adopt that suggestion, for this reason, that so far as our own court is concerned, we almost always have any dilatory pleas reserved until the record is made up, and in the way your Lordship has suggested, the two things could be done at once.

7198. *Mr. Paterson.*—Supposing the preliminary plea to involve the fate of the action, would you still postpone the appeal upon that point until the appeal came up upon the allowance of proof?—Is that with regard to the question of title or competency?

7199. You may take either, or jurisdiction?—I do not think there would be much harm done if the interlocutor repelling a dilatory plea was kept over until the first interlocutor after hearing parties on the closed record.

7200. If the action is fatally bad, why should the parties be kept in pain about it longer than is necessary?—They would not be kept very long in pain.

7201. *Mr. Baxter.*—In doubtful cases, would you give the Sheriff-substitute power to allow an appeal?—It would be a delicate thing to ask the Sheriff-substitute to allow an appeal against his own interlocutor.

7202. *Mr. Paterson.*—What is the benefit of the intervening delay and the intervening cost, if the preliminary plea is such that if it be decided one way or the other, the fate of the action is involved?—In a plea of that importance I don't think the Sheriff would decide it until once he had obtained the pursuer's answer to the defender's statement of facts. He would then close the record, and would hear the parties upon the preliminary plea, and his interlocutor at that time would not only be repelling the plea, but he would likely pronounce an interlocutor either for or against proof.

7203. *The Chairman.*—Do you think there would be no intervening expense?—I do not think that in practice there would be any. A case might happen in which the Sheriff might say, Well, I will dispose of this plea at once, before I ask the pursuer to answer the defender's statement of facts, and before I proceed to consider the case on the closed record. But I think in most cases, if the plea was of great importance, the Sheriff would hold over the discussion of the prelimi-

nary plea until once he had got the record closed, and in that way I think there would not be much delay.

7204. *Mr. Paterson.*—He might in some cases get assistance where the preliminary plea happened to be mixed up with the facts of the case; but there are a variety of other preliminary pleas. Suppose a landed proprietor is the pursuer, and the defender says he has no title to the land, and he is unable to produce an infeftment, what is gained by postponing the appeal upon that judgment?—In a case of that kind, of course, there would not be any gain to the party; but I think there would not be much loss by letting the matter wait over till the interlocutor after the record was closed.

7205. *Mr. Adam.*—Do you think the loss in the one case would be counterbalanced by the gain in a large number of cases?—Yes, I think that, taking the thing on the whole, it would be so; and just now our invariable practice is to reserve the discussion on the preliminary pleas until the record is closed. Then I think a very good check upon appeals which are brought simply for delay would be, if the principal Sheriff were to find the unsuccessful appellant liable in the costs of the appeal. If he was to make that a rule, it would make an appellant for delay hesitate before he appealed simply for that purpose.

7206. Do you mean that in disposing of the appeal, the Sheriff should find expenses due?—Yes, in disposing of the appeal.

7207. *The Chairman.*—If the appeal is disposed of without written pleadings, what would be the expense?—The expense to the opposite party would be about £2 in a case above £100.

7208. Do you think that would be a check upon useless appeals?—Yes, I think it would be a check.

7209. *Mr. Paterson.*—Is the expense you have given according to the highest scale?—It is. I think the expense between £50 and £100 is 30s.

7210. *Mr. Adam.*—In practice, in disposing ultimately of the expenses of the action, does the party who has lost an appeal, but who has gained his case, have to pay the expenses of the appeal in the end?—The practice of the auditor in our court is, that if the party who has been found entitled to expenses generally has been unsuccessful on any particular point of the litigation, the expense of that is deducted.

7211. *Mr. Baxter.*—Who is your auditor?—The Sheriff-clerk.

7212. *The Chairman.*—Have you any further suggestions to make?—I have no remark to make about the review of civil causes by the Court of Session, except this, that I think the mode established by a recent Act will work well enough.

7213. Do you think it is an improvement?—It is an improvement with regard to the lessening of expense. I have had no cases under it myself, but I consider that it is an improvement on the former practice. Then with regard to review in criminal matters, I have had a good many cases of suspension to the Justiciary Court; and while I have always been satisfied with the manner in which the cases were dealt with by the court, I think the proceedings just now are rather costly.

7214. What is the cause of that?—I believe it is said that the court fees are pretty high.

7215. Where does the excessive cost lie; is it in fees that are exacted by clerks, or where is it?—I have always been led to understand that it was so.

7216. Have you never been able to understand that from accounts furnished to you?—I never see the taxed accounts. I have had accounts, but I never examined them carefully to see where the expense lay. I may say that I have been successful in a case where the expenses found due to my client amounted to about £32 of taxed costs. I had a suspension, where I was unsuccessful, and had to pay both sides, and the expenses came to £80. But the review always gave satisfaction; we were always satisfied with the painstaking way in which the matter was dealt with by the court.

7217. *Mr. Adam.*—Do you think that the present mode of taxing country agents' accounts in the Court of Session is not fair to them?—I think it is not fair.

7218. *Mr. Baxter.*—Why?—Because we get nothing.

7219. *Mr. Adam.*—Do you think there are expenses taxed off which should fairly be paid by the losing party?—Yes.

7220. Are these expenses incurred in preparing the case?—Yes.

7221. *Mr. Paterson.*—Are you prepared with any specification of the costs which ought to be allowed to the provincial agent?—I am not. I have not looked into the matter so carefully.

7222. *Mr. Baxter.*—Do you think it is essentially necessary for the client's interest in most cases to have a country agent, or could he do without one?—I think he could not.

7223. *Mr. Adam.*—Would the business be more expensively done if done only by the town agent?—I don't know that it would be; but I think the client in the country generally likes to have a person near hand him, with whom he can converse, and from whom he can get information about the case, and whom he can assist in the preparation of the case.

7224. I suppose, if the country agent did not do that, the town agent would have to do it?—Yes.

7225. He would have to go to the country for that?—Yes.

7226. And that would be more expensive?—Yes.

7227. *Mr. Paterson.*—Has it happened in your own experience that your attendance in Edinburgh has been suggested by the counsel in the case?—Yes.

7228. Did you get anything for that?—Nothing. With regard to the Sheriff Court expenses, I think that where the sum involved, or the value of the subject is great, the fees should be very much increased. Just now they are very small for cases of any real value.

7229. *The Chairman.*—Do you mean the fees of the agents?—Yes, the fees of the procurators. In a case where there was a summons for slander, a condescendence and defences, a hearing of the procurators upon the closed record, and an interlocutor pronounced disposing of the action, my account, as taxed, for all the business I did was £5. In another case, where the sum was £250, where there were summons, condescendence and defences, and hearing, and then a remit to a person of skill to decide on a question that happened to be involved—it was a question as to the sufficiency of centrifugal machines for a sugar manufactory—my expenses only came to £11.

7230. *Mr. Baxter.*—Was there any proof in that case?—No.

7231. But there was a remit?—Yes. The sum involved there, as I have said, was £250; but we get no higher fees, although the matter comes up to £2000, or £3000, or £4000. I think that a case of large amount always requires greater attention and greater research at our hands, and in these circumstances the fees for such cases should be larger. At all events the Sheriff-substitute, or the Sheriff who has tried the case, might have power to enlarge the fees should he think that the importance of the case entitled the agent conducting it to greater remuneration. Just now we are allowed a fee of only 20s., 30s., or 40s. for debating a case on its merits, either before the Sheriff or the Sheriff-substitute—that is, an oral debate on the concluded proof. Well, it often happens that the Sheriff-substitute's day for debates is a Friday. On that day he has his motions for orders, and then he has also his Certain Debts Court; and before he can begin the debates, we have to wait perhaps for two hours. That takes us on to about one o'clock; and after we have been heard for a short time, the Procurator-fiscal may come up and say that he has some criminal business for the Sheriff to attend to. Of course the Sheriff considers that the Crown has the precedence, and he sends us away. We are then obliged to wait over for perhaps some weeks, until the case comes up again in the debate-roll in its turn, because the Sheriff's intermediate days have been filled up by previous orders. We have to make preparations again for the debate, and to be heard again, and this is all done for one fee. I think, therefore, that, on the whole, we are entitled to greater remuneration than is allowed by the present table.

Robert Neill.

7232. *Mr. Orr Ewing.*—Does not the cheapness of an article generally increase its consumption?—That is not the case with law.

7233. *Mr. Baxter.*—Does it frequently happen that you have to wait for your case from day to day?—I cannot say from day to day; but it happens sometimes in important debates that the cases are postponed. I may say that the time of our Sheriff-substitute is very much taken up with criminal business, because, since the General Police Act was passed, which prevents the magistrates in the Police Court from trying any person for assault after two convictions, a great many of these cases have been sent up to the Sheriff by remit for trial. Of course such cases require immediate attendance, and he is obliged, not from his own will, but simply from the necessity of the case, to adjourn our hearing. Of course I do not at all complain of the Sheriff-substitute in that respect, because he is always most anxious to meet the convenience of the agents in every way, and to save time to them as much as possible.

7234. Have you anything to say with regard to the Debts Recovery Act? Have you had any experience under it?—I have not had a great deal of experience, but I have had some, and I find it works pretty well.

7235. What do you say as to the costs under it? Do they afford adequate remuneration?—No; they are very small. They are not adequate remuneration at all. I had a case where the amount given to me was 40s. in all, and I am sure I attended the court ten times with regard to the case.

7236. Do you approve of the principle of a slump sum, or would you rather be paid according to the amount of work you do?—According to the work I do.

7237. *Mr. Adam.*—Do you think that, in cases under that Act, if the proof were paid for separately, the other fees would be sufficient?—I think so. There should be a fee allowed for the time during which the proof lasts.

7238. You mean that, in the case of a proof, it should be paid by time?—Yes.

7239. You think the other fees would be satisfactory and sufficient?—Yes.

7240. *The Chairman.*—Have you any further remarks to make with reference to inferior courts?—With regard to our Police Courts and our Dean of Guild Court, I think it would be an improvement were we to have a stipendiary magistrate to preside in them. Our Police Court now has jurisdiction not only with regard to police offences, but in all nuisance cases, in all cases under the Forbes Mackenzie Act, and in all weights and measures cases. The Dean of Guild Court has been recently established, and has very important duties vested in it with regard to the making of new streets and drains, and looking after the construction of new buildings and the alteration of old buildings. The Dean of Guild Court is constituted thus: The Dean must be one of the magistrates; three of his council must be elective members of the Police Board, and the other three must be members of the Town Council. None of the council require to be tradesmen. The whole are members of the Police Board, and the court is chiefly for the purpose of carrying out the resolutions of the Police Board. In fact, the Police Board, of which these seven persons are members, are generally the prosecutors in the court, and they have first to resolve that certain things shall be done, and that certain proceedings shall be taken in the Dean of Guild Court. They come to these resolutions as members of the Police Board sitting in their council. These matters next come before them sitting as judges, and then, after judgment has been given, they, as members of the Police Board, can have it in their power to suspend the decision of the judge. I think that is a very anomalous state of matters indeed.

7241. Would you suggest that a stipendiary magistrate should take the charge of the whole of that business?—Yes; and take the Police Court too.

7242. Would the burgh of Greenock be disposed to provide a salary for that stipendiary magistrate?—I would not be disposed to answer for that, although I happen to be a member of the Board. But I think it is of great importance for the public that there should be a stipendiary magistrate, particularly as the magistrates have the power of licensing; and I think it is not a right thing that the elective magistrates should have so much power as they have now.

7243. Do you think the Sheriff could not discharge these duties?—Not in Greenock. He has so much to do otherwise.

7244. *Mr. Orr Ewing.*—Do you think a stipendiary magistrate would be better for granting licences than the bench of magistrates?—Yes, I think he would; because we find that the same gentlemen who sit in court granting licences, go about in election times canvassing the people who afterwards come before them.

7245. *The Chairman.*—That is for municipal election purposes?—Yes.

7246. *Mr. Paterson.*—I suppose the persons whom they canvass include the spirit dealers?—Yes, they do.

7247. *Mr. Orr Ewing.*—Do you think that is the opinion of the community generally, or is it only your own?—That is my own impression.

7248. What is your impression as to the opinion of the community generally?—There is great dissatisfaction just now as to the administration by the magistrates of the licensing system in Greenock.

7249. But they have never proposed to elect a stipendiary magistrate for that purpose?—No; they have never discussed that subject in the council.

7250. *Mr. Shand.*—What is the evil that is felt in Greenock at present under the licensing system; do you say there are too many licences, or too few, or that they are granted to wrong persons?—The belief is that licences are granted from favouritism just now.

7251. Are they granted to persons who should not hold them?—Yes.

7252. *Mr. Baxter.*—Do you know the number of public-houses in Greenock?—There are upwards of 200.

7253. What is the number of your population?—It is under 50,000.

7254. *Mr. Orr Ewing.*—Is Greenock not in an exceptional condition at present as to political feeling?—I don't think so. I may say that in 1863 the question as to the propriety or legality of the magistrates who granted the licences canvassing the publicans was brought under the notice of the Lord Advocate at the time, now Lord Mure, and he gave it as his opinion that there was no illegality in such canvassing, although he thought it was a very improper thing.

7255. *Mr. Shand.*—Does the present system not secure that the licences shall be granted, to some extent, according to the public opinion of the district?—Just now I believe there is a general impression that there are too many licences granted.

7256. *Mr. Orr Ewing.*—Have not the public a right to appear before the bench, and to petition?—They have.

7257. Do they take advantage of that power?—They do.

7258. Is no attention paid by the bench to their representations?—Of course the magistrates think they decide the cases according to what is right; but the evil is this, that these magistrates, being elected it may be through the influence of those who are applying for licences, are supposed to be under a certain amount of influence.

7259. *The Chairman.*—Of unconscious influence?—Yes, unconscious.

7260. *Mr. Orr Ewing.*—But that has reference not to political feeling, but to matters connected with the election of the magistrates and Town Council?—Yes; I mean that that influence is felt in municipal politics.

7261. *Mr. Shand.*—Admitting the existence of an evil of that kind to some extent, do you think that if the licensing were in the hands of a stipendiary magistrate the public feeling would exercise the same influence as it does at present?—I think it would; perhaps more so.

7262. Do you think that such a magistrate would be amenable to public feeling to the same extent as the magistrates?—I believe he would.

7263. And do you think that system would be an advantage?—Yes; I think nothing could be worse than the present system.

7264. *Mr. Paterson.*—Do I understand you to state, as a fact, that there is corruption existing just now?—No.

7265. It is rather that the existence of the present system induces the risk of it?—Yes; the risk and the suspicion, and that detracts from the value of the decisions which the magistrates give.

7266. *Mr. Orr Ewing.*—But you have stated that the administration of the Licensing Court at present is not properly conducted, and that you think the magistrates are under influence?—Yes; I think the present system involves the risk of the judges being unconsciously influenced by persons with whom they have recently come in contact on political matters.

7267. Do you think the court at present exercises its power well, and that there is only such a risk, and not a reality?—I cannot say that.

7268. As to the Dean of Guild Court, I think you got the Dean of Guild established in Greenock two or three years ago?—In 1865, by special Act of Parliament.

7269. Therefore the feeling of the community of Greenock, and of the Town Council, does not agree with your own, when the Act was got so recently?—I may say that the Police Board have already appointed a committee to consider what change ought to be made, believing that some change should be made in the constitution of that court; they are already dissatisfied with its present constitution.

7270. And they wish it modified in some degree?—They wish it altered.

7271. But they do not propose to do as you have advised—to have a stipendiary magistrate, for the purpose of discharging the duties at present discharged by that court?—The Board have not come to any decision on the point. Some would like the Chamber of Commerce to elect the Dean of Guild, and that the Dean of Guild should be a person outwith the Police Board altogether, in place of being a member of it, as he is just now; but there has been no decision come to.

7272. *Mr. Murray.*—Is there an assessor to the Dean of Guild?—Yes; a paid officer.

7273. Who is that assessor?—He is a procurator before the Sheriff Court, Mr. M'Ilwraith.

7274. By whom is he appointed?—He is appointed by the Town Council.

7275. *Mr. Adam.*—In Greenock is it the practice, before a person begins to build, that he should apply to the Dean of Guild for a warrant?—He must do so under the new Act.

7276. Does he require to exhibit plans?—Yes; you cannot make a door in an old building, or a new door, or a new window, without applying to the Dean of Guild.

7277. *Mr. Paterson.*—Who elects the Dean of Guild in Greenock?—He is elected by the Town Council, and he must be a magistrate.

7278. In the burgh or of the burgh?—Of the burgh.

7279. What is the avocation of the present Dean of Guild in Greenock?—He was a fish merchant, but he has now retired.

7280. Is he not now in business?—No.

7281. For what period is the Dean of Guild elected?—It is an annual election.

7282. Is he the sole judge in his court?—Yes.

7283. But he is assisted by six other gentlemen, three from the Police Board and three from the Town Council?—Yes; three elective members of the Police Board and three Town Councillors.

7284. Are the Police Board, or the magistrates, as representing the community, ever before the court as proprietors of property or otherwise?—They are not often before it as proprietors of property, but they are very often before the Dean of Guild Court to enforce the opening of streets, the fixing of levels, the extent of drains and sewers, and the making of streets generally.

7285. Do these matters which you have just mentioned originate in the Police Board?—Yes.

7286. And it is after they have gone through the Police Board, or through committee, that you go to the Dean of Guild Court for authority?—Yes. *Robert Neill.*

7287. And you meet there three of the members of the Police Board on the bench?—Yes.

7288. Did you say that after the Dean disposes of the matter, it goes back to the Police Board?—Yes; the Police Board have then to carry out the warrant, and they may find that the expense of carrying it out would be too great, and so they won't do it.

7289. Do you mean that the Police Board are the first adjudicators upon the matter; then, that it goes to the Dean of Guild as the second; and that then the Police Board review the Dean of Guild's judgment?—They review the carrying of it out.

7290. That is to say, they suspend it?—Yes.

7291. Although there may be other parties outside who have been called to the Dean of Guild process?—Yes, that may be so.

WILLIAM LAW, Esq., examined. *William Law.*

7292. *The Chairman.*—You are Dean of Guild of Edinburgh?—Yes.

7293. How long have you been so?—I have been so for about two and a half years.

7294. By whom is the Dean of Guild elected?—By a corporation called the Guildry.

7295. What is the duration or continuance of the office?—It is by annual election. I have been sent three times to the chair.

7296. You are a member of the Town Council?—Yes.

7297. Are you necessarily so?—Yes, necessarily. The Dean of Guild is always a constituent member of the Council.

7298. *Mr. Orr Ewing.*—Are you an *ex officio* member of the Council?—Yes.

7299. *The Chairman.*—Of whom does the Guildry Corporation consist?—Almost all the mercantile people in Edinburgh are members of it. No one can be admitted into the Merchant Company without being a Guild Brother, as it is called, and it is the same with all the trades. Persons must be all Guild Brethren who belong to the trades.

7300. It is the aggregate body of the Guildry who elect the Dean of Guild?—Yes.

7301. And he is the head of that aggregate body?—Yes, for the time being.

7302. *Mr. Harrison.*—Must the members of the Guildry be persons carrying on business in Edinburgh when they are elected?—Yes; they are not eligible without that.

7303. *Mr. Baxter.*—But they have no exclusive privileges? Any man can begin business without becoming a member of the Guildry?—Yes, that is not contested now.

7304. *The Chairman.*—The exclusive privileges of corporations are very much removed by an Act that was passed some twenty years ago?—Yes.

7305. What are your functions as Dean of Guild?—They are very multifarious. In the case of every alteration of property, of any kind, an application must be made to the Guildry Court to have that alteration sanctioned.

7306. Of whom does the Guild Court consist besides the Dean of Guild?—Of three other gentlemen, who are builders or architects, and who are called trades members, and three merchants, who are called merchant members; the court consists of seven members altogether.

7307. Do these six members sit along with the Dean?—Yes.

7308. And is it necessary that there should always be a certain number of them present?—Yes, there must always be three or four.

7309. Do they vote upon any question?—There is necessarily never a vote in the Guild Court.

William Law.

7310. How do you mean there is necessarily never a vote?—The applications being for the alteration of property, we are supplied with plans and descriptions of what is wished to be done. These are pronounced upon by the trades members and the merchant members; the trades members taking the builder's view, and the merchant members view the matter as shopkeepers, and there is not anything like a vote. Everything is talked over, and we come to a unanimous conclusion, either to permit the alterations or to refuse them.

7311. Or to permit them with modification?—Yes.

7312. But you always contrive to have a unanimous judgment?—We have done so ever since I have had anything to do with it.

7313. The three builders apply their professional skill to the matter, looking at the plans, and the merchants apply their skill to the question whether the alterations are suitable for the purpose for which they are proposed, and in that way you are so fortunate as to come to a unanimous judgment?—Yes.

7314. *Mr. Murray.*—By whom are the members of council elected?—As soon as the Dean is installed into his place, he submits a list of the council that he proposes to the Town Council of Edinburgh, and they either approve or alter as they choose, but in point of fact they never do alter. They always adopt the list submitted by the Dean.

7315. *Mr. Orr Ewing.*—Supposing your council were to differ in opinion, would you be obliged to give effect to the decision of the majority, even although it was contrary to your own opinion?—I cannot conceive such a case.

7316. Then you look upon yourself as supreme?—Decidedly.

7317. *The Chairman.*—Do you mean that you cannot conceive the case of your differing from these six gentlemen, or that you cannot conceive the case of these six gentlemen differing from you?—That is the way of it.

7318. *Mr. Orr Ewing.*—In other words, you are supreme, and you could give your decision although you differed from the whole six?—No, I would not do that.

7319. But what is the power under the constitution of the court?—I never saw the case tried, and I could not imagine it.

7320. But from the constitution of the Guildry, is the Dean of Guild not the head of the court, and could he not decide even though the other six members of council were opposed to him?—Yes, he could in a case of last resort.

7321. *Mr. Paterson.*—Is it not he alone who signs the judgments of the court?—Yes.

7322. He is the sole judge?—Yes.

7323. *The Chairman.*—The others are mere assessors or assistants to him to enable him to arrive at a right conclusion?—Yes.

7324. *Mr. Adam.*—Have you a legal assessor?—We have two. We have Mr. George Young and Mr. John M'Laren.

7325. *Mr. Shand.*—Then you have a member of the bar to assist you when you desire his services?—We have two, to decide all questions as to rights of property.

7326. When legal questions arise, are these in use to be discussed before the assessors, or discussed by written pleadings which are laid before the assessors?—The assessor peruses the papers, which must be prepared for him, and he considers the whole case, and decides what is the rights of the parties as to the property.

7327. *Mr. Orr Ewing.*—Does he sit in court with you?—He does.

7328. Does he do so daily?—No; only when he is asked in some extraordinary case.

7329. *The Chairman.*—Have you a clerk of court?—Yes.

7330. Is he a legal gentleman?—I don't think it. His name is Mr. Morham. He has been for thirty years connected with the court.

7331. But you don't take his opinion on points of law?—No; we dare not do that on rights of property.

7332. *Mr. Murray.*—By whom are the assessors appointed?—By the Town Council. They are the city assessors. They act for the Town Council also; but they act for the Dean of Guild Court as well when it is necessary.

7333. In all cases where you think it necessary to take the opinion of the assessors, do you take it?—Yes.

7334. Do you always decide according to their opinion?—Yes.

7335. Have you never differed from that opinion?—Never. But there is an appeal from the Dean of Guild Court. If the parties are not satisfied with the assessors' opinion, they can take an appeal.

7336. But without going beyond the Dean of Guild Court, is it the fact that the assessors' opinion is invariably acted upon?—It has been so since I knew the court.

7337. *Mr. Orr Ewing.*—But supposing you were to differ from your assessors, is not the Dean of Guild supreme, and could he not give a different judgment?—It would be a risk to do that.

7338. Have you the power to do so?—I believe I have. There was a case lately with regard to Charlotte Square, where a man applied for leave to put a great building on the top of his house, and I refused it. We consulted the assessors on the subject, and they said they did not think we had very much to go upon. Lord Neaves was of that opinion; but I took the risk of refusing the warrant. I would not have a hand in spoiling Charlotte Square, if I could help it; and I said, if the Court of Session choose to give liberty to spoil Charlotte Square, let the Court of Session take the odium.

7339. *Mr. Harrison.*—Have you had frequent occasion to consult the assessors during the time you have been Dean of Guild?—I should say three times a year, or so.

7340. *Mr. Murray.*—Do you mean that there are only three cases in the year with regard to which you go to the assessor?—I would give that as about the average. Mr. M'Laren has been consulted oftener than that; but we do not trouble Mr. Young more than we can help, because he has so much to do. I may say that Mr. M'Laren pays great attention to anything that is submitted to him, and we have great confidence in him.

7341. *The Chairman.*—Is there any appeal to the Court of Session from the Dean of Guild Court?——There is.

7342. You have told us that all alterations of property come before you by an application from the party?—Yes.

7343. Do you exercise any jurisdiction with regard to tenements that are dangerous?—Yes.

7344. How are these brought before you?—The Procurator-fiscal of the city has inspectors constantly going about the town, and if they see any house, or if a complaint is sent to the office with regard to any tenement that is in a dangerous or ruinous condition, I visit it at once with the trades members of the Guild Court; and if we see that the house is decidedly dangerous, we order the people out there and then, and the house to be taken down. Several cases of that kind have occurred. The last was one in the Cowgate, down near Hope & M'Lean's brewery, where a piece of a wall fell in. A three-storey house stood upon the top of it, and a piece of the under storey fell right inside. We went down to look at it, and I could have kicked all the rest of it down with my foot. The storeys which were above were made of wood and plaster, and they were set upon an old garden dyke at the back of the house where there had once been a green. We ordered the people out instantly, and they were all out within six hours.

7345. Is there any officer in Edinburgh of the nature of an inspector, whose duty it is to see whether there are any dangerous buildings in the town?—Yes; we have the burgh engineer, Mr. Macpherson.

7346. Does he make inspections in different parts of the town of himself, without being ordered to a particular place by you?—He has inspectors going about

constantly, and they report to him anything that they see wrong.

7347. How often does your court sit?—Every Thursday morning.

7348. Have you always something to do when you sit?—Yes, we have always something. There are certain times in the year when there is a great deal more to do than at others. From Whitsunday, on through the summer, there is always a great deal more to do than during the winter.

7349. That is, at times when building operations can be conveniently carried on?—Yes.

7350. *Mr. Harrison.*—What are the territorial limits of your jurisdiction in Edinburgh?—The ancient and extended royalties positively; but we do not confine ourselves to them, and our authority is recognised anywhere.

7351. Do you derive your authority from statute, or from use and wont?—Chiefly from use and wont.

7352. *Mr. Orr Ewing.*—Are many of your decisions appealed from?—There have been none that I know of, unless that Charlotte Square case; and I am not sure whether it is appealed yet or not.

7353. Your court must therefore be presumed to give satisfaction to the community?—I think it must.

7354. And to the proprietors of property?—Yes. There was a case in Princes Street, at the Caledonian Hotel, where there was a dispute between Burnett and Mrs. Gregory, and steps were taken to appeal that case; but before it came into the Court of Session they compromised it.

7355. *Mr. Shand.*—Was there not also a case about the Balmoral Hotel?—It must have been before my day.

7356. *Mr. Paterson.*—Is there a large proportion of the cases brought before your court that are contested?—Yes, with conterminous proprietors.

7357. Is that so in the majority of cases?—I should say it is.

7358. By contested, do you mean litigated and brought to a judgment after discussion?—Yes. If a man wants to break out the front of his house and to make a shop, he gives notice to his neighbours; and if they think his operations are likely to be attended with danger, they oppose him until they get satisfaction—either security for their property, or until they see that the operations are to be done with such an amount of safety that they will not be in danger; but that is the extent of the contest.

7359. Are there not a great number of cases brought into court which are not contested?—A great many.

7360. But these are the minority in number?—Yes, they are the minority, certainly.

7361. *The Chairman.*—When parties come before you, do they not sometimes bring with them the consent of the conterminous proprietors?—Yes, very frequently. They get the conterminous proprietors to sign their plans, and that is enough.

7362. *Mr. Harrison.*—Have you power to impose fines, etc., if alterations are commenced without application to the court?—Yes.

7363. Have you frequently had occasion to impose these fines?—I have done so to the extent of perhaps £5 or £6 a year, but that is all.

7364. What is the limit to which you can fine?—I can go the length of £10, but I never exceed £1.

7365. *Mr. Paterson.*—Has your court statutory jurisdiction?—I think it is statutory; for in every local Act that has been passed during the last twenty years, the authority and jurisdiction of the Dean of Guild and of his court have always been maintained along with the Sheriff Court. There has not been the slightest attempt to modify it in any way.

7366. It is recognised as one of the judicatures of the city?—Yes.

7367. Has its jurisdiction been extended by any recent statute?—I don't think it—at least by none that I am acquainted with. In the last Provisional Order there is a clause protecting the Sheriff Court and the Dean of Guild Court; in the Roads and Streets Act of 1862 there is a similar clause; and in all recent statutes that I have seen, its jurisdiction and rights have always been maintained.

7368. *The Chairman.*—Are they not maintained also in the Act extending the Royalty?—Yes.

7369. Are there agents who practise before you?—Yes, a good many.

7370. Do you do anything in the matter of the costs of cases before you?—No.

7371. There is never any question as to costs being given to one party or another?—Sometimes, when a case is litigated, one party thinks he is not entitled to pay a certain amount of the costs. That is a legal question, and we always get our assessor to consider it, and then we give our decision how the costs should be allocated, whether divided by two or three, or in any other way, according to the circumstances.

7372. *Mr. Harrison.*—Have you a published scale of fees,—that is, fees to the clerk or any other party?—I am not aware. The clerk can answer that question. I do not interfere with the fees of the clerk in any way.

7373. *The Chairman.*—The clerk is entitled to certain fees?—Yes, these are necessary.

7374. *Mr. Orr Ewing.*—Is there not a table of fees in connection with the court?—There is a use and wont with respect to the fees; there is a constant practice. When certain documents are written, there is so much to be paid; and if they are lengthened out, of course the parties have to pay so much more.

7375. Do you think it would be any improvement to remove the duties from the Dean of Guild Court, and to entrust them to a stipendiary magistrate or to the Sheriff?—They might be removed anywhere. They might be given to the burgh engineer, or to the city architect; but a power equivalent to that of the Dean of Guild Court ought to be maintained.

7376. Do you think it is an expeditious way of arriving at a conclusion with respect to buildings?—I think it is.

7377. Is it also a cheap and economical way?—It is cheap to the public.

7378. *Mr. Shand.*—Have you any suggestion to make of any change on the constitution of the Dean of Guild Court?—Yes; I would like very much to get more power for it.

7379. In what particular direction would you wish to have its power extended?—In looking along the streets I see a great many things put out and put up that I would not wish to see; and if I had the power, I would pull a lot of them down.

7380. *The Chairman.*—Will you explain a little more precisely what it is that you refer to?—As the age goes on, people seem to get more fantastic with their buildings, and I think there are many things perpetrated in the New Town of Edinburgh that ought not to be allowed.

7381. Do you mean as to their taste?—Yes, as to taste. Now we are merely a court, not of taste, but of safety. If a thing can be done with safety, that is all we can look at.

7382. *Mr. Orr Ewing.*—Are you not also a sanitary court?—No, not very much.

7383. Have you not the power of regulating the drainage?—No, we have nothing to do under the surface.

7384. Can people build a house without showing you that there is sufficient sewerage through it?—That is fixed by the Provisional Order, and they must satisfy the Town Council, not the Dean of Guild Court, with regard to it.

7385. Then you have not the regulation of water-closets and the sewerage?—No; we have nothing to do with anything of the kind.

7386. Have you the power of restricting the height of buildings in the streets?—That is also regulated by the Provisional Order.

7387. Would you like these powers transferred to the Dean of Guild Court?—No; the powers I refer to particularly are such powers as would enable us to prevent things being put out and put up on houses that disfigure our streets.

William Law.

7388. *The Chairman.*—Do you not consider you are entitled to refuse a warrant for such alterations or erections?—There are many cases in which we cannot refuse a warrant if the operations can be done with safety.

7389. You refused in the case of Charlotte Square?—Yes; but that was an extraordinary case.

7390. *Mr. Shand.*—Have you any change to suggest upon the arrangements of the court?—I am not aware that I could do anything to improve them.

7391. *The Chairman.*—I suppose you are aware that in the case of Charlotte Square there was a great discussion many years ago as to the alteration in the style of one of the houses there, and that there was an elaborate interlocutor and note of the first Lord Meadowbank on the subject?—I have not seen that case.

7392. *Mr. Murray.*—Is there not a class of cases that come before your court involving legal points which would better go at once to the Sheriff?—I don't think such cases are very frequent.

7393. In that case of Princes Street, to which you referred, are you aware that it involved a question as to the construction of a title?—It appeared to me very much to be a great deal of money and time thrown away about a trifle, for the space of ground about which the contention arose was a very small one. If they had been good-natured people, they would either have cut it in two, or the one would have thrown it up altogether.

7394. Did it not involve a very nice question as to the construction of a title?—I don't think there was much nicety about it. One party admitted that the ground belonged to the other, but he objected to him building against his house.

7395. *Mr. Orr Ewing.*—It is in the power of parties to appeal to the Court of Session if they fancy that your decision is erroneous?—Yes; in that case the parties took steps to do so, but they did not get the length of the Court of Session.

7396. Do you find you have often the power of effecting a compromise between conterminous proprietors in a cheap and expeditious way, and to the satisfaction of both parties?—Very often. We visit the ground with the trades members, and meet the parties and their legal advisers on the ground; and when we see that they are contending about a mere trifle, we advise them to do so and so, and they generally agree to do it.

7397. Do you find that often taking place?—In almost every case.

7398. Has that the effect of saving an expensive litigation on a very trifling matter?—Yes; and it also saves ill feeling between neighbours.

7399. *Mr. Paterson.*—According to what method would you exercise your functions as a court of taste?—We would get one of the tip-top architects in the Dean of Guild Court, and show him the plans, and make him dictate what was the sort of thing to be done.

7400. Would you do that independently of the opinion of the conterminous proprietors, who might be quite pleased with the alterations which were proposed?—No; I would take their opinion also.

7401. Suppose they were of opinion that the style was unexceptionable, and that the court differed, who would prevail?—We would make a compromise somehow.

7402. But you would like the power of fixing the style of any building that you considered objectionable?—I would be quite content with having a veto upon anything that I considered absurd.

7403. Would that veto be ruled by an architect of great experience in his profession?—Yes.

7404. *Mr. Orr Ewing.*—Do you mean that you should have power to interfere only where the conterminous proprietors objected to the style of building that was proposed, or that you should have power to do so independently of the conterminous proprietors, but allowing them to give their opinion?—Both things must be taken into account as elements in the question.

7405. *Mr. Paterson.*—Can you give the Commission a specimen or example of the class of building that you wish to remedy?—There is a house near the west end of Queen Street, where an additional storey has been put up; and in place of making it anything like ornamental, they have put slates on the face of the perpendicular wall, making it a terribly ugly place. I would hinder a thing like that from being done.

7406. Did the Dean of Guild Court authorize that?—It was done before my day. I have always looked upon it with pain.

7407. But do you know whether it was authorized by the Dean of Guild?—I presume it was.

7408. Do you know whether the conterminous proprietors objected to it?—I don't know.

7409. In a case of that kind, would you contemplate a power being given to the Dean of Guild to exercise his own judgment in taking off the slates and substituting something more ornamental?—If such a plan had come before me, I would have suggested that it was very ugly, and asked the party to adopt some other; and I have no doubt that, with a little persuasion, he would have done it. It makes no difference to the inside of the house whether the outside is ugly or not.

7410. Would you have made it more ornamental in point of taste, supposing the adjoining proprietors had not objected to it?—I would have liked to make it correspond in some degree with the adjoining buildings.

7411. What do you say as to the power of making it to your own mind as a court?—I say in that case, as in the case of Charlotte Square, I would not be a party to allowing such a thing as that; if you are determined to do it, do it at your own risk.

7412. Had you not opposition in the Charlotte Square case?—It was not sufficient opposition to be successful. The proprietors met and considered the matter, and they did not think it worth while to contest it in the Court of Session.

7413. Was it not a contested case in the Court of Session?—It was only contested between the Guild Court and the proprietors; there was no contest on the part of the conterminous proprietors.

7414. *Mr. Harrison.*—As I understand, you would like more power to prevent alterations which, in your opinion, injure the amenity of the city or of adjoining properties?—That is the whole.

7415. At present your powers are very much confined to preventing alterations which may be dangerous?—We are merely a court of safety, not of taste; and you know that the finest buildings in Europe can easily be spoiled with perfect safety.

7416. *The Chairman.*—Would your suggestion not imply that the Dean of Guild Court should always have at their head a Dean of Guild competent to dispose of such matters?—I do not admit that.

7417. *Mr Shand.*—Do you think the Dean of Guild and his liners would always be a safe court of taste?—I think that, somehow or other, they would always be able to get an architect of some eminence to preside or assist in the Dean of Guild Court.

7418. *Mr. Murray.*—Can you specify any other recent case, besides that of Queen Street, where you have objected to alterations in the town of Edinburgh?—There was an application made for leave to put an additional storey on the top of the Edinburgh Hotel. We objected to that, but suggested that the parties should apply to the Town Council, for the Edinburgh Hotel is already beyond the height prescribed by the Provisional Order, and to have an additional storey put upon it would make it still further beyond that height. I suggested that they should apply to the Town Council to see whether they would sanction the additional storey, and they did so, but it has not yet been put on.

7419. *Mr. Orr Ewing.*—Does the Town Council override the Dean of Guild Court in Edinburgh?—In such cases as that it does, because they are under the Provisional Order, and such matters are always under the management of the Town Council. The Dean of Guild Court has very little to do with the height of buildings.

7420. *Mr. Paterson.*—What is your practice with regard to the photographic galleries that are seen all over the town?—I don't like them at all.

7421. Do they not go through the Dean of Guild Court?—I have never given permission for any of them, and I hate to see them. There is one in George Street, above Anderson the fishmonger, that is really frightful; and there is another erection at Free St. Andrew's Church, in George Street, which is equally objectionable. *William Law.*

FRIDAY, 22D JANUARY 1869.

Members Present:—

LORD COLONSAY.
THE LORD JUSTICE-GENERAL.
LORD BARCAPLE.
GEORGE SCLATER BOOTH, Esq.
GEORGE HARRISON, Esq.
JAMES ADAM, Esq.
A. B. SHAND, Esq.
T. G. MURRAY, Esq.
CHARLES MORTON, Esq.
J. B. BAXTER, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

JAMES JAMESON, Esq., examined. *James Jameson.*

7422. *The Chairman.*—You are a practitioner in the Sheriff Court of Elgin?—I am.

7423. How long have you been so?—For thirteen years.

7424. Do you hold any official appointment?—I am clerk to the Police Commissioners of the burgh of Elgin; I am clerk to the County Prison Board of Elgin; and I act as Justice of Peace clerk in the Justice of Peace Court of Elgin, my partner holding the appointment.

7425. The county of Elgin and the county of Nairn form one Sheriffdom?—Yes.

7426. With a Sheriff-substitute in each?—Yes.

7427. One Sheriff-substitute being in the town of Elgin, and another being in the town of Nairn?—Yes.

7428. You practise at Elgin?—I practise exclusively at Elgin.

7429. The Sheriff-principal holds a court in each place?—He does.

7430. Are there many civil causes before the court at Elgin?—There is a large number of civil causes before the court at Elgin.

7431. Are there many of them appealed to the Sheriff?—As a rule, I may say that every judgment is appealed to the Sheriff.

7432. In civil cases there is a power of appeal at four or five stages?—There is a power of appeal of an interlocutor disposing of a dilatory defence, of an interlocutor sisting process, of an interlocutor allowing a proof, and of an interlocutor disposing in whole or in part of the merits of the cause. I don't mean that there is an appeal taken at every one of these stages. I mean that, as a rule, there is an appeal taken to the Sheriff on every judgment disposing of the merits. At the other stages we sometimes appeal, and sometimes we do not.

7433. There is an appeal from the Sheriff to the Court of Session?—In cases above £25.

7434. Are there many of those cases that are carried to the Court of Session?—Comparatively few.

7435. Is the manner in which the business is dealt with by the local judges satisfactory?—If that refers to appeals, I say yes; if it refers to other business, I have another answer.

7436. What is the other business you allude to?—The great business of the county consists of small debt jurisdiction, criminal jurisdiction, consistorial jurisdiction, and bankruptcy jurisdiction, by which I mean sequestrations and cessios.

7437. In regard to those branches, what do you say?—I say that, as a rule, the Sheriff-principal does not interfere in the conduct of that business. It is all done by the resident Sheriff-substitute.

7438. And is that satisfactory?—Very satisfactory, so far as my experience has gone.

7439. Then the manner in which the business is conducted in that Sheriffdom, in all its departments, is satisfactory?—Very satisfactory, in my opinion.

7440. Have you any suggestion to offer as to the constitution of the court, as consisting of the Sheriff and his substitute?—I have.

7441. What are your suggestions?—My suggestion is, that in so far as the double Sheriffship is concerned, there should be no double Sheriffship.

7442. What do you think ought to be the course of procedure?—With your Lordship's permission, I shall put in a minute of our Society of Solicitors, and make an explanation in regard to a matter which was represented to this Commission by the Vice-President of the General Council of Procurators of Scotland. The Society of Solicitors of Elginshire are members of the general body of procurators, and they have a representative at the General Council of Procurators. The General Council of Procurators, as we are informed by a circular from the secretary of their body addressed to the secretary of our body, read before this Commission a statement upon 28th of December last, and, so far as I understand, it was represented that that statement gave the views of the whole body of procurators in Scotland. Now I beg to say that that does not represent our views, and that, so far as the statement is concerned, it does not represent the views of the whole body of procurators in Scotland.

7443. *Mr. Baxter.*—You are under a misapprehension. The representation made to the Commission was, that it represented the opinion of the General Council?—I merely state what my understanding was. Of course what was said will speak for itself. I produce an excerpt from a meeting of the Society of the Solicitors of Elgin, holden on the 9th January 1869, at which the statement of Mr. M'Neel Caird was read. 'Mr. Cameron moved that the meeting approve generally of the statement read to the Law Commission by Mr. M'Neel Caird, with some important exceptions, viz.: 1. That the proposed appeal court is highly objectionable; that the office of Sheriff-depute should be abolished; and that the appeal should be made by reclaiming petition and answers submitted to the resident Sheriff in the first instance, from whom, after reconsidering his own judgment, there should be an appeal to the Lord Ordinary in the same way as there is to the Sheriff-depute at present. 2. That there should be no restriction in the jurisdiction of the Sheriff Courts, the litigants being the best judges of the courts they wish to resort to. 3. That the small juries proposed for the Sheriff Courts would be objectionable and mischievous.'

7444. *The Chairman.*—Was that the unanimous resolution of your body?—The secretary's letter to

James Jameson.

me, sending me the minute, says that Mr. Cameron's motion was unanimously agreed to, and adds, 'I may mention that Mr. Cooper, Mr. Murdoch, and myself were in favour of an appeal within the Sheriff Court—in fact, to retain the office of the double Sheriffs; but we did not divide the meeting.'

7445. How numerous was the meeting?—I cannot say, as I was not present at it. I was in Edinburgh at the time.

7446. *Mr. Adam.*—How many members are there in your Society?—I cannot say; but between 25 and 30.

7447. *The Chairman.*—You say the suggestion as to an appeal made by Mr. M'Neel Caird was objectionable to you?—Yes.

7448. What did you understand to be that suggestion?—Mr. M'Neel Caird, as I understand, made this proposition: 'The preponderant opinion in our body is in favour of appeal courts of two Sheriffs. Our General Council, after much discussion, came unanimously to the conclusion that such a court would be a great improvement on the present system.'

7449. *Mr. Baxter.*—That is the opinion of the General Council?—Well, we dissent from that; and I dissent personally from it very much.

7450. Instead of that, would you have a direct appeal to the Court of Session?—No; I shall explain our views a little more fully than is done in the minute. The Sheriff-principal, I may say, is really only an appeal judge at present; and instead of having the Sheriff-principal an appeal judge, we would propose that, in cases under £25, there should be an appeal by reclaiming petition and answers prepared by the local practitioners, and sent from the local Sheriff-clerk's office to the Lords Ordinary in Edinburgh, the Lords Ordinary to consider the reclaiming petition and the answers, and to dispose of the case by a written interlocutor, which shall be sent down to the Sheriff-clerk's office in the county, and there promulgated. That is in cases below £25; and in these cases, of course, under the present law,—and I don't suppose it is presumed that there will be any power to appeal further in these cases,—that would end the litigation; the judgment of the Lord Ordinary promulgated in the Sheriff Court, and coming in place of the Sheriff as an appeal judge.

7451. *The Chairman.*—Would you allow an answer to that petition?—Yes; I would allow an answer to be given in by the opposite agent in the Sheriff Court within a certain time.

7452. Would you allow counsel to be heard by the Lord Ordinary?—I would not on any account, unless the parties asked it. If they asked it, they are the best judges of their own interests, and they are entitled to have it. In cases above £25 I would have the same procedure, with this addition, that after the decision by the Lord Ordinary, the parties, or either of them, might appeal the case, as they can do at present, to the Inner House to have a judgment.

7453. *Mr. Adam.*—Would you allow counsel to be heard before the Lord Ordinary in cases above £25?—No, certainly not, unless the parties wish it. I would exclude counsel by statute from being heard unless the parties wish it; but if parties wish it, there is no reason why counsel should not be heard.

7454. *Mr. Baxter.*—Is not your proposal just a direct appeal from the Sheriff to the Court of Session?—I don't see that. We still hold that it is a local Sheriff Court process. We would prevent the Lord Ordinary from doing anything more than advising the case here, and the judgment would be promulgated in the Sheriff Court in the same way as it is promulgated at present when it comes back from the Sheriff residing in Edinburgh.

7455. *The Chairman.*—In regard to other classes of cases—consistorial cases, bankruptcy cases, and so forth—have you any suggestion to offer?—With reference to the office of Sheriff, I was going to call the attention of the Commissioners to some previous reports of Law Commissions, in which the desirability of the Sheriff being a resident judge was put forward. For instance, in the report of the Commission in 1818, the Commissioners said: 'For these, among other reasons, although we consider it to be clearly incumbent on every Sheriff-depute to give personal attendance within his Sheriffdom during some adequate period of every year, and that the functions of the office cannot be properly discharged if he does not from time to time, and as occasion may require, visit the seat of his jurisdiction and reside within its bounds, it appears to us (chiefly from the difficulty of establishing a general rule which would be attended with utility) that any positive enactment respecting the period of residence is a matter of very doubtful expediency.' That body reported in these terms in 1818. But, notwithstanding that report, the law requiring the Sheriff to reside four months within his jurisdiction, which was enacted at the original institution of the office in 1745 or 1746, still stood. In 1837, the next Commission on the Sheriff Courts say in their report, as to the constitution of Sheriff Courts, that the 'chief question which has come under our consideration has been, whether the office of Sheriff should be held by an advocate resident either constantly or during the usual term of the court within his county; or whether it should be filled, as it has been for many years past, by an advocate continuing his practice before the Supreme Court.' And they reported in favour of the latter alternative, and the reasons for their so reporting are given in these terms: They say that a Sheriff resident and continuing his practice in the Supreme Court, combines with the local resident judge 'a ready and unexpensive application of the higher judicial talents and knowledge of men of eminence in the law, removed from local influence, and familiar with the administration of justice in the Supreme Court.' They also say, 'When it is further taken into view that the principal judge is a practising barrister in the Supreme Court; that he may be and often is at the head of his profession, and may justly look forward to the highest judicial stations; that these advantages are communicated to his substitute, the resident judge, by the constant intercourse that subsists between them, and by the sense of responsibility and the other well-known consequences of their mutual relation to each other,—we cannot doubt that the satisfaction which is actually produced by the operation of this system is as well founded as we believe it to be general.' Now under that report the old law of 1745 or 1746, rendering it necessary for a Sheriff to reside four months in his county, was changed, and it was enacted by the second section of the Act of 1839, 'That every Sheriff-depute shall attend personally within his Sheriffdom upon all necessary and proper occasions, and shall, unless prevented by indisposition or other necessary cause of absence arising from his official duties,' hold a certain specified number of courts in each year. The law stood on that footing until the Act of 1853, when all personal attendance appears to have been dispensed with, and it was only necessary that the Sheriff should come down and hold so many sittings in the year. The section is in these terms—section 46: 'Every Sheriff shall, unless prevented by indisposition or other unavoidable cause, hold annually in his county sittings for the discharge of the judicial business of the county,' in terms of the provisions there laid down. So that the present law as it stands is an innovation, and is inconsistent with the old law requiring the Sheriff to reside and to do work personally in the county; and it was an innovation which, I believe, the Legislature did not intend, because it was not brought under their notice in the report of the old Commission. From the returns made to Parliament I have prepared abstracts showing the amount of business actually performed by the Sheriffs and the Sheriffs-substitute in each county for the different kinds of business throughout the year.

7456. *Mr. Baxter.*—For what year?—The returns are for 1861, 1862, and 1863, and they were ordered by the House of Commons on an address from Sir William Dunbar. There are no summations in these returns, and they don't show what amount of business was done—I mean they don't show the totals.

7457. *The Chairman.*—We have an abstract prepared by a committee of Sheriff-substitutes?—I am not sure that the abstract of the Sheriff-substitutes is right.

7458. *Mr. Baxter.*—Have you taken considerable pains upon your abstract?—I have: it cost me a fortnight's labour.

7459. *Mr. Adam.*—You say you do not think the abstracts of the Sheriff-substitutes right?—No; I cannot get it to agree with mine; but, possibly, it is mine that is wrong. Another consideration which, I think, calls for the abolition of the double Sheriffship is that, generally speaking, I don't think the Court of Session produces men able to give judges to the Sheriffs and the Court of Session itself. I think there is a scarcity of men at the Scotch bar; with all deference to the learned body, I think there is not a sufficient supply of raw material to give the necessary number of judges having the proper qualifications.

7460. Supposing you could not have that appeal which you propose to the Lord Ordinary, would you prefer the present system to that of two appeal judges, such as has been suggested?—Yes. I don't see how the two judges would work; and, besides, why not make two new Lords Ordinary instead of two intermediate judges? It would be just going back to the old system, which was so much condemned, of having Admiralty Courts and little intermediate courts, which have been all abolished, and the whole jurisdiction merged in the Court of Session.

7461. Then you would prefer the present system to that of an ambulatory court, with two judges to do the work?—I think that ambulatory court a foolish idea, with all deference to the gentlemen who started it.

7462. Is that the opinion of your body?—I may state that, personally, I am rather in advance of our body in these things. They don't go so far as I go, and as many others of my profession go; but they are clearly of opinion, as you will see from the minute I have read, against the two ambulatory judges going about the country hearing appeals: they would not have the status of judges of the Court of Session, and they would not have the status which the Sheriff has, being the judge of a particular county. I don't think the public would look up to them or reverence them; and I don't think the practitioners would care anything about them. I think we would rather go to the Court of Session.

7463. *Mr. Baxter.*—Do you not think an appeal to them would be much cheaper than an appeal to the Court of Session?—No; I don't think it would.

7464. Why?—Because I don't see how you can appeal to two Sheriffs with written pleadings. I can conceive one man considering a written paper; but I cannot see how two could do so without a multiplication of copies of the pleadings.

7465. Would you not have oral pleadings?—A great deal is said about that in the Sheriff Court Act of 1853; and no doubt there are exceptional men at the bar of the Sheriff Court who are good pleaders. It is well known that in Glasgow there are some of the procurators who have set themselves out to plead cases in the Sheriff Court; but the great body of the Sheriff Court practitioners are not educated as speakers, and not expected to be pleaders, though many of them are so.

7466. You are not in favour of oral pleadings?—I am not, for many reasons. For instance, in an oral pleading there is great danger that it might be prepared in a slovenly manner. But laying that out of view, take the case of a well-prepared and well-got-up debate at an oral hearing before two gentlemen, coming round as proposed: you are asked a question; they may be clever judges, and they may anticipate you in your arguments; they may do what Lord Bacon said was a thing that should not be done—they may put posing questions to a person, attempting to put him out in his argument; and the best men get confused in these circumstances, things go out of their heads, and a man cannot state his argument so well as in a well-considered written pleading, which will stand reading and re-reading. That is my reason for disapproving of oral debates. I think an argument is best stated when it is stated in writing.

7467. *The Chairman.*—Do you think as many cases as are now appealed to the Sheriff would be appealed to the Lord Ordinary on your system?—Yes; I am decidedly of that opinion. As long as a Scotchman has a chance at law, he won't give it up.

7468. Right or wrong?—Right or wrong.

7469. How many appeals does the Sheriff of Elgin dispose of?—I cannot say; but I am right in saying that there is not a case decided on the merits by the Sheriff-substitute, which does not as a rule go under review to the Sheriff-principal, and I may state that we have great satisfaction in the appeals.

7470. In cases of appeals against judgment on preliminary defences, or disposing of questions of admissibility of evidence or the like, would you have the appeal equally to the Lord Ordinary?—Yes.

7471. And that by a reclaiming petition?—Yes.

7472. And answers?—And answers.

7473. Sent up to the Lord Ordinary to be by him considered?—Yes; I would not change the system. I think it is a good system, and I think the advice of the Lord Ordinary, or any superior judge, at a preliminary stage of a case is of great service to the parties, because a case is looked at in different views by different minds.

7474. Would you apply that system to Glasgow and to Edinburgh, where there are resident Sheriffs?—I don't see why there should be any exception made of Glasgow or Edinburgh; but if there are good grounds for an exception, of course the exception should be allowed.

7475. Have you considered whether the Lords Ordinary would be able to overtake all the appeals from the various sheriffdoms in Scotland in that way?—I have not considered that question; but I think there is an easy answer to it. If there are more Lords Ordinary required, it is easier getting two or three additional Lords Ordinary than eight or ten Sheriffs.

7476. When the Lord Ordinary has announced a judgment, or if he thinks that further argument is necessary, how would you have him obtain that further argument?—Under our present Act of Sederunt of 1839, it is quite competent for the Sheriffs in any case, where they consider further argument necessary, to order minutes of debate.

7477. Do you propose that the Lord Ordinary should have that power?—Certainly.

7478. And that the future argument ought to be in minutes of debate?—Yes.

7479. Would you allow these minutes of debate to be prepared by counsel?—I would leave that in the option of the parties. If they thought counsel preparing the minutes of debate would be a better course than the Sheriff Court procurators doing it, and are able to pay, I would allow it to be done.

7480. Either party might take counsel as he chose, whether the other party had counsel or not?—Yes; I would leave the parties to manage their own cases, and give them the greatest liberty. They are the best judges of what is best for their own interests.

7481. When the case came to the Inner House, it would come as a case now comes from the Lord Ordinary to the Inner House?—Just so.

7482. And counsel would be heard upon it?—Yes.

7483. Suppose the Inner House, when the case comes to them, desire to have oral argument?—By that time, however, it is a Court of Session process.

7484. And that argument would be by counsel?—Of course it is a Court of Session process, and it must then be managed under their rules.

7485. You would hold it to be a Sheriff Court process till it passed from the Lord Ordinary to the Inner House?—Yes, by a formal appeal taken in the Sheriff Court by either of the parties to the Court of Session.

7486. Then the Lord Ordinary, in fact, would be a Sheriff?—He would be something better, I hope, than a Sheriff.

7487. He would be a judge in the Sheriff Court?—He would be a judge in the Supreme Court administrating justice in the Sheriff Court.

7488. You have some precedent for that kind of

James Jameson.

thing in the circuit appeals?—Yes; which I am sorry to say there are not so many of, as there should be.

7489. The judge on circuit can hear cases of appeal to him there from the Sheriff Court, and pronounce a judgment, which receives effect in the Sheriff Court?—Yes.

7490. *Mr. Shand.*—Do you propose that the right of appeal to the Lord Ordinary should remain at each of the stages at which appeal is now competent?—Yes, I think so.

7491. So that you might have, in the course of a case, five or six different appeals to the Lord Ordinary in the Court of Session, with written argument?—Yes; my own experience is, that if I don't think I have a good dilatory defence, and it is disposed of against me, I don't go further with it. Then in regard to an interlocutor sisting process, I don't remember any appeal as to that in my practice, and I have a very large Sheriff Court practice. As to an interlocutor allowing proof, that is the turning-point where we take an appeal if we have a question of relevancy to discuss. We sometimes take an appeal there; but the tendency of Sheriff Court litigation is to have the proof in all cases. Whether right or wrong, let the proof be led, and the whole light that can be got thrown in.

7492. *The Chairman.*—You think the tendency is to let the facts be ascertained first?—Yes; but don't assume relevancy till we see the facts.

7493. *Mr. Adam.*—You said that in your court there was an appeal to the Sheriff-principal in almost every case on final judgment?—Yes.

7494. To what do you attribute that frequency of appeals?—In my own experience I have seen that when I considered I had got a good and sound judgment of the Sheriff-substitute against me, it did not convince my client, and I have seen the Sheriff take the view that my client took of it. When we get instructions from our client, it is understood that we shall do all we can for him; and if there was an appeal to a third Sheriff in the Sheriff Court, we would take it as long as our instructions were not recalled, and we would be answerable in damages if we did not do so, as I have found to my cost.

7495. *The Chairman.*—You say that a Scotchman will not give in as long as he has a chance?—Yes, that is my feeling.

7496. Are there many judgments of the Sheriff brought to the Court of Session?—No, because the agent in the Sheriff Court has then no great interest in the case.

7497. But if the party resolves not to give in as long as he has a chance?—He is generally amenable to the advice of his agents. An agent has no interest in advising an advocation to the Court of Session now.

7498. If the suggestion that you propose were adopted—having reclaiming petition and answers—the agents would have an interest?—They might or they might not. The agent would just have the same interest that he has at present in appealing to the Sheriff; but I sink the question of interest altogether. If it is not for the benefit of the country and the public it should not be carried out.

7499. *Mr. Adam.*—Perhaps the cheapness of the appeal to the Sheriff-principal leads to appeals?—I don't think it is so cheap as people think. I have got £8 for drawing a reclaiming petition, and I consider that a reclaiming petition should never be done under £5.

7500. *Mr. Shand.*—Do you mean at each stage of a case?—No, I mean on the merits, when the whole case comes up. A short note of a page or two is all that is necessary at preliminary appeals.

7501. You say there have been very few advocations from your court?—Very few. It is a seven days' wonder when an advocation takes place.

7502. Then I suppose the judgments are very satisfactory as matters at present stand?—Yes. The last advocation from the Sheriff Court was in a case of mine, in which both the Sheriff-substitute's judgment and that of the Sheriff was reversed.

7503. *The Chairman.*—I think the county of Banff is within the same sheriffdom?—Yes, the same Sheriff administers justice in the county of Banff also.

7504. And he has a Sheriff-substitute also?—Yes, at Banff.

7505. *Mr. Adam.*—There is an appeal in cases between £12 and £25 to the Circuit Court?—It is a question whether there is or not. I think that is taken away by our last Sheriff Court Act, and there has been no Sheriff Court procurator bold enough to try it.

7506. *The Chairman.*—Have you any suggestion to make as to the jurisdiction of the Sheriff?—With reference to the jurisdiction of the Sheriff Court in civil matters, I don't see any reason why the Sheriff should not have as extensive a jurisdiction as the Court of Session. The Sheriff had the jurisdiction apparently before the institution of the Court of Session, as is stated by Erskine, and it was only after the Court of Session was established that the cases were appropriated to the Court of Session from their importance or their intricacy; but the old jurisdiction evidently was that the Sheriff was the competent judge in any cause of any amount, and of any kind, and I don't see why this should not be given back. As far as I am aware, the Sheriff Court has had no literature, and there has been no systematic examination of the Sheriff Court records; and my impression and opinion is, that if these records were examined, it would be found that the Sheriffs exercised their ancient jurisdiction down to a much later date than is generally supposed. I have here an excerpt which I have got made from the Sheriff Court books of Elgin: 'The Sheriff Court of the sheriffdom of Elgin and Nairn, holden within the Tolbooth of Elgin, the third day of November 1654, Mr. John Hay, Sheriff-depute.' It was an action of divorce at the instance of a man against his wife on the ground that she was 'ane creature called a hermaphrodite, and unfit for the marriage bed.' The Sheriff held the court, and tried the cause in the same form apparently as such a cause would now take, and he pronounced decreet; and I am inclined to believe that if examination was made of the Sheriff Court records, it would be found that the Sheriffs of Scotland had exercised a higher jurisdiction down to a later period than is generally supposed. I don't see why the Sheriff should not have power also to appoint factors *loco tutoris* and other administrators, and should have equal jurisdiction under the Trusts Act and the Conjugal Rights Act. I have known cases of great hardship where parties had to go to the Court of Session with reference to small heritable property, worth £100 or £200. The matter was done as cheaply as it could be done under the existing state of the law; but it was done at the expense of double agency, because we had to employ an Edinburgh agent. That is a hardship which the public suffer under.

7507. You would have actions of declarator of marriage in the Sheriff Court?—Yes; I don't see why they should not. Very often there are poor people in the predicament of not knowing whether they are married or not, or wishing to be divorced. There is a denial of justice to these persons at present by their being compelled to go to the Court of Session, because it is impossible for them to go there. Within the last two months a labouring man called upon me in Elgin. His wife ran away from him two or three years ago with a travelling tinker. He wished to be divorced from her. I asked him if he had money. He said he might raise £4 or £5; but I told him that unless he could raise £20 he could not get a divorce, as it would take that sum to prove the facts before the Lord Ordinary. Now that is a case where a man suffers from his poverty, and that should not exist in this country.

7508. Would he not have to collect his witnesses at Elgin, if an action of divorce was competent in the Sheriff Court?—The witnesses are all at Elgin; but even if they were in the most remote parts of Elginshire, they would come to Elgin in a day, and they would come from good-neighbourhood.

7509. How would you regulate the jurisdiction, supposing the wife was out of the sheriffdom?—Of course these are questions of jurisdiction which require to be

regulated. These questions arise between the English and Scotch courts; but each case must depend upon itself. I would give the facility to as many as possible; and if there are exceptional cases of hardship, they must just suffer the hardship. We cannot provide for everybody any more than the Court of Session can.

7510. But do you propose any extension of territorial jurisdiction, or of reach of the arm of the Sheriff, in reference to such cases?—No, I don't think so.

7511. The man must go where the recreant wife is to be found?—Yes; and she is very possibly in the next Sheriffdom of Nairn. The man could have found the woman there, in the case to which I have referred, living with the tinker.

7512. Have you anything to say in reference to criminal matters?—I don't see why the Sheriff's jurisdiction should not be extended to all criminal matters, excepting pleas of the Crown.

7513. *Mr. Baxter.*—Do you except robbery?—I would say the pleas of the Crown, in order to get a well-known criterion.

7514. *The Chairman.*—Have you anything to say in regard to procedure?—In regard to the writs, pleading, and procedure, including the investigation of facts in civil matters, my opinions are shortly these: We have at present, as it were, three Acts of Parliament under which the great amount of business in the Sheriff Court is done. We have the Small Debt, the Act of 1853, and a special and peculiar Act, called the Certain Debts Recovery Act. All these have different forms of procedure. The writs by which the cases are commenced in court are different in each case, and the procedure following on these writs is different. I think these could all be simplified. I think there should only be one court in the Sheriff Court, as in the Court of Session; and that all claims for debt, or any demand, should come into the Sheriff Court by one form of writ. Let it be as short and as simple as possible; and after it comes in the court,—if it is under £12, which is the extent of our small debt jurisdiction,—let the case be called and determined, in terms of the Small Debt Act. If it is above £12, or any other sum that may be thought should be the extent of the small debt jurisdiction—though I think £12 a very nice and proper limit—let it be disposed of by record and answer, much the same as in the ordinary court now.

7515. Would you make a note of the reply?—I think it is placing the judge in an invidious position, to ask him to take down the pleadings of the parties.

7516. Would you have condescendence and answers?—Yes; just a statement and answer after the case is called, and the defence is stated in court orally. The Sheriff gets a notion of the defence from its being stated orally, and he orders condescendence and answer; and let the case be disposed of in the same way as is done at present. But there should be simplicity of that kind introduced. There is no reason for having three different writs to bring a money claim into court.

7517. Do you speak of money claims entirely?—Money claims or demands.

7518. *Lord Barcaple.*—Would you have all these classes of cases to come into the same roll?—Yes; in the same way as a case in the Court of Session, of £25 or £500, is in the same roll.

7519. But would you have the small debt cases under £12 to abide the course of the roll?—That is a peculiarity in the small debt jurisdiction which is not to be found in any other civil jurisdiction in Scotland, that the diets are peremptory in small debt cases. They are not peremptory in other cases. If the parties appear on the day of the court, there is just the same order of procedure as at present.

7520. But the case that is before a small debt case might be long, and involve a good deal of time and consideration. Would you have the small debt case to wait till that longer one is disposed of?—There is no necessity for that. Suppose my plan were adopted, the Sheriff-clerk would be applied to for a summons to-day, and in Elgin the court day would be Wednesday week; and I shall suppose there are 20 summonses issued for that day, and 10 of these are for sums under £12. The parties appear, and a proof is led, and the cases are disposed of. Ten of the cases are above £12, and the Sheriff makes an order for condescendence and answers, and the cases go to enrolment. These cases would then go on a separate court day.

7521. They would then go to some other roll?—They would go to a long roll.

7522. *The Chairman.*—Would you call the small debt cases first?—Yes.

7523. Or on a different day?—No; I would have them all the same day.

7524. *Lord Barcaple.*—Your answer, I think, was that you would call the small debt cases along with the other cases in the order in which they were issued?—Yes.

7525. And you think that would not lead to delay, because, in the other cases, there would be merely some order for record or further procedure, and not a disposal of the case?—Unless the parties wish to take the judgment of the Sheriff without written pleading at all; and I would give them that option. The advantage of that would be that litigants would be able to get an easy and inexpensive decree in absence, if that was all that was necessary; and if they both chose to accept the sitting Sheriff's judgment as final, they have only to say so, and he might dispose of a case of £500 himself in the Small Debt Court by a prorogated jurisdiction. There is a sort of power of that kind in the present Sheriff Court Act, but it is not very often exercised. But that would enable decrees in absence for any amount to be obtained at absolutely no expense.

7526. *The Chairman.*—Would you have finality in any class of cases on the Sheriff's judgment, or should they be all open to appeal?—In regard to that I stated my views before. I would not interfere with the present sums, appealable and not appealable. I would have the present regulations on that point, unless the parties chose to state to the Sheriff that they would accept his judgment, and then his judgment would be more of the nature of a reference.

7527. *Mr. Shand.*—The present system of having all the small debt cases together works very well?—Very well.

7528. Don't you think it would be desirable to keep up that?—Yes; as to these matters of detail I have no very obstinate or decided opinion. I am quite prepared to accept anything, if a man proposes a better thing, or even a less thing, if it is an improvement. With reference to the procedure in civil cases, I wish to bring under the notice of the Commission the fees payable to the Sheriff-clerk, particularly in small debt cases. These fees are, of course, payable to the Crown; they are not payments to the Sheriff-clerk himself.

7529. *The Chairman.*—He is paid by salary?—Yes, I only know one Sheriff-clerk in the north of Scotland who is paid by fees, and that is the Sheriff-clerk of Nairnshire, which is a very small county. But, generally speaking, the Sheriff-clerk has no interest in the fees. When the Small Debt Act was introduced, the great object in providing the fees payable was to recompense the Sheriff-clerk for his trouble, and to make up for the loss of business he would have in consequence of the introduction of the Small Debt Court; but there is no reason for that now. The fees go into the Treasury; and the sum which goes into the Treasury is nothing to speak of to the revenue of the country. It is of the nature of a tax on justice, and should be abolished. The ordinary payment in a small debt case at present is 2s. 1d. before you get out the summons. The average value of small debt cases over all Scotland amounts to about £3, 10s., from a calculation I have made. After the summons is taken out and returned, there is another 1s. payable to the Sheriff-clerk before you can get decreet. That is 3s. 1d. paid to the Sheriff-clerk, which is about 5 per cent. on an average on the amount sued for. A great number of the people who take out small debt summonses are of the poorest classes in the country, and they cannot afford to pay 5 per cent. to the Sheriff-clerk, for they have to pay officers' fees and other things. It is therefore a tax which should be taken off in my opinion. It is a hardship to the public; and as a source of revenue, it is of

James Jameson.

little moment. I have nothing more to say in regard to civil matters.

7530. *Mr. Booth.*—Why do you say that the fees paid to the Sheriff-clerk is of the nature of a tax on justice? Do not the fees paid to the superior courts stand in the same position?—They are liable to the same objection. There should be no fees at all. I think they are wrong in principle. I don't suppose that the revenue derived from all the fees in the various courts of law amounts to £15,000 or £16,000 a year. But in the Sheriff Court it is a mere bagatelle. I suppose the small debt fees collected in the Sheriff Court at Elgin are about £150 a year; but I speak without book or authority.

7531. *Mr. Shand.*—Have you any idea how much is paid as fees in small debt cases in Glasgow alone?—I cannot say. I know it is a large sum. In 1863, 68,000 small debt cases were decided in Scotland, and 2s. 1d. on each comes to a large sum.

7532. *The Chairman.*—The Sheriff-clerks are now paid by Government,—by salaries?—Yes.

7533. And the fees are paid into Exchequer?—Yes.

7534. As some compensation or remuneration to the Government for paying the salaries which they have undertaken to pay?—Possibly it may be put in that way.

7535. *Mr. Booth.*—Are you not aware that it is the fact that the courts in England are self-supporting, or nearly so?—I have no positive knowledge of the courts of England. If it is so, I think the litigants are taxed too heavily. I consider that any tax in courts of justice operates as a tax which should not be exacted, because, as a rule, it is poor people who apply to courts of justice, in the Small Debt Courts more particularly.

7536. *The Chairman.*—You have already spoken to the matter of review in civil causes?—Yes; but I was going to say something as to the investigation of facts in criminal cases. I think there are serious objections to the present system, and that it should be revised and re-adjusted. In criminal matters, as at present conducted in Scotland, we are told the Sheriff is the superior official taking charge of the King's peace, and all criminal matters are under his control and jurisdiction. He is, therefore, the person who sets in force an accusation against anybody accused of a crime, in the shape of getting him taken before him for examination. He is examined, we shall say, before the Sheriff-substitute, and afterwards a precognition is taken, and that precognition is conducted in private. During the time it is being conducted the accused person has no power to employ an agent or to call witnesses, and he is not allowed any intercourse with the world; he is locked up for further examination till after the precognition is taken; the Sheriff, on the consideration of it, grants his warrant for commitment in order to trial, or he may not grant warrant, and then, of course, the man is liberated. But suppose he does grant the warrant in order to try him, the man is committed to prison. He can now be bailed. That involves an application to the Sheriff—the same judge who committed him; an application for bail is presented in writing, and the Sheriff finds whether the crime is bailable or not. If it is a bailable crime, he fixes the amount of the bail; if it is not a bailable crime, he refuses the petition, and the man has his redress otherwise. But suppose it is bailable, the bail is fixed, and the prisoner finds caution or signs a bail bond to the satisfaction of the clerk of the court, and gets liberation from jail. After he is liberated, we shall suppose that the cause of committal was well-founded, and that he is afterwards tried before the same Sheriff. He may be tried summarily or by a jury; and the same Sheriff who committed him is now asked to review the same evidence which he had before him when he committed him, and he is asked to pronounce the sentence of the law against him. Now I think it is a great objection that criminals, when they are first apprehended, have no power to have the privilege of employing an agent and of producing witnesses. I therefore say that the system of declaration, as it at present exists in Scotland, and as it has existed since there was a criminal system in Scotland, should now be altered; I think the system of private precognition should be altered, and that all criminal accusations should take place before a magistrate sitting in open court, hearing the evidence, with the witnesses cross-examined, and the prisoner having power to call witnesses in support of his defence, if that is thought proper. Under the present system I believe there is great injustice done. I have prepared a return from the prison of Elgin; and I only take it because I am familiar with it, and not because the people of Elgin or the county are greater sinners than other counties in Scotland, but I believe it is a fair example;—I have a return made by the jailer to me of the number of persons committed to the prison of Elgin under warrants of the Sheriff, and who were bailed, between 1st January 1868 and 1st January 1869, and there were 21 persons committed to the prison of Elgin by the Sheriff in order to trial, and who afterwards presented petitions and were bailed. Of these 21, 1 was found not guilty by the verdict of a jury; in 4 cases no further procedure was ordered; 1 was dismissed from the bar; 10 were fined in sums varying from 5s. to £2,—and of these I find several had been in jail for three, four, and in one case six days before being bailed. Now the mere fact that a man punished with a fine of 5s., or of an alternative of 3 days' imprisonment, or a fine of 10s., with an alternative of 6 days' imprisonment, or even a fine of 30s. or £2, with an alternative of 30 or 40 days' imprisonment—the mere fact that that man had previously suffered 4, 5, or 6 days' imprisonment before he could get out on bail, is, I think, a great hardship which should no longer be allowed to take place, because, after the law adjudicated on him, it declared that he was only liable in a pecuniary penalty, but still the law was the means of inflicting the term of imprisonment on him. Then bail is not procured without expense. The expense of preparing and procuring an order for bail in the Sheriff Court cannot be reckoned at less than from 30s. to £2. That is an additional hardship on a party wrongfully accused; and if he is acquitted by the verdict of a jury, he must be held to be wrongly accused. I have another return of parties imprisoned in Elgin prison, and liberated by order of Crown counsel, or acquitted, for the same year; and I find that there were 11 persons committed to the prison of Elgin. 9 of these cases were liberated by order of Crown counsel or by the Procurator-fiscal. In one of these cases the party was 72 days in jail before trial; she was tried before the Circuit Court of Justiciary at Inverness and was acquitted. In another case the party was 115 days in prison before being tried by the Circuit Court, and I don't know what became of him. Now I say these are cases of great hardship; and if the law were altered to the effect of allowing the accused to bring forward witnesses, they would have established their innocence, and need never have been committed to prison at all. Then I find that the country population is not, in this respect, treated in the same manner as the population in burghs and towns; for if a person, say in Edinburgh, commits a slight assault or breach of the peace, he is taken before the magistrates the next morning, and is sentenced to whatever the law thinks sufficient for the offence; but in the country, and places where there is no police administration, the party lies under this disadvantage, that if a Fiscal or Sheriff take it into their heads, they will not serve the man with a criminal libel calling on him to appear to be tried, but they will present a petition for his apprehension in order to his examination, and to his declaration being taken. That is done in many cases; and supposing it is done, the prisoner, a countryman, for a police assault that afterwards only infers a penalty of 10s. or 10 days' imprisonment, is hauled in this way before the Sheriff, and his declaration is taken, and all the equipage of the law is put in force against him as if he were the greatest criminal or the greatest murderer. I think that, in cases not inferring a jury trial, there should be no such thing as declaration or previous examination at all. The country population should be put on the same footing as the population of burghs and towns; and the magistrates of counties should

exercise their criminal jurisdiction in the same way by presenting a petition for citation, citing the party, and let him appear to be tried without any preliminary investigation, which at present is destructive of the comfort of the people.

7537. Do you mean tried by the Justices of the Peace?—By the Sheriff. I am speaking of the Sheriff Court.

7538. You think the country population should be brought to the Sheriff?—They are at present brought to the Sheriff, generally speaking, though not always; but they are liable to be apprehended, and a declaration taken from them, and to be committed for trial. But a person committing the same crime in a burgh or town would be hauled up before the magistrates the next day, or the same day, and would be sentenced at once, without the trouble, expense, annoyance, and degradation of being imprisoned before being tried; and there are many cases which don't infer imprisonment, though they may infer punishment by a pecuniary fine. I have prepared a return of the number of persons tried by the magistrates in Elgin and Forres, and committed for the year from 1st January 1868 to 1st January 1869; and I find that while the Sheriff of Elgin committed only 41 persons to the prison of Elgin, the magistrates of Elgin committed 50 persons, and the magistrates of Forres one person. The Justices of the Peace of the county of Elgin exercised jurisdiction in 75 cases, and there was not one of these persons imprisoned a day before he was sentenced; and there was not one of the 58 persons committed by the magistrates of Elgin, committed a day to jail before being sentenced. They were only committed after the law had declared their punishment. So that I think there is great room for improvement upon the administration of the criminal law in those matters which I have spoken of. In regard to the investigation of facts after a person is served with a libel, there is no reason why the Sheriff should not be the judge who tries them; but I would have no judge who examines a prisoner trying a prisoner, with a jury or otherwise. The judge may have gone wrong. He may have committed the prisoner on erroneous evidence; he may have the impression of that evidence weighing on his mind at the trial, and he cannot help being biassed against the prisoner if he has given a warrant of commitment against him, for it was his opinion that he was worthy of being committed.

7539. *Mr. Baxter.*—Do you say that in police cases which are brought from the country, it is the general practice to imprison the party, and not bring him up summarily before the court for trial?—In all cases—you may call them police cases—inferring not more than 60 days' imprisonment, or a fine of £10, it is not the general practice to do so, but the Sheriff has the power to do so, and very often does it. I don't say it is the general practice. I have produced a return from the prison of Elgin of persons who had been tried in that way, and who had suffered a previous imprisonment; and the Sheriff has the power of doing it.

7540. But is it the practice?—I speak of the county of Elgin; and I say it is the practice to examine people sometimes on declaration for police offences.

7541. Is it the general practice?—Do you mean the general practice in Scotland?

4542. No; I know the general practice—I mean the general practice in Elgin, that a party brought in by a constable for a police offence is put in prison before his trial?—I believe they are as often examined on declaration, and put in prison before trial, as they are tried at once.

7543. *Lord Barcaple.*—Do you know whether in those cases there is a report made by the Procurator-fiscal to the Crown Office before the trial is ordered?—I know this, that in cases where the Fiscal or the Sheriff thinks that a precognition should be taken, a precognition is taken; and in all these cases, generally speaking, the person is examined on declaration, and his declaration is sent up along with the precognition.

7544. My question was, whether in those cases of offences which ultimately are tried summarily, but where the party has been in prison, and a declaration has been taken, there has been a report to the Crown Office before a trial takes place?—No; not generally. It is only if the Fiscal thinks it necessary that he reports.

7545. You mean, that generally in those cases where the party has been in prison, and a declaration taken, the Fiscal does not report?—I know fiscal practice as well as other practice, and I know that if the Fiscal thinks the prisoner should be tried by a jury, or at the Circuit, he reports the case to the Crown Office. But if he thinks it a case that should be tried summarily, he tries it summarily by the Sheriff without reporting it.

7546. And in those cases which he so tries summarily upon his own judgment, does he generally take a declaration and have the party committed in the meantime to prison?—He may, or he may not, as he thinks proper.

7547. Which is the general mode in Elgin?—There are as many cases disposed of the one way as the other. For instance, 21 people were bailed in Elgin, and I find that 10 of them were fined in sums varying from 5s. to £2. Now these parties having been bailed, must have been committed in order to trial before they were bailed, and these are police offences.

7548. Can you say of your own knowledge that in all these cases where the parties were bailed, they had been in prison?—I can say so of my own knowledge from these returns.

7549. That in all these cases where the parties were bailed they had been in prison?—Yes; the returns show that, except in two cases.

7550. Then there were two cases in which bail was taken?—No, no bail was taken; they were tried at once.

7551. But in the cases where bail was taken, can you state of your own knowledge that in all these cases the parties had been in prison?—They had.

7552. *Mr. Shand.*—Surely it is very common to take bail immediately from a man without his entering the prison doors?—You cannot do that legally.

7553. Supposing the Sheriff signs a warrant for commitment, it may be done?—No. He must be sent to jail, and be served with a copy of the commitment by the jailer or the incarcerator.

7554. *Lord Barcaple.*—You so understand the law?—That is the law; there is no doubt about it. The party's name must be entered on the prison books.

7555. *Mr. Shand.*—In 99 cases out of 100 for petty offences, I suppose that is the course followed. The party is taken to prison, and, without any detention, he presents his application for bail?—Yes; and he has to get his agent, and all that sort of thing.

7556. I suppose the Sheriff-substitute does not grant commitment to prison unless the case has a somewhat serious aspect?—I don't suppose he does. He and the Fiscal have the management of that part of the business.

7557. But for petty offences?—I can only speak from the return. Here is a return of 21 persons committed to the prison of Elgin under warrants from the Sheriff, and they were bailed.

7558. *Lord Barcaple.*—But does that show you that these parties were in prison?—One was 6 days, one 4 days, and one 3 days in prison before they were bailed; and I have no doubt the same thing takes place throughout Scotland.

7559. *Mr. Shand.*—Are there not many cases where the prisoner is law-abiding, having his house in the neighbourhood, where the Sheriff-substitute allows the case to be adjourned without such a proceeding?—I know the Sheriff-substitute often does that; but there are cases in which he can hardly do that.

7560. Is that because of the apparent gravity of the charge?—Yes; and you don't know much about the men. They are from a distant part of the country, and you must enforce the law as you find it.

7561. Is it in that class of cases that the law is so enforced?—Yes.

7562. *The Chairman.*—In regard to review in civil matters, you have already stated your opinion?—Yes.

James Jameson.

As to review in criminal matters, I would suggest that there might be a power given to the prisoner to except to the judge's charge to the jury, and take the case by a bill of exceptions to the Court of Justiciary, and obtain the Court of Justiciary's opinion on the law laid down by the presiding judge to the jury.

7563. And if the exception is sustained on any point, that would be conclusive of the case?—Yes.

7564. There would be no further trial?—I would further suggest that the defences of all criminals should be paid by the Crown. If a prisoner is apprehended and punished, he is punished for the good of society. It is necessary, in order to apportion his punishment, that the whole truth should be disclosed to the judge, in order that the judge may administer the law and the proper amount of punishment. That can only be done by an efficient contradicter to the prosecutor. If the prisoner is accused, society has done the prisoner a harm in making him defend himself at his own cost, and the public should therefore pay for the cost of his defence, and it should be the best defence that could be procured.

7565. *Mr. Shand.*—That would lead to a good many protracted defences?—I have no doubt of it, and I have no doubt that there would not be so many convictions throughout Scotland.

7566. *Lord Barcaple.*—Would you have that to apply whether the defence was successful or unsuccessful?—If it is a sound principle, it should be applied throughout.

7567. *The Chairman.*—And whatever the rank of the party, and his ability to pay for himself?—There is possibly a difference there; but it is matter of principle, and does not matter whether the man is rich or poor. It is for the interest of society that he should be tried, and society should pay for it.

7568. *Lord Barcaple.*—Would you leave him to select his own law advisers?—I would leave him all freedom in that.

7569. *Mr. Harrison.*—Do you think that many persons are convicted unjustly in Scotland at present?—I believe that many are convicted who would not be convicted if they were properly defended.

7570. But do you think that they are convicted unjustly?—They are convicted according to law, and whatever is according to law cannot be said to be unjust; but I say that many persons are convicted who, if they were efficiently defended, would not be convicted.

7571. *The Chairman.*—Do you think that many innocent persons are convicted?—That is a difficult question. I never saw an innocent person convicted in my own experience; but it is difficult to say. I never investigated.

7572. But if innocent men are not convicted, do you think it would be a benefit to society that more guilty men should escape?—I think that if my plan were adopted, a guilty man's guilt would be better brought out, and the judge would see his guilt more clearly, and give him a more severe sentence. The innocence of the innocent man would also be brought out, and if less guilty than the other, he would get a less punishment. It is necessary to apportion the punishment. It should be a just punishment, and no just punishment can be apportioned if only one side of the question is represented to the judge.

7573. You think punishment would be better apportioned?—Yes, when it was due.

7574. But if innocent men are not now convicted, and there would be more acquittals, these would be acquittals of guilty parties. Would that be for the benefit of society?—That is a difficult question, and I could hardly answer it. It is more a question of metaphysics, and I am not in a position to say whether nnocent parties are convicted or not.

7575. *Mr. Murray.*—You give these views on general principles?—Yes.

7576. You don't think that any feeling generally exists in Scotland that innocent people are convicted?—I cannot speak as to Scotland; but I think it would be more conducive to justice if they were defended. A prisoner undefended is a very pitiable sight.

7577. *Lord Barcaple.*—Have you ever a prisoner undefended in your court?—There are prisoners undefended every day. I have seen a prisoner refuse to have an agent.

7578. Have you prisoners who are undefended, not in summary police cases, but other cases?—All the prisoners tried by jury are defended by an agent; but there are different degrees of excellence among agents. They have an agent, such as he is.

7579. *Mr. Shand.*—And in all cases of a higher class than police cases they are defended by agents?—Yes.

7580. *The Chairman.*—Are they agents employed by the party, or agents assigned to them by the court?—If the party does not employ an agent, an agent is assigned to him; but the rule in our court, when a party is to be tried by jury, is, that the jailer generally hands the libel to a poor's agent. We have two or three poor's agents.

7581. *Mr. Booth.*—Who pays that agent?—The agent pays himself out of the future profits of his profession. In England, I believe, under Mr. Russell Gurney's Act, the expenses of prosecutions and defences are paid by the public.

7582. *The Chairman.*—The prosecutions are differently conducted there?—Yes; but I understand that, under Mr. Russell Gurney's Criminal Procedure Act, the defence is paid for as well as the prosecution.

7583. Have you any suggestion to make with the view of diminishing the costs of litigation?—I think an easy appeal to the Court of Session, in the way I described by abolishing the double Sheriff, would tend to diminish the costs. I have no particular views about costs.

7584. Have you anything to say about the privileges of agents?—I think an agent, after being an agent for 10 years, should have the power of pleading before the highest court in Scotland, and should be eligible for the office of Sheriff.

7585. *Mr. Murray.*—I thought you proposed to abolish the principal Sheriff?—But there would still be a resident Sheriff.

7586. But a practitioner is eligible for the office of resident Sheriff at present?—Yes.

7587. And that is the Sheriff you propose to leave?—Yes; but he would not be eligible to plead before the Supreme Court of Session. Of course I am speaking of the Sheriffs as they exist at present.

7588. *The Chairman.*—At present country agents are eligible to be Sheriff-substitutes?—Yes.

7589. That requires no alteration?—No.

7590. Then you think that after a man has been 10 years a practitioner before any inferior court, he should be allowed to practise in any other court, inferior or supreme?—I think so; in any inferior court at all events.

7591. Do you mean in any other inferior court?—Yes; or to plead before the Supreme Court.

7592. As an agent?—No, as a counsel.

7593. *Mr. Shand.*—Is there any reason why, after pleading as a counsel for some time there, he should not also be qualified for the supreme bench?—No reason whatever, if he is fitted for it. Let the best man be elevated.

7594. And you would remove any restriction that might prevent that?—Decidedly. The best man will come to the surface, and if he has ability he should not be kept down by any restrictions.

7595. *The Chairman.*—It has been suggested to the Commission that it might be a proper thing that a local practitioner once admitted to practise, having been examined by a General Board, should be allowed to practise not only in the county in which he is settled, but in any other Sheriff Court, or in the Supreme Court as an agent, from the time he has so passed: do you approve of that?—Yes; I think the wider the basis is made, the more efficient will be the superstructure.

7596. Do you think there would be any inconvenience attending the conducting of causes before the Supreme Court by an agent resident at a distance?—I don't think they would attempt it. I am only speaking of my own feeling; and I know that I would never

attempt to conduct a case in the Supreme Court. I would send it to our Edinburgh agents.

7597. Have you anything further to suggest on that subject?—No.

7598. Are there any other points that you would like to mention?—No.

7599. Is there a Justice of the Peace Court held in your district?—Yes.

7600. Do the Justices sit in petty sessions in different parts of the county?—Yes.

7601. *Mr. Shand.*—Is it your opinion that the distinction between counsel and agent should be abolished?—Yes; and it is coming practically very much to that in England at the present day. I think there should be no such distinction.

7602. Do you think the law would benefit as much under such an arrangement as it does at present?—Yes, the public would be benefited; and what is for the public benefit must be for the advantage of the law.

7603. Do you think agents in that position would have the same opportunities and advantages for acquiring legal learning as at present?—Yes.

7604. *The Chairman.*—There was a system not unlike that in existence in Scotland at a remote period?—I don't know to what your Lordship alludes.

7605. Was there not a time when causes were conducted by counsel and their clerks?—I understand that, at the institution of the College of Justice, the advocates conducted their own cases.

7606. And their clerks acted as agents?—Yes.

7607. That system was changed?—Yes.

7608. You think the change has not been for the better?—Well, I think old things are sometimes better than new.

7609. And that among others?—That among others.

7610. Do you think the subdivision of duties has or has not tended to increase the knowledge and the character of members of the bar?—I don't put it upon that ground.

7611. But what is your opinion on that point?—I cannot offer an opinion upon that point.

7612. But if that subdivision has the effect of enabling each party to acquire greater dexterity in his own department, is that not an advantage to the public?—It is an advantage to the public, no doubt of it; but it may operate as a private disadvantage, because there may be two or three agents throughout Scotland peculiarly fitted for pleading before the Supreme Court, and unless they are members of the Scotch bar they are disqualified.

7613. You think it might operate severely upon two or three agents throughout the country; but that it is for the advantage of the public?—I think it would be for the advantage of the public if the profession were thrown open.

7614. I thought you stated it otherwise a little ago. You said the subdivision might be for the advantage of the public, but that it might be a disadvantage to two or three agents?—Yes.

7615. These persons might come to the bar, and display their talents there?—Yes.

7616. That is open to them now?—Yes.

7617. And some who have come from the other branch of the profession have showed great talent?—Yes.

7618. The Justices of the Peace hold courts throughout your county?—Yes.

7619. And quarter sessions?—Yes.

7620. Do they hear small debt cases?—No; the Sheriff small debt jurisdiction has practically extinguished the Justices' small debt jurisdiction in the Elgin district of the county; but in the Forres district the Justices hear small debt cases.

7621. What jurisdiction do they exercise?—I find that for the year ending 1st January 1869, there were 75 persons tried before the Justices of the Peace of Elgin. Of these, 45 were convicted under the Act 2 and 3 Will. IV. c. 68—the Day Poaching Act; 1 was tried under the Act 9 Geo. IV. c. 69—the Night Poaching Act; 16 were tried for not taking out the dog licences—(it was a special year for that); 2 were tried under the Act 25 and 26 Vict. c. 114, for the prevention of poaching; 2 for breaches of the Public House Act; 1 for illegal possession of game; 5 for contravention of the Customs Consolidation Act, by smuggling tobacco; 1 for contravention of the County Voters Act—a bellman who had torn down a notice from a church door; and 1 under the Mutiny Act.

7622. These are all under special statutes?—Yes.

7623. The Justices sit for the granting of licences?—Yes; they hold two half-yearly courts.

7624. Is the jurisdiction of the Justices satisfactorily exercised in Elgin?—I consider that it is very satisfactorily exercised.

7625. Do they exercise any criminal jurisdiction?—They do not generally exercise common law criminal jurisdiction. I have seen them sometimes, in a case of emergency, if the Sheriff was at circuit, examine a man, and commit him till the Sheriff came back.

7626. *Mr. Murray.*—Do you approve of leaving game cases with the Justices?—I think they are very good judges in game cases.

7627. *The Chairman.*—Is there a Commissary Court at Elgin?—Yes, for the commissariat of Elgin and Nairn. It is held at Elgin. It is one commissariat.

7628. Has it separate officials?—Yes, it has a separate clerk and separate record; but the judges are the same—the Sheriff and the Sheriff-substitute.

7629. Do you think that system of having separate records and separate clerks is a convenient and useful one?—Yes, very.

7630. *Mr. Murray.*—Why?—Because I think the jurisdiction is different altogether from that of the Sheriff Court.

7631. The judge is the same?—Yes; but the matters are different.

7632. If the judge is the same, why should not the clerk be the same?—Because it is a different kind of court altogether, and exercises a different kind of jurisdiction. The clerk must have special knowledge. He has to consider all the wills given in for confirmation.

7633. Does that objection not apply to almost every court?—Possibly it might.

7634. *Lord Barcaple.*—You say the clerk has to consider all the wills. Does he in point of fact go over each will, and make an examination of it?—Yes, he does.

7635. With reference to testing the correctness of the procedure adopted by the executors?—The title of the party claiming confirmation. The party claiming confirmation gives in an inventory, asking confirmation as executor, and it is the clerk's duty to go over the testament or testamentary writing produced to him, and to say whether that is a proper title for having the office of executor conferred on the party claiming it.

7636. The clerk undertakes that duty?—Yes.

7637. Is it not personally performed by the Commissary?—No. The writ afterwards issued runs in the name of the Commissary, but the clerk does the work.

7638. *Mr. Murray.*—If the clerk has any doubt he would go to the Commissary?—Yes; but the Commissary would not perhaps solve his doubt; it is the clerk that is responsible for it; and even though the Commissary might tell him to do it, he might not do it.

7639. Suppose the clerk refused confirmation to the executor, would the party applying not appeal to the Commissary?—No, he cannot.

7640. Do you mean that the clerk is the judge as to whether, if a party applies for confirmation, he is to get it or not?—Yes, the clerk is the responsible party.

7641. Is that practice confined to Elgin?—I don't think so.

7642. *Lord Barcaple.*—What is the party's remedy if the clerk refuses confirmation? There has been a petition presented, has there not?—No, they just give in the testamentary writing. I never saw the point arise.

7643. *Mr. Murray.*—But suppose the point did

James Jameson.

arise, it is surely the Commissary who is the judge whether the applicant is to be confirmed?—Well, he would present the petition to the Commissary very likely.

7644. And what would follow on that?—Very likely the Commissary would grant the warrant, and that would be a warrant of court.

7645. *Mr. Baxter.*—Does not the writ of confirmation run in the Commissary's name?—Yes.

7646. And he confirms the executor, and gives him power to intromit with the goods?—Yes.

7647. *Mr. Murray.*—Wherever there is an executor-dative, the proceedings must commence by petition?—There is no testament at all there, and the executor-dative presents his petition under a special Act of Parliament, and gets his decerniture. The Commissary is the judge, and gives the decerniture, and confirmation is issued by the clerk.

7648. Assuming there is a testament, but that there is a doubt in whose name confirmation should go out, is not the Commissary the judge?—The clerk says he has a doubt about it, and the clerk must then present a special application to the Commissary.

7649. But he ultimately gets the judgment of the Commissary?—Yes.

7650. *Mr. Shand.*—And as the Commissary is the judge in both classes of cases, the clerk has no responsibility except for mere administrative duty?—Possibly not.

7651. Then would it not be a convenient arrangement that that administrative duty should be vested in the Sheriff-clerk?—Yes; so far as that goes, there is no reason why it should not.

7652. *The Chairman.*—Do your burgh magistrates hold any court in Elgin?—They hold a Police Court.

7653. They hold no civil court?—No. The Sheriff Court has extinguished that.

7654. Do they hold the Police Court under a special Act of Parliament?—Yes, under the Lindsay Act.

7655. Does that work satisfactorily?—Yes, I think so.

7656. Have you a Dean of Guild in Elgin?—We have.

7657. Does he exercise any jurisdiction?—I have heard of it, but I have never seen any jurisdiction exercised by the Dean of Guild. It is done, however.

7658. He is one of the magistrates?—He is.

7659. Does he hold a regular, periodical court?—No, it is only on special applications presented to him.

7660. What are these applications about? Is a party entitled to build or pull down without communicating with the Dean of Guild?—Before the Lindsay Act was adopted, I believe that in Elgin, parties pulled down and built without reference to the Dean of Guild, they did not apply to him at all; but the Lindsay Act provides for the commissioners taking notice of these things. The only other matter in the Burgh Court is ejections.

7661. Is there much of that done?—Not much; perhaps one ejection in a year. A party applies to the magistrates for a warrant, after the tenant has been warned by chalking the door.

7662. That chalking is done by order of the magistrates?—Yes.

7663. Have you any Barony or Regality Courts?—We have a great many Barony Courts, that is to say Barony Bailies. We have Baron Bailies at Lhanbryde, Lossiemouth, Rothes, and other places. The reason of their existence is that, under the Local Roads Act, they have seats at the County Road Board.

7664. Do they exercise jurisdiction?—Not further than attending the County Road meetings, and as Commissioners of Supply. They exercise no jurisdiction.

SATURDAY, 23D JANUARY 1869.

Members present:—

LORD COLONSAY.
LORD JUSTICE-GENERAL.
LORD JUSTICE-CLERK.
LORD BARCAPLE.
E. S. GORDON, Esq., Q.C.
GEORGE SCLATER BOOTH, Esq.
A. R. CLARK, Esq.
DR. BARCLAY.
A. ORR EWING, Esq.
GEO. HARRISON, Esq.
JAMES ADAM, Esq.
A. B. SHAND, Esq.
T. G. MURRAY, Esq.
J. B. BAXTER, Esq.
ADAM PATERSON, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

Angus Turner.

ANGUS TURNER, Esq., examined.

7665. *The Chairman.*—You are town-clerk of Glasgow?—I am.

7666. You are also clerk to the Dean of Guild Court?—Clerk and assessor.

7667. You have been a long time clerk to the Corporation?—For nearly 40 years.

7668. At one period, I believe, there was a great deal of civil business transacted before the court of the magistrates of Glasgow?—A great deal,—more than in any court in Scotland at one period.

7669. *Dr. Barclay.*—And there was then very little in the Sheriff Court?—Very little.

7670. *The Chairman.*—There is not much business now in the court of the magistrates?—Very little. It is very much in abeyance since the passing of the Sheriff Court Act of 1838, by which the proceedings were very much abbreviated in all cases, for example, of citation, only one witness instead of two; and in the case of extracts, the long formal extracts of these days were abolished; and in fact the whole system was so abbreviated as, in point of fact, to disparage the Burgh Courts to so great an extent, that since that period one might almost say they have been gradually going into disuse, and there is very little business now in these courts. The contrast has been very great between the advantages conferred by the Act of 1838, and the pre-existing state of matters in the Burgh Courts.

7671. The same advantages have not been given in the Burgh Courts?—They have not. There is a power, in the Act of 1838, given to the Court of Session to apply the abbreviated forms to proceedings in the Burgh Courts. And I was myself the means of getting that power inserted in the House of Peers when the bill was passing through Parliament; but on a representation made to the judges, subsequent to the passing of that Act, by the late Mr Reddie, they were not disposed to make any change with reference to the Burgh Courts. The idea was, that the Burgh Courts should be gradually superseded in terms of the report that had been previously made by the Royal Commission in favour of the general and gradual supercession of these courts, and the judges did not

think it right to pass any Act of Sederunt, making the Sheriff Court Act of 1838 applicable to the Burgh Courts. Therefore, the Burgh Court is disparaged as it were, by the Act of 1838, as in contrast with the proceedings in the Sheriff Court under that Act.

7672. Is there a small amount of business conducted before the magistrates' court still?—Very little indeed.

7673. Is there any assessor who sits with them and considers these cases?—Yes; one of the town-clerks always sits as assessor when there is any business before the court; but there is very little business now before the ordinary Burgh Court.

7674. The gentleman whose name you mentioned—Mr. Reddie—was a very eminent judge?—Yes.

7675. He was a member of the bar, I think?—Yes.

7676. And a very distinguished man?—Very much so.

7677. In the Dean of Guild Court, of which you are the assessor, is there much business transacted?—A very considerable amount of business.

7678. Would you state generally the nature of that business?—I had occasion to make an epitome of the jurisdiction of that court for the Merchants' House in an inquiry which they were lately making, and I have that statement with me. The letter of Guildry is dated in 1605; and as to the constitution of the court, the Dean of Guild Court is composed of eight persons appointed yearly; viz., four merchants, whereof the Dean of Guild is one; and four craftsmen, all Guild brethren, who shall be men of good fame, knowledge, experience, care, and zeal to the common weal,—the most worthy men of both ranks. The lyners of court are appointed 'the next day after the Dean of Guild is chosen,' those of the merchant rank by the Dean of Guild and directors of the Merchants' House, and those of the crafts rank 'by the Deacon Convener and deacons of crafts and their assistants.'

7679. *Lord Barcaple.*—Do these persons require to be masons or wrights?—Not further than being members of the Trades' House.

7680. *Mr. Orr Ewing.*—They are always master tradesmen, joiners, or masons?—That is practically the case, but there is no legal qualification attached, except that they must be members, in the case of the merchant rank, of the Merchants' House, and in the case of the craftsmen, of the Trades' House. The Dean of Guild Court is peculiar to royal burghs, and exercises a jurisdiction similar to that belonging in ancient times to the Roman ÆDILE. Its jurisdiction is privative—that is, exclusive of any other jurisdiction, in as far as regards the buildings within the burgh which forms its peculiar territory. To this court belongs the control of all buildings within the royalty or municipal jurisdiction, the prevention of obstructions in the street, the removal of old and ruinous tenements, and in general all matters that have any connection with buildings. It is especially the Dean of Guild's duty to take care that buildings within burgh be agreeable to law—neither encroaching on private property nor on the public streets or passages, and that houses in danger of falling be taken down, and rebuilt if necessary under judicial security. It is his duty also to line or define the boundaries of properties, and to settle questions of possession in matters of vicinage or rights to build, where there is some question of structure in dispute. He has power to decern for penalties and expenses, and in certain instances to grant warrant of imprisonment. The jurisdiction of the Sheriff has been extended to similar questions in counties, by the Act 1 and 2 Vict. cap. 119, sec. 15; but the Sheriff possesses no cumulative jurisdiction with the Dean of Guild Court within burgh, unless the question involves a right of servitude, and certain other prescribed cases. Neither does the Dean of Guild's jurisdiction depend in any measure on the Court of the Burgh, or, as it is commonly called, the Bailie Court. He has a council of his own to assist him, and has also the benefit of the advice of the legal assessors of the burgh; but the judgments must be subscribed by himself, and are subject to the review of the Court of Session. The proceedings of the Dean of Guild Court, and its functions as presently exercised, are in many cases regulated by the Police Act for Glasgow, 29 and 30 Vict. cap. 273, and extend over the district comprised within the municipal boundaries of the city, as defined by the Act 9 and 10 Vict. cap. 289, and by the interpretation clause of the Police Act. These statutes do not, however, limit the previously existing powers and jurisdiction of the Dean of Guild, or the procedure before his court with respect to his general jurisdiction, or processes of lining, or questions of title or servitude. By the Glasgow Police Act all new streets within the district over which the Act extends must be laid out under warrant and direction of the Dean of Guild, conformably to certain prescribed rules. The Act also requires the Dean of Guild's authority to be obtained, and certain conditions fulfilled, before buildings can be erected, altered, or removed. The power of the Dean of Guild to grant what are technically termed 'jedges and warrants' is also recognised, and rules are prescribed by the Act for its exercise. A jedge and warrant is an authority granted by the Dean of Guild to rebuild or repair a ruinous tenement within burgh, creating the cost a real burden on the property, and entitling the person in whose favour the jedge and warrant is granted to continue in possession until he is recouped in the amount expended and cognosced by the court. This procedure is usually resorted to by persons having right to the property, or to a portion of it, but who are doubtful of the validity of their title. It may also be resorted to by an adjudger, or an heritable creditor in possession, for his security, as, without the authority of the Dean of Guild Court, questions might arise in connection with such expenses, as to whether the parties had the right to retain the amount expended by them in repairs in an accounting with other adjudging creditors. The following is a summary of the particular powers conferred by the Police Act upon the Lord Dean of Guild, viz.:—Power, on the application of the Procurator-fiscal, to order compulsorily the removal of the tenants or occupiers, and to take down or repair ruinous buildings from which danger may be apprehended. Power, on the application of the Procurator-fiscal, with concurrence of one or more of the proprietors, or of any of the proprietors alone, to order the sale of ruinous or dangerous buildings. Power, on the application of the Procurator-fiscal or the Master of Works of the city, to order the removal of obstructions or projections on the public streets. Power, with concurrence of the Board of Police, when the proprietors are in court, to require them to sell to the Board such portion of their property as may be necessary to form a regular line of frontage to any public street, or to widen, enlarge, extend, or otherwise improve it, at such a price as may be fixed under the provisions of the Lands Clauses Consolidation Act. Power to declare streets or courts public on the application of the Master of Works, and of the proprietors of property adjoining to or having a right of access thereby; and to impose conditions on proprietors who may not have concurred in the application when they apply for warrant to erect or alter buildings adjoining or having access to such streets or courts. Power, at the instance of a proprietor having the greatest frontage to any private street or court, and highest valuation, jointly with the Master of Works, or of the Master of Works separately, to impose conditions on proprietors making application for warrant to erect or alter any buildings adjoining or having a right of access to any such street or court. The procedure relative to the formation and improvement of streets is prescribed by other sections of the Act. Power to award compensation to owners through whose properties the Board of Police may form public sewers. On the other hand, power to fine proprietors of subjects draining into sewers in private streets for not keeping the same effectually cleansed. Power, on the application of the Procurator-fiscal, to order gas and water pipes to be raised, sunk, or otherwise altered.

7681. *The Chairman.*—These are generally the powers of the Dean of Guild?—Yes; and they are exercised every day in the court.

Angus Turner.

7682. These are statutory powers conferred on the Dean of Guild of Glasgow?—Yes.

7683. Is the amount of work imposed in that way very great?—It is very considerable. I have had a table prepared in order to make the return which the Commissioners have called on me to make; and the following is the number of the cases in each of the years from 1864 to 1868 in Glasgow:—1864, private cases 223, Procurator-fiscal cases 65; 1865, private cases 233, Procurator-fiscal cases 54; 1866, private cases 312, Procurator-fiscal cases 51; 1867, private cases 323, Procurator-fiscal cases 40; 1868, private cases 281, Procurator-fiscal cases 28—making a total of 1610 cases for the five years, or an average number of 323 cases each year; that is including last year, in which, from the depression in the state of trade, there was a falling off of about 40 cases.

7684. Are many of these opposed cases?—I may explain that, by the regulations of the court, there is first a petition presented, and the parties must present with their petition an elevation plan and a ground plan. The elevation plan shows the effect of the building on the conterminous tenements; the ground plan shows any possible encroachment upon the adjoining proprietor affecting the lights, or servitude of entries, or of various other kinds. The case comes before the court, and in almost every one of what I may call the unopposed cases the parties appear. I call them unopposed because there is no litigation in them. The Dean of Guild is generally one of the most eminent of our merchants, and he is advised by four tradesmen sitting on one side of him, and four merchants on the other. The parties come before the Court and submit their plans, and in many of the cases they are not at one about the boundaries; but the Dean of Guild and his tradesmen enter into explanation with the parties, and suggest that certain arrangements should be made, for example, in regard to ventilation, putting water-closets in proper positions in the house, the strength and stability of buildings, and so on. The tradesmen say: That wall is not sufficiently strong; it is not founded properly, or the joisting is not proper: you must alter it. And the parties adjust that at the bar. Those cases are practically unopposed, because the moral effect of these eight men sitting and influencing the parties is such that they are disposed of without litigation.

7685. *Mr. Orr Ewing.*—Though they are not opposed by further litigation, the parties appear and settle their cases at the first hearing?—Yes.

7686. *Mr. Baxter.*—And they would probably otherwise be opposed?—Yes; but the influence of the tribunal over the parties is such that this is the practical working of it.

7687. *Mr. Orr Ewing.*—You have said that the parties present an elevation plan and a ground plan. Do they not present the whole plans of the building?—Yes; but all that the regulations require are the elevation and ground plan. But it is quite true that the parties produce the detailed plans, chiefly to illustrate and make plain to the court what their object is.

7688. The court could not judge of the strength of buildings, or the ventilation, or of the sanitary regulations, or of the sewerage, unless the plans were complete?—No; and therefore they are generally produced. Parties know that the tribunal takes cognizance of the whole question, and they come prepared to meet all questions of ventilation, drainage, etc.

7689. The Dean of Guild Court grants no authority to build unless the whole plans are laid before it, and they are satisfied as to the building in every way?—That is the case.

7690. *The Chairman.*—Is it for the advantage of the parties to have that settled beforehand, so as not to be arrested in the progress of the works?—No doubt of it.

7691. *Dr. Barclay.*—Although the parties don't appear, does the court take cognizance of the plans?—The magistrates and the Police Board have a city architect, who is called the Master of Works; and his instructions are, that every plan of a new erection, or any alteration of a building, either as to position or encroachments, must be reported to the court, and he must state that he has gone over the plans, and he must bring under the notice of the Dean of Guild anything which he considers necessary. For example, in the case of building churches and theatres, we have had a number of those lately in which we have had to see that there was proper ingress and egress. This public officer brings the plans of these buildings before the court, because, though the parties may be satisfied, he is not satisfied; and he brings it before the court in order that proper staircases and means of access and exit may be provided.

7692. Is he a party called in every case?—Yes; and therefore, though there may be no opposition on the part of the private parties, still this officer brings his view before the court; and if he satisfies the court that these matters are not properly attended to, the court will not grant the lining, and the case is postponed until the parties satisfy the court that the plan can be carried out with safety. In fact, the court takes cognizance of every description of building.

7693. If parties don't appear, do the court look after private interests, with regard to encroachment on private ground, or interference with servitude of lights, etc.?—If the parties acquiesce, the court would not interfere, except by the intervention of the public officer.

7694. Is it not usual to visit the ground?—Not always; but whenever there is any case of doubt, the court visit the ground and see the premises, and judge for themselves.

7695. In an unopposed case?—No; not unless the public officer brings the matter under their cognizance. Every petition is served on the conterminous proprietors, and they must be presumed to have gone to the office some days before the case is called, as the plans must be lodged two days before the court meets; and therefore it is presumed that the parties have gone and examined the plans, and are satisfied, as far as their private interests are concerned. But the public officer may not be satisfied, and he takes a course of his own.

7696. *The Chairman.*—There are two interests involved—the interests of the conterminous proprietors as regards their property, or any encroachment on it, and the interest of the public?—Precisely.

7697. The interests of the private party you assume he will look after himself?—Precisely.

7698. And if he does not appear, you suppose he has no objection?—Yes.

7699. But if he does not appear, you take cognizance of the public interests?—Precisely.

7700. *Dr. Barclay.*—Are the plans authenticated in any way?—Yes.

7701. Are they subscribed by the Dean of Guild?—They are subscribed by the assessor of court, and are referred to in the sentence. The plans are all preserved, and parties have access to them at any time.

7702. Have you sometimes had a demand to see them?—Very often cases arise before the Court of Session, and other questions may arise in connection with these buildings, and we are sometimes directed to transmit the plans for the information of the Court of Session, or to exhibit them to parties interested. With the explanation I have before made, I may now state, that the cases which were not litigated, but were to a certain extent opposed in the manner I have described, consisted for the following years:—Unopposed cases in 1864, 203; 1865, 205; 1866, 264; 1867, 289; 1868, 259. Then, of cases where the parties were dissatisfied, and would have their cases disposed of according to law, under a regular record made up in terms of the Act of Sederunt, there were in 1864, 20; in 1865, 28; in 1866, 48; in 1867, 34; and in 1868, 22. These are the private cases. Then as to Fiscal cases, there were unopposed, except in manner before noticed—in 1864, 30 cases; in 1865, 46; in 1866, 46; in 1867, 23; and in 1868, 16; and opposed or litigated—in 1864, 35 (I may explain that this large number arose from the Act of Parliament with reference to the consumption of smoke); in 1865, 8; in 1866, 5; in 1867, 17; and in 1868, 12. Total, 1610 cases.

7703. *The Chairman.*—When you talk of Fiscal cases, do you mean that the Procurator-fiscal has observed

or got information that transgressions were going on?—Yes.

7704. Dangerous buildings?—Precisely.

7705. Or parties violating the Smoke Act?—Yes.

7706. Or not following out what the Dean of Guild had ordered to be done in regard to the construction of buildings?—Precisely; or in enforcing certain provisions of the Police Act.

7707. Then the Fiscal interposes as a public prosecutor, and calls the attention of the Dean of Guild to the matter?—Yes. By the roll of court it would appear that the average number of days that elapsed from the calling of the original petition to the date of the final decree was, in private cases, in 1864, 6 days; in 1865, 12 days; in 1866, 9 days; in 1867, 4 days; and in 1868, 7 days. There is great despatch given by the court. These are the average number of days that the cases were in dependence before it. The whole of the Fiscal cases in 1864 were in reference to the Smoke Act, and in almost every instance they were opposed very violently, and some of them were carried to the Court of Session; but the number of days occupied in the other Fiscal cases, between the calling of the original petition and the final sentence, was in 1865, 8 days; in 1866, 6 days; in 1867, 40 days; and in 1868, 35 days.

7708. Are these cases such that despatch is of great moment to the parties?—Very often—very important indeed. They frequently involve buildings of great value. For example, there was one case lately in regard to carrying out a plan, called 'The Wind of Athens,' after the model of a building in Athens. This was a litigated case, and I think the expense of the proceedings before the court amounted to about £12; but the buildings in question might be of the value of from £20,000 to £30,000. It came to the Court of Session afterwards, and the judgment of the Dean of Guild was affirmed.

7709. But I am speaking of the importance of despatch. Does it frequently happen that there is a stoppage of the proceedings of tradesmen while the case is in dependence?—That arises very often in the Fiscal cases, because he applies to the court where a party has not been conducting his operations properly, and we remit to a tradesman to get the operations conducted in a proper manner. In that case there must be a delay of several months until the operations are completed, because the expenses payable by the parties can only be ascertained on completion of the operations.

7710. But does it frequently happen that the progress of work must be interrupted in consequence of the interposition of the Fiscal, or that the arrangements which parties have made for proceeding with their operations in the season are arrested until the deliverance of the Dean of Guild is given?—That does occasionally arise.

7711. Does that make despatch of great importance?—That is one of the reasons why I think cases are so very rapidly disposed of. In 1864 there was only an average of six days between the calling of the petition and the final disposal of it, so that there must have been great despatch.

7712. *Mr. Orr Ewing.*—And though the ordinary courts are only held twice a month, there are special courts held when necessary?—Yes; but you will observe I am talking of the average number of days the whole cases were in dependence.

7713. *Dr. Barclay.*—You have the power, and use it, of granting interdicts?—Very often.

7714. *Mr. Baxter.*—Do you make up a record?—In contested cases.

7715. *Dr. Barclay.*—By condescendence and answers?—Yes, under the Act of Sederunt.

7716. *Mr. Paterson.*—In the case of new erections, I understand the proprietor does not commence till he has got the judgment or lining of the Dean of Guild Court?—No.

7717. And having got that, he goes on to complete the building without delay, unless he does something contrary to the plans?—Yes.

7718. *Dr. Barclay.*—What happens if he does anything contrary to the plans?—Then there is an interdict.

7719. By the Fiscal or a private party?—Yes.

7720. Do you grant an interdict in that case, without any allegation that the party is making an encroachment, but simply that he has not got the authority of the proper court?—The interdict is only granted on the petitioner's allegations showing a *prima facie* case for interdict.

7721. You have seen that?—Yes, frequently.

7722. Without any such allegation?—The allegation must be sufficiently definite and relevant. For example, in cases where the conterminous proprietors have not been duly notified of the proceedings, and therefore the parties had no right to proceed with the building without complying with the regulations of the court, we interdict them.

7723. *Mr. Orr Ewing.*—And fine them for contempt of court?—Yes. The number of cases in which reclaiming petitions were lodged was in 1864, 5; in 1865, 4; in 1866, 5; in 1867, 4; and 1868, 1. Then in the Fiscal cases there was no reclaiming petition for the first three years, and in the last two years there was one in each year. The number of cases advocated was in 1864, none; in 1861, one private case, and one Fiscal case; in 1866, none; in 1867, two private cases; and in 1868, five private cases, and one Fiscal case. The number finally decided in accordance with or adversely to the decree appealed from, in so far as known or intimated to the clerks of court, was in 1864, one appeal judgment affirmed; 1868, one appeal judgment affirmed. Although appeals in ten other cases, as appears from my return, are stated to have been intimated, it does not appear that they have been followed out. So that there were only for these five years two advocations followed out, in so far as known to the clerks, and in these two the judgments were affirmed by the Court of Session.

7724. You believe that in reality only two cases have been taken to the Court of Session?—I have no access to know the result of the five cases, but they have never come back to the court. Only one has come back, and that has been an affirmed case. The advocations were taken some time ago; and the probability is, that if anything had been done, we would have heard of it. The average expense to the pursuer in an unopposed case is not known to the clerks of court, as that is a matter fixed between client and agent, and not known to the clerks, except when some dispute arises as to expenses, when the court may be called on to dispose of the amount; but by the fees established by Act of Sederunt, agents are only entitled to charge certain fixed fees, and which in petitions of ordinary length, at the instance of private parties, ought not to exceed £1, 19s. in each case, including copies for service, besides the fees to the clerks of court mentioned in the return which I have made to the Commissioners, and the average fee to the bar-officer and witness of 6s. 8d. for each case, taking the defenders not to exceed three in number. The average expenses decerned for in cases which have been opposed, as appearing from the Act Book:—Private cases in 1864, £4, 7s. 9d.; 1865, £5, 12s.; 1866, nothing; 1867, nothing; 1868, £8, 18s. Nothing means that neither party got expenses. It is almost impossible to give a correct average of the expenses in Fiscal's cases, inasmuch as the cases themselves are not with the clerks of court, and the decrees for expenses, as appearing in the Act Book, include the expenses of operations ordered by the court; but from £2 to £3 in each contested case may be considered a fair average.

7725. *The Chairman.*—You have mentioned the average of the other cases. Can you state the highest amount and the lowest amount?—The greatest amount of such expenses during any of the five years was £12, 12s., and the smallest amount was 10s. 6d., as appearing from the Act Book.

7726. *Dr. Barclay.*—Was that an opposed case?—Yes.

7727. *Mr. Orr Ewing.*—Did you state what was the expense of a case settled at the first hearing?—£1, 19s.

Angus Turner.

7728. *Mr Paterson.*—Does that include the fee of the clerk and officers of the Court?—No; there is a table of fees to the clerk. The forms of procedure observed in the Dean of Guild Court in Glasgow are chiefly regulated by Act of Sederunt passed by the Court of Session in relation to judicial proceedings before Burgh Courts in Scotland; and the special fees exigible by the town-clerks as clerks of court, by a table adjusted with the Faculty of Procurators, and confirmed by the Town Council, and subsequently recognised by the Royal Commission sitting on the courts of justice in Scotland in 1822, a copy of which is given in my return to the Commissioners.

7729. *The Chairman.*—In such a case as Mr. Ewing alluded to, disposed of at the first hearing, what would be the addition made to the £1, 19s. by the clerk's fees?—2s. 6d. would be the fee in an ordinary case; and then there is the sentence money, which depends on the value of the case. In a Procurator-fiscal's case, for instance, the fee would be 1s. 6d., if of the lowest value; if it was of greater value, 3s. 6d.; and of the highest value, as in linings of buildings, 7s. 6d. That would be added to the charge which the procurator would make for preparing the petition and the copies for service. These sums would fall to be added to the £1, 19s.

7730. *Dr. Barclay.*—And the extract?—I do not know what it costs.

7731. Does it comprehend the boundary?—Yes; it must contain the boundary.

7732. *Mr. Paterson.*—Do you include the bond of caution?—There is a bond of caution in all linings, and that will be an additional expense of 3s. 6d., I think.

7733. *Dr. Barclay.*—Do you ask that, although it is not an opposed case?—Yes, in all cases, in order to insure that the walls are properly constructed, and that conterminous proprietors are not injured.

7734. Is there any authority for that?—Just the usage of the court for the last hundred years at least.

7735. *Mr. Paterson.*—Would it be understating the total cost in each case, incurred by the fees of the clerk and officers of court, at 20s., including the bond of caution, sentence money, and all the rest?—I cannot tell the fee for the extract. I suppose it cannot be more than a few shillings. The others are, I think, about 11s.

7736. *The Chairman.*—That would make the cost about £2, 10s.?—Yes.

7737. *Mr. Paterson.*—The 11s. is exclusive of the fee for extract?—Yes; but there are very few extracts taken—not one in twenty. Parties are quite satisfied with the judgment of the court, and proceed upon that. If there is a dispute with some conterminous proprietor, or a collateral case going before another or a higher court, an extract may be necessary, because the record could not be taken to the higher court, and the extract would go; but with that exception, I think few extracts are required.

7738. *Dr. Barclay.*—What penalty is there in the bond of caution?—It is unlimited. It is, that they shall indemnify the public in the first instance, and the conterminous proprietors, for all damage occasioned by their operations.

7739. Who is the judge of the solvency of the cautioners?—The clerk of court.

7740. Suppose that a proprietor gets authority and declines to find caution, or cannot find caution?—Then the Fiscal applies to the court, and he is fined for not complying with the order of the court.

7741. *Mr. Murray.*—Is there a separate cautioner along with the proprietor?—Yes; generally the builder.

7742. *Mr. Paterson.*—That is to guard against the possible bankruptcy of the proprietor?—Yes. And I have known buildings so fragile, being speculatively constructed, that they were not secure; and no adjacent proprietor should be compelled to submit to conduct of that kind on the part of a builder. There must be security that the erection is of a substantial kind.

7743. *The Chairman.*—Have you found that parties have had any difficulty in finding caution?—No.

7744. Have you known any instance in which the bond of caution was proceeded upon?—Not one. The security afforded by it is itself of value; because the party applying for lining is under an obligation to the cautioner, and great care is observed.

7745. *Mr. Orr Ewing.*—It is found to be no practical hardship?—None.

7746. *Dr. Barclay.*—And there is no authority for it but custom?—No; but I think it is a fair and reasonable rule. Supposing a man to be a speculative builder, and a man of straw, he gets authority to line; and if he makes an unsubstantial building, are the neighbouring proprietors and the public to suffer from the speculation of this man? The neighbouring proprietors must be made secure that they shall not be injured by him; and the Dean of Guild Court think it reasonable to put him under a bond of caution, that he shall indemnify the proprietor if any damage arises.

7747. *Mr. Murray.*—What authority have you for that?—No court is bound to grant a warrant, if they don't see that it can be fairly executed for the public safety. A judge must take care, in issuing a warrant, that the work shall be done competently and legally, and that parties shall not be injured by it.

7748. *The Chairman.*—Practically, you have not found it to be any obstruction to proceeding with the operations?—None whatever.

7749. *Dr. Barclay.*—You put it on the ground of speculative builders requiring to be taken care of. I suppose you don't mean to lay it down as a general rule, that every man who builds a house in Glasgow is a speculator; and yet you ask it from every man?—We cannot distinguish between them, and we ask it from all.

7750. *Mr. Orr Ewing.*—It is a wholesome law?—Yes.

7751. *Mr. Murray.*—You would not allow them to put up an insufficient building?—We see a plan representing a certain building. But how is the court to know that that plan will be executed? There is no party supervising the executing of it, and therefore the court takes this bond of caution.

7752. *Dr. Barclay.*—Did Sir James Campbell find caution with reference to that magnificent house of his in Ingram Street?—Yes.

7753. *Mr. Murray.*—After the court approve of the plan, do they take no means of seeing that the work is done in accordance with it?—No; excepting that it is under the observation of the Master of Works. If he sees any building being constructed on an improper footing, he represents that to the Procurator-fiscal, who immediately brings it before the court. There are many cases of that sort.

7754. But still the court take no cognizance as to whether the plans which they approve of are carried out in their entirety?—No; they cannot.

7755. *Mr. Orr Ewing.*—But though the members of the court do not do so, the Master of Works does; and is it not the case that it has frequently been found that when stairs have been made narrower than the plans, and the scantling of wood less, the Dean of Guild Court has had occasion to interfere, and order these things to be altered?—That occurs frequently.

7756. *Mr. Baxter.*—But you don't leave private parties to protect themselves?—We do, so far as we can.

7757. You don't leave them to their own remedy?—No; we hold they are acting upon our warrant. We make it a condition of our warrant, that the work shall be done faithfully and correctly.

7758. *Mr. Murray.*—Suppose there was a difference of opinion in a litigated case between the Dean of Guild and his council, how is that settled?—The Court of Session have held, by repeated reported cases, that the Dean of Guild is the judge, and that his council are merely his advisers. He may or may not be regulated by their advice. There are three or four cases to that effect, and he alone subscribes the judgment.

7759. What position does the assessor hold?—He takes care that matters are in due form, that Acts of Sederunt and Acts of Parliament are properly brought

under the notice of the court, and that the proceedings are in due form. The merits of the case are disposed of by the Dean of Guild and his council, who are a most competent and intelligent body of men.

7760. *The Chairman.*—If a question of law arises, the Dean of Guild may take assistance from the assessor, just as the magistrates used to take assistance from Mr. Reddie?—Yes.

7761. The magistrates pronounced the judgment, but it was Mr. Reddie's judgment?—Yes; but in this case it partakes more of the character of a jury. The details are with reference to the plans, and tradesmen are more competent than a lawyer to say what should be done with regard to the strength or ventilation of a building, and the strength of partitions, etc. It resembles more a jury of eight men sitting to determine on the propriety of the erections, whatever they may be.

7762. *Mr. Murray.*—But supposing a legal question to arise, on which the Dean of Guild takes the assessor's opinion, does he always find in conformity with that opinion?—No; I have known him differ from the assessor.

7763. *Mr. Orr Ewing.*—Have you generally found the Dean of Guild right?—I know one case where the Dean of Guild differed from me, and the case went to the Court of Session, and the Dean of Guild was found to be right.

7764. *Dr. Barclay.*—Was that a question of pure law?—No; I was rather taking an equitable view, and I should perhaps have rather taken the legal view.

7765. *Mr. Murray.*—The town-clerk is the assessor?—The senior town-clerk is the assessor.

7766. The fees of court are payable to the town-clerk?—Yes. They amount to £180 a year only. They would not pay the expenses of the clerks, and I would be very glad to be relieved of it to-morrow, unless the duty belonged to my office. Otherwise, I would not undertake it; but it is part of our duties, and we are paid in another form.

7767. *Mr. Orr Ewing.*—I suppose the Dean of Guild Court pays you very well?—It is just £180 a year, and it takes the whole time of one clerk, and part of the time of another. I don't believe it puts into our pocket £30 a year, and I would be glad to get rid of it.

7768. *The Chairman.*—Are the expenses of the Dean of Guild Court paid entirely out of the fees?—Entirely so; but probably I should not exactly say that, because the Dean of Guild's Court is a court of the burgh; and the Court-house Commissioners provide the courts, and they also provide for their being cleaned and kept in order. Therefore it may be said that that expense falls on the assessment raised for the purpose of court-houses in Glasgow.

7769. But they give no salary to the assessor?—None whatever.

7770. *Mr. Orr Ewing.*—The Dean of Guild performs very important duties *ex officio?*—He is a member of the Town Council, and a member of the Merchants' House.

7771. He is a Commissioner of Police?—Yes.

7772. And he holds the Commission of the Peace in Lanarkshire?—Yes.

7773. He is a member of the Court-house Trust and the Cumbrae Lighthouse Trust?—Yes; and all the more important offices connected with the town.

7774. And having been once Dean of Guild, he is a member of the Cumbrae Lighthouse Trust for life?—Yes; as an old Dean.

7775. He is trustee in a dozen mortifications?—Yes.

7776. And he is a Road Trustee?—Yes.

7777. And he takes part in the charitable and educational institutions of Glasgow?—Yes.

7778. Besides being head of various special charities?—Yes.

7779. In the ancient letter of Guildry granted in 1605, is it not the case that the Dean of Guild and his court was a court of conciliation or arbitration between the merchants of the city?—It was. That was a part of the letter of Guildry.

7780. Resembling very much the Commercial Courts now held in Paris?—Yes.

7781. The letter of Guildry alludes to the courts in Paris?—Yes.

7782. And they are exactly identical with the present courts?—Yes; or nearly so.

7783. Do you consider it would be a good thing for the merchants of Glasgow, or such a city as Glasgow, if we had similar courts now established?—Only yesterday, the head of the Merchants' House called on me, and stated that he is about to bring before the Chamber of Commerce a proposition exactly to the effect you are now mentioning; and in consequence of that, I called on the French Consul, and asked him to give me a note of the constitution and character of these *Tribunals de Commerce*, as they are called in Paris, and he gave me the book containing their constitution.

7784. *Dr. Barclay.*—Is that the Code Napoleon?—Yes. When two merchants quarrel about any mercantile or commercial matter, they go before this court of conciliation in Paris, and almost all these questions are disposed of in presence of eight merchants, including the president, who are conversant with the subject-matter in dispute, being selected from the general body of merchants; and the two disputants are so affected by the moral decision of their compeers engaged in the same trade as themselves, that they go away contented, and the question goes no further. That is the practical effect of the court in Paris; and the Chamber of Commerce in Glasgow are, I think wisely, moving to have some similar court established in Glasgow, for the disposal of these commercial questions.

7785. *The Chairman.*—In regard to the Dean of Guild Court, do you think that there would be detriment to the parties interested in the questions that come before that court, if its jurisdiction was transferred to the Sheriff, and mingled with their proceedings, with the necessary delay that would be thereby caused?—I think it would totally disorganize the whole proceedings of the court. If the Sheriff were to interpose, the whole system of the court would be destroyed. It is a court partaking more of the character of a jury, not of the character of a Sheriff Court, which is presided over by a lawyer going through a long roll of causes, making up records, etc. The cases I have been describing are in most instances disposed of at one hearing; and they would not be disposed of in the Sheriff Court in three years probably.

7786. And there would be more expense?—Ten times more expense.

7787. And some of them would have to be remitted to men of skill?—Yes. At present the cases come before tradesmen, and the whole thing is done at once; but no Sheriff could dispose of a case of that sort without the interposition of some skilled person.

7788. *Mr. Orr Ewing.*—The Dean of Guild compromises or adjusts cases often which the Sheriff in his official position could not well do?—Yes.

7789. The Sheriff must decide on law and facts?—Yes.

7790. Whereas the Dean of Guild takes a mercantile or practical view of the matter, and effects a compromise?—That is the practical working of it.

7791. *Dr. Barclay.*—As to the Burgh Courts, you are aware that at one time the aliment of civil prisoners was entirely within the magistrates' jurisdiction?—Yes.

7792. And that was formerly a very extensive jurisdiction?—Yes.

7793. That is now divided between the Sheriff and the magistrates?—I don't think the Sheriff grants any aliment.

7794. Who does it?—The magistrates always.

7795. Your prison is in Duke Street, about a mile from the magistrates' court?—Yes.

7796. Is the prisoner brought from prison to you?—It is done both ways, but the Court of Session have held that the magistrate must be present. It is a very onerous duty altogether.

7797. When you bring a man up to your chambers, under what warrant do you do so?—The warrant of a magistrate, who grants the warrant to convene him for the purpose of examination.

7798. What if he were to escape on the road?—

Angus Turner.

That is one of the risks attending it. There have been cases of escape in Glasgow, and it is a very onerous and serious duty.

7799. It is entirely in the hands of the magistrates?—Yes.

7800. Do you fix a uniform rate of aliment?—It is not in my department. But there is a regular table fixing the amount.

7801. *The Chairman.*—On what principle?—There is a certain graduated scale.

7802. *Dr. Barclay.*—They are not all on the same scale?—No.

7803. There was once in Glasgow a service of heirs called a service by ward of court?—That has been abolished. It is now done by precept of *clare* under the late Act.

7804. You mentioned the jedge and warrant: are there many such?—Not a great number, but there are probably two or three every year—cases of ruinous tenements, where the parties can make out no satisfactory title, or where the proprietors are absent, and you cannot make extensive repairs without the jedge and warrant.

7805. The jedge and warrant forms a real security on the property?—Yes.

7806. Is it recorded in any register?—Yes, I think it is generally recorded in the burgh register, and so a party buying a property is put on his guard.

7807. Then he must search the register?—I don't know that the jedge and warrant would be effectual without being put on record.

7808. Are you aware of the decision of last century in the case of the Sheriff and the Dean of Guild of Stirling?—If you refer to the general common law jurisdiction of the Dean of Guild Court, it will be found in Mr. M'Glashan's *Practical Notes on the Jurisdiction and Forms of Process in Civil Causes of the Sheriff Court*, edited by yourself.

7809. In the case of Neill, from Dundee, it was held that a Dean of Guild had no privative jurisdiction except in lining?—I was not aware of that.

7810. You mentioned that the Sheriff's jurisdiction in counties had been extended so as to embrace questions of that kind. That Act does not exempt burghs, does it?—It saves the jurisdiction of the Dean of Guild.

7811. *The Lord Justice-Clerk.*—What is the state of the business before the Burgh Court of Glasgow in ordinary civil cases?—It is almost entirely in abeyance.

7812. Do you think there ought be an alteration to the effect of putting the administration of the Burgh Court in the same position as formerly?—It is rather an anomalous jurisdiction altogether, particularly having in view the opinion of the Commissioners in 1822. I could not with propriety say that it would be expedient to revive it or strengthen it, because one must defer to the opinion of the eminent men who sat on that Commission. They thought that the Burgh Court should gradually pass into the Sheriff's jurisdiction, and should be dispensed with. Against the authority of that Commission I think it would be almost idle now to express an opinion, with a view to the revival of the Burgh Court jurisdiction,—the Commissioners being of opinion that it was anomalous that a bailie should sit there only to subscribe the sentences, the business being really done by a lawyer. But in Glasgow there has been a very strong feeling that something ought to be done with reference to the Sheriff Court, in regard to which there is now a great accumulation of business.

7813. Having regard to what took place in the Burgh Court of Glasgow in the days of Mr. Reddie, and in the former period, might there not be a propriety in having such a tribunal encouraged?—I think there would be an immense advantage from having a competitive court—another court besides the Sheriff Court. I think the mere fact of there being two courts would be of the greatest possible advantage. It is scarcely appropriate to talk of competition in regard to courts of law, but the principle of competition even in courts of law is very desirable.

7814. So far as your opinion is concerned, it would go to a restitution of the court?—Yes, in some form. I think that would be very desirable in a public point of view. The business of the Sheriff Court is accumulating very largely.

7815. *Mr. Orr Ewing.*—Would not an additional Sheriff do the work?—I think it is generally felt that there would be an advantage in having a competing jurisdiction. Just now everything is sent to the Sheriff Court, and agents have not time to attend to the business. If there were two courts, there would be two classes of agents. The Small Debt Court of the Sheriff ought to sit daily; and were a Sheriff specially appointed for that duty, the time of the other Sheriffs might thus be saved for the general business of the higher courts, and of the county, etc.

7816. *The Lord Justice-Clerk.*—Would you give the same privileges to the decrees of the Burgh Court which you give to the decrees of the Sheriff Court, and make the system of pleading as expeditious and economical?—I think it would be a great advantage to have competition between the two courts. I would subdivide the judicial business of the county. The business in Glasgow has increased so greatly, that some remedy must be applied.

7817. Formerly the greater number of proper mercantile cases went before the Burgh Court?—Yes; and during Mr. Reddie's time the greater number of important cases went there.

7818. *Mr. Paterson.*—You mentioned that out of the 1600 cases in the Dean of Guild Court, about 1200 are passed after a sort of conference at the bar between the court and the parties?—Yes.

7819. And each of these cases costs about £3?—£2, 10s., including the citation of witnesses and of conterminous proprietors.

7820. It has been suggested that, instead of putting a proprietor *in petitorio*, and having to go to the Dean of Guild Court when he wanted to do no wrong, there might be a deposit of the plans with the City Architect, and notice given to the other proprietors; and that, if these plans were not objected to within six days, the proprietor should go on and put up his building; and if they were objected to within six days, the party complaining should seek his remedy. What is your opinion of that view?—That would be making the present proceeding still more cumbersome; because I don't think that depositation of the plans would be practically effectual. It would be going through a form of proceeding which would be disregarded. No architect receiving plans in that way could have the authority that the court has. The parties know that they are to be dealt with peremptorily and at once, if they don't come prepared with their plans, and with all the information necessary to enable the court to judge whether the building should proceed. It would totally destroy the efficacy of the court, if the plans were merely to be deposited with an architect.

7821. *Mr. Orr Ewing.*—Although 1200 cases are unopposed in reality, in the great number of them the parties did appear, and pointed out what objections they might have, so that the Dean of Guild and his brethren intervened and adjusted or altered the plans to satisfy the parties; and though judgment was given on the first hearing, these cases were opposed?—To that extent they were so.

JOSIAH LIVINGSTONE, Esq., examined.

7822. *The Chairman.*—I believe you are one of the Justices of the Peace for the county of the city of Edinburgh?—I have been so for some years.

7823. You sit in the Justice of Peace Court?—I have had considerable experience in sitting there.

7824. Do cases of debt come before you there?—Yes; in almost every form, and to a very large extent cases of servants' wages.

7825. You deal with cases of small amount very

summarily?—Very summarily. At the same time, so far as I have seen, the decisions are given very carefully.

7826. There is no review?—There is no review.

7827. How many of you sit?—Two constitute a quorum.

7828. Are there sometimes more than two?—There are sometimes three. I understand that there are generally three summoned.

7829. Are there a good many cases brought before you for debt?—An immense number of causes. I have seen 160 cases on the roll in one day.

7830. How often do you sit to hear those causes?—The court sits every Monday.

7831. When you say that there have been 160 causes in one day, I suppose you mean that some of them are questions between master and servant, and some between ordinary debtor and creditor?—Exactly.

7832. What may be the amount of the claims that come before you there?—In ordinary cases, generally up to £5, and servants' wages to any amount.

7833. Have you any written pleadings before you?—None.

7834. Merely the summons?—Merely the summons.

7835. Do the parties attend in person?—The parties attend in person. I understand that the law is that the parties should attend in person, or by a member of their family, but there is a practice of agents attending. I suppose that can be objected to, and it is sometimes objected to, but it is a practice.

7836. And it is sometimes allowed?—It is.

7837. And it may sometimes be but fair to allow it, when the party is not very able to state his own case?—I think, as a general rule, it is better that parties should attend personally. At the same time, many Justices find considerable difficulty in getting at the truth from the confused story of the litigants, and they find difficulty in making the witnesses speak the truth; so that a practised and intelligent agent sometimes saves a great deal of time and trouble.

7838. From the number of cases brought there weekly, do you consider that it is a court which is popular with the community?—It seems to be so.

7839. Are the expenses of procedure there large or small?—They are very small. I am not prepared to say exactly what the expenses are, but they are very small.

7840. Are there any other classes of matters which you sit on—as, for instance, granting licences?—The court of which I am speaking just now—namely, the Edinburgh City Small Debt Court—has no jurisdiction as to licences.

7841. Have you anything more to say about the Small Debt Court?—I desire to say that I think it appears to be not only popular with the public, but highly fitted to be useful. I have observed that a Justice who sits, and who really is qualified for his work, is of very great use to the litigants who are brought before him. It appears to me that the court in that matter differs considerably from the Sheriff Small Debt Court, where the Sheriff, from his education and his office, judges simply as regards the law of the case. But I have thought that the Justices, who are the neighbours of the parties, while they give their decisions according to law, have a tendency to bring the parties together and reconcile them; and I think great good is effected by the judge being enabled in a very few words to show the reasonableness of his decision, and so to bring them to good terms with one another.

7842. Are the Justices often successful in that endeavour?—I think I have observed that they are often very successful in that.

7843. *Mr. Harrison.*—Have you any difficulty in getting the requisite number of Justices?—I don't think that in Edinburgh there is any difficulty in getting the requisite number. It is not every Justice who is qualified to act as a small debt judge. There are some peculiar qualifications which I consider requisite for that. It is not so much knowledge of law as knowledge of mankind, and of the classes of mankind that are met with in these courts; and he requires to give a patient, kindly attention to his cases, and to be able very quickly to see how he should give his decisions.

7844. *The Chairman.*—To see the real merits of the case?—Yes; and he requires a good deal of tact to keep the litigant and the witness to the point and get the truth out of them.

7845. *Mr. Harrison.*—I need scarcely ask whether you think it desirable that the business transacted before the Justice of Peace Court should be transferred to the Sheriff Court?—I think decidedly not. I think there are some elements of good in the Justice of Peace Court that you could not get in the Sheriff Court.

7846. *The Chairman.*—These you have explained to us?—Yes.

7847. *Dr. Barclay.*—You have said that you entertain questions as to servants' wages to any amount. Do you conduct these without written pleadings?—Yes.

7848. Are they not subject to review by the Supreme Court?—They are not subject to any review.

7849. Are they not reviewable by the Quarter Sessions in the first place?—The Small Debt Court is limited to £5, and servants' wages to any amount.

7850. But are the cases of servants' wages above that sum all conducted by regular record, with an appeal to the Court of Session?—I have never met with a record in our court.

7851. And you adjudicate upon questions above £5 without any record?—We do.

7852. *Mr. Clark.*—What is the largest sum you have adjudicated upon in that court?—I never met with any large sum.

7853. What is about the largest sum you recollect of?—About £12.

7854. *Mr. Shand.*—Do you entertain questions about the paternity of illegitimate children?—I never had a question of that sort before me.

7855. And you never saw one raised in the Justice of Peace Court?—No.

7856. *Mr. Orr Ewing.*—What would you say is the expense of a case before the Justice of Peace Court?—I am not sure of the expense of the summons; but I observe that each litigant pays 6d.

7857. That is paid to the clerk of court?—Yes.

7858. Is it the practice in your court, that if a person comes forward and has not the 6d., the court decides and gives decree just as if he were not present?—I never saw that done.

7859. Are you aware whether that is the practice in any Justice of Peace Court?—I do not know any Justice of Peace Court except our own. I have no information as to the County Justice of Peace Courts, and anything I have said does not apply to them.

7860. *Dr. Barclay.*—Is it the fact that the defender, before he can be heard, must table 6d.?—No; the 6d. is paid when the decision is given.

7861. Does the Act not say, that a party appearing shall pay before he shall be heard?—I am speaking of the practice.

7862. Is there a certain sum paid for each witness examined?—I never saw that done.

7863. *Mr. Orr Ewing.*—If such a practice existed in the court, as that a poor person coming there without 6d. should have decree given against him as if he were absent, would you think it a bad practice?—I am not at all satisfied as to the system of fees. I don't know that it is a proper principle that the clerk should be paid by fees; and I think that in all cases the Justices should have the power to remit the fees when they think proper.

7864. *The Lord Justice-General.*—Do you award expenses to the successful party?—Generally.

7865. Can you tell what they amount to on an average?—The amount of expenses is very small. There are the fees, and the sixpences, and the taking out of the decree. I should think the expenses, as a general rule, would not exceed 5s.

7866. Are they as much as 5s.?—In some cases they are.

7867. *Mr. Orr Ewing.*—What hardship have you seen regarding fees which makes you opposed to them?

Josiah Livingstone.

—I cannot say that I ever saw any particular hardship. I never saw any person refused justice for want of paying the 6d.

7868. You have no reason for your desire to see the system of fees altered?—I never saw a miscarriage of justice on account of that.

7869. *Mr. Harrison.*—You find the practice is better than the law, and that the fee is not exacted when parties are not able to pay it?—I have often seen the parties unable to pay the fee.

7870. *Dr. Barclay.*—Where they are able to pay, is not the fee exacted?—Yes.

7871. *The Chairman.*—That fee is received by the clerk?—It is received by the crier of the court.

7872. *The Lord Justice-General.*—How many acting Justices are there in the Justice of Peace Court?—I am not able to say. We have about 100 Justices acting in the Licensing Courts for the city; but I should not think that more than a third of that number take their turn in the Justice of Peace Small Debt Court.

7873. But there are as many as a third of the 100 Justices who take their share of the business of the court?—I would not say that there is a third who take their share, but about a third occasionally sit.

7874. They take some share?—Yes.

7875. *Mr. Murray.*—Who selects the Justices who sit?—Practically it is the clerk of court.

7876. In what way?—The clerk of court sends me a note requesting me to sit as a Justice next Monday, if I can afford the time. If I am able to afford the time, I do so; and we make a sort of arrangement, that we shall continue sitting on Mondays for so long, or until we see cause to decline sitting longer.

7877. *Mr. Baxter.*—How often do you sit yourself?—I should think about eight or nine Mondays in the year.

7878. *Mr. Murray.*—Are you aware that there are many Justices who have never been asked to sit in that court?—I cannot say that of my own knowledge.

7879. *Dr. Barclay.*—You cannot say whether the clerk takes them by rotation?—I cannot say.

7880. *Mr. Paterson.*—Are you aware of any who decline to sit?—I never heard of any who refused to sit. Excuses are made; but I never heard of any who definitely refused to sit as Justices.

7881. I suppose there must be a great number who don't sit at all?—The clerk of court has a very general acquaintance with the Justices, and he knows who are able to attend; and I should think he has a good idea of who will be most likely to make good and efficient Justices in his court. I may mention that the clerk has sometimes told me, that the lawyers make of all Justices the very worst in the Small Debt Court.

7882. *Mr. Gordon.*—May that not be because they don't so much require to lean upon the clerk for advice?—I don't think so.

7883. *Mr. Paterson.*—My question was, whether, according to any plan of management on the part of the clerk, it is the fact or not that a great many of the Justices don't sit in the Small Debt Court?—It is perfectly evident that a great majority of the Justices do not sit in the Small Debt Court; but I should say that, on the whole, that is a matter of congratulation; because it is not every Justice who is qualified to sit there. But in order to make the court very efficient, the Justices themselves ought to arrange who is to take the turn of duty.

7884. *The Chairman.*—You think they should distribute their duties, and appoint a certain number of themselves to take the small debt part of it. Is that what you mean?—Yes.

7885. What are the other duties which you perform, besides sitting in the Small Debt Court? Do you sit in regard to other matters?—Only in the court of review for granting licences.

7886. Reviewing the judgment of the magistrates granting or refusing licences?—Exactly.

7887. *Dr. Barclay.*—That is in Quarter Sessions?—Yes; and granting licences for theatres.

7888. *The Lord Justice-General.*—In Petty Sessions?—Yes.

7889. *Dr. Barclay.*—And in Quarter Sessions too?—Yes.

7890. *The Chairman.*—In regard to the review of the acts of the magistrates in granting licences, does a good deal of business come before the Quarter Sessions?—Generally it occupies one whole day each half-year.

7891. *Mr. Orr Ewing.*—How many cases are there?—The number varies very much. I have seen a large number of cases, and I have seen very few indeed.

7892. *The Chairman.*—Do you approve of the appellate courts?—That is not a matter on which I came here to speak. What I intended to give evidence about was the Small Debt Court.

7893. You have not considered the other matter?—I have often considered it, but it is a very large question.

7894. And you would rather avoid giving an opinion about it?—Yes.

7895. *Dr. Barclay.*—In the Small Debt Court, are there not cases continued from a previous sederunt, and which you continue to another sederunt?—Very frequently.

7896. Don't you find it difficult to take up a case which has been heard once before the other Justices, without any record having been made by these Justices?—I never felt that.

7897. How do you gather the facts?—I depend entirely on my memory.

7898. But I am supposing that two Justices have heard a case, and left it to other Justices for adjudication?—I consider it the duty of a Justice who begins a case to attend and finish it.

7899. Do they do so?—I have always done so; and I never found a case continued from a previous day, where there was not a Justice on the bench who had been there the previous day.

7900. *Mr. Harrison.*—If such a thing takes place, I suppose there would be a re-hearing?—I never met with a case where it was necessary to have a re-hearing.

7901. *The Chairman.*—The business of that court, so far as regards its small debt jurisdiction, is, so far as you are able to judge, satisfactory?—I think it commends itself to the people in general, and it is the means of doing considerable good. There is one point which I think it my duty to mention. I have very often thought that the Justice of Peace Court, with proper Justices, might have its jurisdiction very considerably extended in mercantile cases. I think that, were certain Justices to be designated by such bodies as the Town Council, the Chamber of Commerce, and the Merchant Company, many merchants and tradesmen who would not bring their cases before the Sheriff Court or the Court of Session, would very gladly avail themselves of that court, and that it might be of considerable use to the mercantile community.

7902. *Mr. Shand.*—Do you contemplate a court before whom agents and counsel should practise, or a court for the parties alone?—My idea is that it should be for the parties alone, on the very same principle as the Small Debt Court.

7903. You mean a court of the nature of arbitration?—Of course it would come practically to that.

7904. *Mr. Orr Ewing.*—But with a power of appeal?—I don't think that would be necessary. I think the public would be quite satisfied without it.

7905. To what amount would you extend that?—To almost any amount.

7906. *Mr. Murray.*—But you would make the consent of both parties necessary to going before that court?—That is a difficulty which I am not able to see my way through. If it could be arranged, I am persuaded that it would be found a most useful court.

7907. *The Chairman.*—Would you confine it to mercantile cases?—Yes.

7908. How would you define mercantile cases?—I think the term expresses what it means—a dispute between two men in business regarding a matter of business, in regard to which they had been transacting.

7909. Mercantile transactions?—Yes.

7910. *Mr. Shand.*—Is not a tribunal of that kind at present open to the public, by the choice by two merchants of two of their own number, if any question arises?—Not practically. We understand that a clause in a contract of arbitration is not operative if either party objects to it, and brings the case before the court.

7911. This is a tribunal which you desire to have established, to be resorted to even if both parties do not consent?—That is a difficulty that I don't see my way through; but I would give that court what an arbitration has not, and that is, the effect of a legal decision.

7912. *Mr. Orr Ewing.*—The expense of drawing up a deed of arbitration would be saved in that way?—My experience of arbitration is, that it takes fully longer time, and fully greater expense, than going before the court, and is very much more unsatisfactory at the end of it. *Josiah Livingstone.*

7913. *The Chairman.*—If parties, by contract, agree to arbitration, it cannot be enforced unless they name the arbiters; but suppose they merely agreed to arbitrate, would it be part of your plan that they should be enabled to go before the court you suggest?—That would partly meet my idea—that where a contract specified arbitration, that should be the court in mercantile cases.

7914. *Mr. Harrison.*—But if both parties are agreeable, do you think the powers of that court might be extended so as to take in any sum, and decide as a court of arbitration?—Yes, in mercantile cases.

MONDAY, 25TH JANUARY 1869.

Members present:—

LORD COLONSAY.
LORD BARCAPLE.
E. S. GORDON, Esq., Q.C.
GEORGE SCLATER BOOTH, Esq.
JAMES CAMPBELL, Esq.
GEORGE HARRISON, Esq.
JAMES ADAM, Esq.
A. B. SHAND, Esq.
T. GRAHAM MURRAY, Esq.
JAMES WEBSTER, Esq.
J. B. BAXTER, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

GEORGE WEBSTER, Esq., examined. *George Webster.*

7915. *The Chairman.*—You are Sheriff-clerk of the county of Forfar?—I am.

7916. How long have you been so?—Since 1854.

7917. You reside in the county of Forfar?—I do.

7918. There are two places in the county of Forfar at which Sheriff Courts are held—Forfar and Dundee?—Yes.

7919. You are Sheriff-clerk of the whole county?—Yes.

7920. Both courts are under you?—Yes.

7921. Is there much business transacted at Forfar?—Yes; the district is nearly as important as that of Dundee. By the census of 1861, its population was about 100,000, and Dundee about 104,000. Dundee has a larger town population; but Forfar has also a large town population in Montrose, Arbroath, Brechin, Kirriemuir, and Forfar town,—in all, nearly 60,000 of town population: this brings a very considerable amount of business to Forfar.

7922. Not so much as there is at Dundee?—No; there is not so much judicial business, but there is a good deal of business otherwise.

7923. Business falling under your department as Sheriff-clerk?—Yes.

7924. What is the nature of that other business?—The registers of deeds recorded in the Sheriff Court books, the register of entail vouchers, curatorial inventories, Fiars Courts, and such like general matters, are all kept there.

7925. Are these in your custody?—Yes.

7926. I believe the county meetings are held at Forfar?—The county meetings, Fiars Courts, etc., are all held at Forfar.

7927. It is the county town?—It is.

7928. How are you represented at Dundee?—I have a deputy there, and clerks. I have also a deputy and clerks at Forfar.

7929. Do you do any of the duty in person?—Yes, I do.

7930. At Forfar?—Both at Forfar and at Dundee. I go occasionally to Dundee, and very frequently, indeed generally, when the Sheriff is there. I have no employment whatever, except my duties as Sheriff-clerk.

7931. Are there any fees exacted in the Sheriff Court of Forfar?—Yes.

7932. And they are accounted for to the public?—They are accounted for, by me, to Exchequer once a quarter. They are paid into bank once a week, and they are accounted for every quarter, or as soon after the end of the quarter as I can get the accounts made up, showing a classified return of the fees.

7933. Have you the means of stating precisely or by approximation the amount of the fees paid annually into Exchequer from your county?—Yes. For the year ending 31st December 1868, the fees were—for Forfar, general fees, £457, 14s. 1d.; lunacy fees, £11, 15s.; total, £469, 9s. 1d.;—for Dundee, general fees, £604, 5s. 1d.; lunacy fees, £11, 5s.; total, £615, 10s. 1d.; making for both districts the sum of £1084, 19s. 2d.

7934. How are you remunerated?—I am remunerated by a fixed sum. As Sheriff-clerk I get £1200 a year; but out of that I have to pay for two establishments, deputies and clerks, stationery, and every other expense connected with my office, including any expenses incurred in consequence of alterations made; for example, the Debts Recovery Act brought on me an expense of upwards of £30 for books, and that comes out of my pocket.

7935. Are you provided with office-room?—I am.

7936. In both places?—In both places.

7937. Free of rent?—Yes.

7938. How many persons are employed in your establishment at Forfar?—I have a deputy and five clerks. At present I have six clerks there. I have employed an additional clerk, in consequence of having had to prepare a return for this Commission; but that is a mere temporary arrangement.

7939. That is a temporary demand which comes upon you every now and then?—Yes, very frequently.

7940. When returns are moved for in the House of Commons?—Yes. I may state that the items of my fees are very numerous. As near as I can calculate, there are in the two establishments between 14,000 and 15,000 items of fees collected annually, varying from 3d. to 3s. 6d.

7941. These are collected and paid over?—Yes; and entered in the books descriptive of the cause in which the fee was paid—the step of process, or occasion on

George Webster.

which it was paid; and then these are classified in the return.

7942. These are all accounted for?—Yes; and these accounts go to Exchequer.

7943. What is the extent of your establishment at Dundee?—I have a deputy and six other persons there; and one of these, as is the case also in Forfar, is entirely for the use of the Procurator-fiscal.

7944. That is for criminal matters?—Yes.

7945. Do the costs of these establishments encroach much upon your salary?—Yes; when I accepted the office of Sheriff-clerk, I was told that I would have about £600 a year clear, but I found that did not turn out to be the case. It is very little more than £500. The expense is increasing every year, and all that increased expense comes out of my pocket. Besides my establishments at Forfar and Dundee, I have a deputy for the Small Debt and Debts Recovery Court at Brechin, another at Montrose, another at Arbroath, and another at Kirriemuir. I am specially authorized by statute to appoint deputies there, and they receive a salary from me; the arrangement being that they shall get one-half of the fees, while I have to pay the whole of the fees received at these places into Exchequer. Therefore the emoluments to the deputies at these places consist of one-half of the fees; and the more business that is done there the more I have to pay, which I think is a very vicious principle.

7946. Does it appear to you that the principle of contract between the Government and the Sheriff-clerk, by which they pay him a certain sum, and he provides the whole establishment, is a good system?—I think it a very bad system, because it brings upon me the desire to keep down the expenses of my office as far as possible—to the nearest point.

7947. Is that a vicious thing to do?—I think so, if it trench upon efficiency. It has a tendency to do that.

7948. It is a temptation to keep it at a starvation point?—Yes; a tendency.

7949. What would you suggest as a more equitable and efficient system of managing the duties of the office?—I think there should be a sufficient number of clerks allowed me, that their salaries should be fixed and paid as part of the establishment, as is done in the case of the Court of Session, I understand. I am the chief person, and I should have a certain clear sum. The clerks should be paid their fixed salaries, and should not be dependent altogether upon me for their remuneration, though under my control as to duties. The stationery and other items should also be provided for. I have to furnish notepaper and books for the judge; I have to furnish all the paper at the trials, pens and ink, and everything of that kind.

7950. You think the Government should attend to all these matters, they receiving the fees as at present?—I think so. At any rate, I think the principle of paying by contract, a bad one. It would be matter for consideration how the new system should be arranged.

7951. In judging whether it is a good or bad system, one would require to see whether there is a better?—Certainly. But I think in many departments of the public service examples of a better system can be found.

7952. How long has that system of paying by contract been in operation?—It was authorized by Lord Murray's Court of Session Act in 1838. I think up to that time the Sheriff-clerks received all the fees for their own benefit. By that Act, power was given to the Treasury to give the Sheriff-clerks a fixed sum, and to receive all the fees; and I believe that is now the case in almost the whole of Scotland, except Lanarkshire and one or two other places, where the Sheriff-clerk did not choose to go into the arrangement. The arrangement, so far as Forfarshire is concerned, had been made with my predecessor, and when I came into office in 1854 I found the system in operation. I saw the calculation of the probable expenses, and it was then represented that there was £600 a year clear, but it has turned out a little below that.

7953. Before that Act of Parliament which you have alluded to, and when the Sheriff-clerk was paid by fees, were the fees regulated by the Sheriff or by the Court of Session, or were they regulated by Act of Parliament?—They were first regulated by Act of Sederunt 16th, and Act of Adjournal 21st March 1746, then by 6 Geo. IV. cap. 23, and lastly by the Act of 1838.

7954. Is the Act which you allude to the 1 and 2 Vict. cap. 119?—It is cap. 119, sec. 28.

7955. Was there not a table of fees framed at that time?—Yes; it is annexed to the Act. I think the system on which the fees are charged requires very much revision, reducing the number, and adopting the Act of last session as to the use of stamps. I think that would be a most important improvement.

7956. It would simplify the collection?—Very much; and it would be a great means of preventing fraud. Where so vast a number of small sums are collected in an office, the chief, who is responsible, is very much open to those under him, particularly the class of apprentices that are employed. The chief cannot be always in his office; neither can his deputy. A solicitor comes in with a paper, and pays 6d. The proper party to make the entry is not there, and an under clerk gets the particulars, which he ought to hand to the chief to be entered in the proper book. But this may be in the first instance omitted by mistake; and the clerk finds that he has got 6d. Altogether it is a bad system, and no audit of these accounts can be made without a great amount of labour—without going through every process and every book in the office. But if stamps were employed, the operation of cancelling the stamps would be done by the chief officer; and it has worked amazingly well in England, and is largely acted on there, to the admitted convenience of all parties. I would diminish the number of items of fees, and substitute fewer and larger fees to be paid at different cardinal points of a case; I would have a different distribution of them, so as to get a sufficient sum out of the whole fees. I think the present system had its origin in the Sheriff-clerk having an interest in the fees; and every opportunity was taken advantage of, for transferring something into his pocket at every little step of process,—occasions which might be passed over,—and a few fees put on at cardinal points, which would raise the necessary sum; and perhaps, to some extent, these should be in proportion to the value of the case.

7957. Do you think that the present division of the county of Forfar for Sheriff Court purposes is a good one—I mean having one court at Forfar, and another court at Dundee? Or what do you think of the suggestion which has been made to the Commissioners, that a Sheriff Court should be held at Montrose, comprehending Arbroath and Brechin, and other parts of the county, rather than at Forfar?—Well, Montrose has some claim. It is a large community; and if justice is to be brought home to the doors of everybody, and expense is not to be considered, a court might be held there. The present system, I think, works very well; but thinking I might be asked something upon this subject, I procured a list of the small debt cases in the last four courts held at Montrose; and I find there were 30 small debt cases at one court, 22 in another, 19 in another, and 17 in another,—in all, 88 cases.

7958. *Lord Barcaple.*—At what intervals were these held?—Every alternate month—July, September, November 1868, and January 1869; and in all the 88 cases, the aggregate sued for was £363, 15s. 1d. Then in the Debts Recovery Court there were 8 cases, the aggregate sum being £189. I also got a return of the cases from the Montrose district, brought in the ordinary court at Forfar.

7959. *The Chairman.*—Which at present comprehends Montrose, Arbroath, and Brechin?—What I have stated as to the small debt and debts recovery business comprehends the Montrose district; and I find also from the Montrose district, during the year from 1st January 1868 to 1st January 1869, there were 18 cases called for the first time in the ordinary roll of the court at Forfar; and the aggregate sum sued for in these 18 cases was £2736. Of these, 1 was for £1588, and another for £518—making for 8 cases £638.

There were also 5 affiliation cases and 3 petitions—making up the number of 18. That is the amount of business during the last year done at Forfar from the Montrose district. The population of Montrose by the census of 1861 was 14,563.

7960. Would there be any greater convenience to the people of Arbroath and Brechin to be taken to the court at Montrose, than to go to the court at Forfar, as they now do?—Yes, certainly for Brechin; but then Arbroath has a much stronger case than Montrose for a separate court. It is a larger community, and has a great deal more business. Its population in 1861 was 17,593.

7961. The suggestion made to the Commissioners was that Arbroath and Brechin should be thrown into a district, the court for which should be held at Montrose; and I wanted to know from you whether it would be more convenient for them to go to Montrose than it is now to go to Forfar?—Oh, certainly not for the Arbroath parties.

7962. Then it would be no advantage to them?—None whatever to the Arbroath people.

7963. You think Forfar is more convenient?—I am quite sure of it, for the Arbroath suitors.

7964. *Lord Barcaple.*—You have a good court-room at Forfar?—Ground was broken last week for the building of a new one.

7965. *The Chairman.*—It is in course of erection?—Yes; it has been contracted for.

7966. *Mr. Baxter.*—It would be as far in point of mileage to go to Montrose?—It is about 7 miles farther by rail from Arbroath to Montrose, than from Arbroath to Forfar, and there is no direct train to Montrose.

7967. *The Chairman.*—As I understand, you don't see any general advantage which would result from transferring the seat of the court from Forfar to Montrose?—Certainly not, because if you are to transfer the seat of the court, then all the district of Kirriemuir comes into play. You cannot dispense with a court at Forfar. If you are to give them a new court at Montrose, that is another matter.

7968. If you were to establish a separate Sheriff-substitute, with a court there, that would require additional officials, and the providing of court accommodation?—Yes, the Sheriff-clerk would require to be there. It would require a new establishment, which would probably cost more than the sums sued for. A court-house would have to be built.

7969. *Mr. Adam.*—Is there business at present existing to justify that?—You must draw your inference from the figures I have read. As far as I am concerned, I think Montrose is a much nicer town to live in; but unless, regardless of expense, it is desired to bring justice home to every man's door, I scarcely think the establishment of a court with a jurisdiction like the Sheriff's is required there.

7970. *Mr. Baxter.*—You have a depute at Forfar?—Yes.

7971. What salary do you pay him?—£110.

7972. If you were to do duty there, could you save that?—No; I could not do the manual clerking work.

7973. Why?—Because I cannot always be there; and, besides, I could not do the mechanical, detailed clerk's work which is required, and must be done by some one in the office.

7974. Why not?—It is impossible; and that it is so, must be plain to any one who knows anything of public departments. The principal never acts as a clerk merely.

7975. What do you pay your depute in Dundee?—£155 a year.

7976. I suppose the depute in Dundee conducts the whole business of the Sheriff's clerk?—He does the whole details, subject to my direction.

7977. You are not often in Dundee?—Yes; I have been latterly a good deal there.

7978. When the registrations were going on, but you are not often in Dundee?—No, not every day, nor every week; but I am in constant correspondence. There is never a point upon which I am not consulted.

7979. You are the Commissary-clerk?—I am.

7980. How are you paid as Commissary-clerk?—By fees.

7981. What is the amount of the fees of the Commissary-clerk in the year?—I think it is about £700.

7982. Have you any table of Commissary fees?—Yes.

7983. Have you got it with you?—No; but the fees were fixed by the Court of Session by Act of Sederunt a few years ago.

7984. Who extracts the judicial decreets in Dundee?—The Sheriff-clerk.

7985. Your deputy?—Yes.

7986. And he attends the Small Debt Court?—Yes.

7987. And the ordinary courts?—Yes.

7988. Do you ever go with the Sheriff to his Small Debt Courts in Forfar?—Yes.

7989. But not very often?—I almost always go with the Sheriff on his Small Debt Circuits and the Registration Courts, and attend him always at parliamentary elections.

7990. Was not Mr. Guthrie Smith Sheriff-substitute at Forfar for some years?—Yes.

7991. A statement has been made to us by him which I will read to you: 'I think one clerk should be appointed for each court, with a competent salary. The Sheriff-clerk may himself do the work, by giving personal attendance at his office where there is only one court; but where, as in Forfarshire, there are two, it is obvious that he cannot be in two places at the same time. At Dundee the depute-clerk has a salary of only £155, while the salary of the depute at Forfar is only £110. The entire expense of both the offices at Forfar and at Dundee must be under £600, and yet the principal clerk gets a salary of £1000 a year as Sheriff-clerk, and draws from £600 to £700 a year as Commissary-clerk. The country thus gives this gentleman close on £1200 a year for doing literally nothing, but dividing among those who do the work £600 of the public money.' Is that statement correct?—No, it is not correct that I do nothing. Mr. Smith does not and cannot know all that I do or advise upon. I think I do a good deal, and I think I am useful in the office I hold.

7992. What is it you do at Forfar?—I direct.

7993. You superintend?—I superintend. I am very often there. I am performing the duties of the office by depute, but I am present there often, and I have a residence within three miles, and I am pecuniarily responsible for what is done in both my establishments. Mr. Smith's plan might do if Dundee district were made a separate county.

7994. It is very painful to me to put these questions to you, but I do it from a sense of duty?—I have no difficulty in answering them. I make a return annually to Exchequer of all the salaries I pay as Sheriff-clerk, and of all the fees I receive as Commissary-clerk.

7995. Do the deeds recorded in your county go all to Forfar?—Yes.

7996. There is no record of deeds in Dundee?—None. I may explain that, soon after I was appointed, I found that deeds were taken in at the office at Dundee, and extracts were given out at Dundee as from the record at Forfar, and then the original deeds were sent on to Forfar to be recorded. It occurred to me that that was destroying altogether the authenticity of the record as bearing faith in judgment, because the extract given out was a statement that it was recorded in my books, which was not the case. I consulted Sheriff Logan, and by his authority a regulation was made that all the deeds, and everything that was to be recorded in the Sheriff Court books, should be transmitted to Forfar, and there recorded in the order in which they were given in.

7997. Who signs the extracts of the decrees?—My deputy; that is to say, he signs the bulk of them.

7998. *Lord Barcaple.*—Is there a separate staff for the Commissary-clerk's work?—No, the same gentlemen do it.

7999. Do they hold a separate deputation as Commissary-clerks?—Yes; my deputies at Dundee and Forfar hold separate deputations for Commissary business.

George Webster.

8000. And their work in that department is included in their salary?—Certainly.

8001. *Mr. Baxter.*—How is a confirmation obtained and given out to an executor-nominate?—The deed appointing him, or an extract of it, is produced with the proper affidavit. These and the inventory are carefully examined by the Commissary-clerk, and if found in order, the matter proceeds to confirmation.

8002. Is there any application to the Commissary?—Always. If it is left with us, there is a requisition for confirmation either in the letter or in the marking on the back of the deed by the agent when he gives it in. It is certainly never issued without a request either written or verbal.

8003. It proceeds in the name of the Commissary?—Yes. The whole business of the Commissary Office is done by the clerk. It is very rarely that the Commissary is applied to, except in cases that appear to me to be attended with difficulty. The business of the Commissary is in the main formal, but it involves very often very difficult cases; and I think my knowledge and my upbringing is brought to bear on these points with some useful results.

8004. *Mr. Gordon.*—Are there more duties performed by your clerks connected with the Sheriff Courts than with the Commissary Court department?—There are two commissariats—Dundee and Forfar; but the vast amount of the business is the Sheriff Court business.

8005. The Sheriff-clerk is not necessarily the Commissary-clerk?—Not necessarily.

8006. It is a separate office?—It is.

8007. But you happen to hold both?—Yes. I was first appointed Sheriff-clerk, and then a few years afterwards Commissary-clerk. These offices are joined in eleven counties—viz. Argyle, Bute, Fife, Forfar, Haddington, Kincardine, Kinross, Linlithgow, Peebles, Ross and Cromarty, Selkirk, and Wigtown; and they are separate in all the others. I think it would be right that they should always be combined, they are so much connected with one another. I know no reason for not combining them. I think it would be a great advantage.

8008. *Mr. Adam.*—Supposing there was to be a change of system, do you see any difficulty in the duties of the office being discharged by the principal clerk at the seat of each Sheriffship doing the duties in person, as suggested by Mr. Guthrie Smith?—That depends on the remuneration being such as to secure the services of a fit person. I don't think it would be prudent to put there an inferior man, without somebody over him.

8009. But an efficient person could do the work in person?—Of course, if he was efficient, he could do the work; but I don't think that arrangement would end in economy.

8010. *Mr. Baxter.*—I suppose you find your depute at Dundee a pretty efficient person?—Yes, I do; but I keep him right very often in general things. I think he is most excellent in his position, and that is the reason why I selected him. He was bred in my office at Forfar; and the depute at Forfar learnt the business for two years in my office before he was promoted to Forfar. It is a special business. It is not very interesting to do the details of it, but there are occasions on which the Sheriff-clerk principal is very useful; and from the nature of the office, he should be a responsible educated person, engaged in no other business.

8011. *The Chairman.*—You said that your previous training gave you an ability to give advice in some of those matters when a question of difficulty arose. I think you practised as a solicitor in London for some time, did you not?—Yes. I am a Writer to the Signet of 1821. I went to London soon after, and I remained in business there till 1854. I had the management of one of the largest businesses in London as a Scotch solicitor in appeals from the Court of Session, in Peerage cases, and also in railway bills. During all that time I had one of the largest businesses. And with reference to the Commissary business, I may say that in the course of it we had a vast amount of instances in which we had to take out probate in England, and I am well acquainted with the course of procedure there. There is one thing I should like to say while it occurs to me,—namely, that I think the custody of the records, and the regulations as to access to the records for inspection, are very defective in Scotland. Parties claim a right to come into my office, and for one shilling to get any of my record books, and sit down and copy from it for a whole day, doing so with pen and ink; so that, if they were fraudulently inclined, there is every opportunity. In England, if you go to the Court of Probate, you are not allowed to go near a record or original document with anything except a pencil. You are not allowed to copy anything, and there is always somebody present with you. That system is not at all observed in any record in Scotland that I have seen, and certainly not in my office.

8012. *Lord Barcaple.*—If parties in England want a copy, it is supplied by the office?—Yes, always. I was threatened with an action lately, because I would not allow a man to copy a will. I always say, if it is a poor case, I will give a copy; but this was a case in which I thought there was no reason whatever for not paying me fees as Commissary-clerk. However, I did give way, because it is rarely anything of that kind occurs; but they claim a right to come into my office, to have the record or the original deed, and copy from them without restraint of time or extent.

8013. *The Chairman.*—And not only to read, but to copy?—Yes. In England, parties are allowed to take, in pencil, the name of the executor, the date of the deed, and the amount for which the will is proved; but that is all they are entitled to get.

8014. Are they not entitled to take the names of parties benefited by the will?—No; they may read the will; but if they want to know the particulars, they must order a copy.

8015. But they may read the will?—Yes; and it depends on their memory what they can carry away. That was the practice in Doctors' Commons when I was in business in London, and is, I believe, so still. At any rate, I think it ought to be more stringent in Scotland than it is at present.

8016. Have you any other suggestions to make, either about the record or the duties of Sheriff-clerks, and the mode of regulating the payment of the fees?—We are required to keep a great many books. We are also required to make a great many returns. These books have been imposed on us from time to time, without considering the books we were then keeping; and returns are asked from us, which, if they had been made consistent with other returns, and our books had been framed and uniformly kept so as to show these particulars readily, might have saved us an immense amount of trouble. For instance, the Act for amending the law of hypothec requires us to keep a most detailed account of all applications for sequestrations, the names of the parties, the name of the farm, the rent, and all that sort of thing. We require to keep a somewhat similar return as to small debts. This applies to sequestrations of urban tenements as well. Now, if it was necessary to have that book at all, one book would have done. It was intended for public inspection; but there has never been an instance in which it has been looked at since the Act was passed.

8017. Do you mean that there is a separate book kept for urban tenements?—No; we have a book under the Small Debt Act, and a book under the Hypothec Act. As to the sequestration of urban tenements, in the clause in the Hypothec Act imposing on us the necessity of keeping the book, words seem to have been added, extending it to urban tenements.

8018. What would you suggest?—I would suggest that, in any revision of the law, these matters should be considered. In the first place, they should be uniform in all Sheriff Courts; and if statistics are to be required, they should be framed so that these could be easily obtained. They should be diminished in number as much as possible, and only those that are found to be useful kept up; because there is an immense amount of time required to fill up all these things, and it is

labour apparently without any object, for they are never looked at.

8019. You mean that only those matters should be entered that are of use?—Yes; and where two similar books are kept, they should be combined, and made uniform.

8020. Does it not very much depend upon the motions that are made for returns in the House of Commons, or in the House of Lords, what it is that you are called upon to give?—Certainly.

8021. And that may not be in accordance with the books you keep?—No; but in the House of Commons or the House of Lords any person acquainted with the subject would say, on the part of the Government, 'There are no materials for giving such a return;' and any gentleman, told that upon good authority, would not press his motion for a return. But certain things could be obtained very easily, if we knew beforehand what would be required of us. For instance, the returns which I have laid before you from Montrose, were available from an alteration which I made some time ago in keeping the books. My deputy there says that he had no trouble in giving these returns, because of the order which I gave to note some particulars in the fee-book. Under the old system he would have had to look at every case, and would have found, very likely, that one half of them were not in our custody; and I may state that I think the system of borrowing processes is a very bad system, and is the occasion of a vast amount of delay. The record is taken out of the custody of the clerk of the court; and at this moment, when returns are asked from me for a certain year, I find that 25 per cent. of them are out of my custody—that is to say, the whole record is out of my custody, and all I have is the interlocutor sheet, which does not give the particulars wanted.

8022. These are current cases?—Yes; and the record is borrowed out of court. I have never been able to find what is the reason of this practice. The defender has, or ought to have, a copy of the pursuer's papers, and *vice versa*. The summons is served upon the defender. If he has a defence, why should he not be required to serve a copy upon the opposite agent?

8023. You are limiting that to the record, exclusive of the productions?—These are in a different category. I don't see why the system in England should not be adopted, that a man should keep his own evidence till the trial. Why should my evidence against a man be put into the hands of the clerk of court, and then borrowed up and put into the hands of my opponents?

8024. *Mr. Webster.*—Why not?—Because there is a door open to fraud and vitiation. It is not so in England.

8025. Is there not a wider door open to fraud by keeping up the documents till the last moment?—You don't keep them up. You give the opposite agent notice that you intend to produce at the trial such and such a document, which he may see and take a copy at your office, and he comes there. What he wants to see is, first, whether it is genuine; and if it is genuine, a copy is as good as the original. I judge only from Forfarshire, where we have large communities in Arbroath, Montrose, Brechin, and Kirriemuir; and constantly, when cases come on in court, it is found that the process is in Kirriemuir or Montrose, and often out of the jurisdiction of the Sheriff altogether, and the case is postponed.

8026. According to the system you propose, would you let a party use a document at the trial if he had not given notice that he had the document, and offered inspection of it?—Certainly not.

8027. Have you ever, in practice, known any fraud committed by the document passing from the custody of the one party to the custody of the other?—Certainly not.

8028. If you were to adopt the English system, would you require that not the solicitor only, but every one who was to speak to the document, should go to the agent's office and inspect it?—I take the English system, where a summons of inspection can be taken out; but it is quite consistent with my view that the judge should have the power, upon special application in a special case, to order the documents into court, and either to allow them to be inspected in the clerk's hands, or to be borrowed up under certain regulations. I think, in general, it is quite unnecessary to borrow them.

8029. Are you speaking of that from practical experience in the conducting of process business, or from your official position as clerk of court?—I am speaking from my official position; and I state this as a fact, in which the judge at Forfar will concur, that a great number of the cases are put off owing to the processes not being in the clerk's hands.

8030. You distinguish between the record and the documents?—With respect to the documents, they are not essential until the trial, if parties have previously had access to see them and learn their contents.

8031. You think that detailed accounts, or correspondence, or vouchers, are not necessary until the trial?—I don't know what use there is, of seeing the original of any writing more than once, if you are satisfied it is genuine; a copy is then as good as the original.

8032. *Lord Barcaple.*—Are there not a good many cases in your court where there is no parole proof led at all?—Yes.

8033. But the matter depends on statements, admissions, and documents?—Yes.

8034. How would you deal with the documents there?—The parties should have copies of them.

8035. The evidence must be the document itself—not the copy, unless it is admitted?—Certainly. If you have seen a document once, and it is genuine, the copy, if correct, is just as good as the original.

8036. *Mr. Webster.*—At what stage would you let the party see it, if the case is to be disposed of, without a formal proof?—Whenever a man brings a suit that is to go to trial, and whenever it comes into the clerk's hands, after trial it should remain there till it is returned to the party who produced it.

8037. *The Chairman.*—What do you mean by the expression after trial?—I mean when the case is decided by the judge.

8038. But what do you call trial?—After proof, or after decision.

8039. Suppose there is no parole proof in the case; but the case turns upon certain documents, and the parties have stated their case in written pleadings, they may require to look at the documents, and the documents must be laid before the judge. There is no trial in that case?—Of course the documents or copies should be before the judge, and there may be cases in which it would be proper to allow the documents to be borrowed; but I spoke principally of the record. These borrowings, in my opinion, occasion a great deal of delay and expense. I don't run into extremes; but I know that practically a great deal of delay and expense arise from the record being out of the custody of the court.

8040. And that, I suppose, arises a good deal from the negligence of the agents in not returning it when they ought to return it?—Certainly; there is a rule of court, that no case ought to go to the roll unless the process is in my hands the night before.

8041. That is not observed?—It is not; and for this reason, that it is not made imperative on me to refuse it. The agent brings the process at the last moment into court, and then the judge takes the case up. But in the great number of cases it is postponed for want of the process.

8042. *Lord Barcaple.*—You mean it is dropped because there is no process?—Yes, and there is a fine exigible; but it is not imperative, and agents do not press for it.

8043. *The Chairman.*—Have you any opinion upon the constitution of the Sheriff Court, as consisting of a Sheriff and his substitutes?—Yes. I think it a very good arrangement at present, subject perhaps to some modification, principally as to extending the area of the Sheriff's territory. I think the present system of a resident substitute, with an appeal from his judgment to a gentleman in actual practice before the Supreme Court, intermediate between that court and the resident

George Webster.

judge, affords a very cheap and expeditious, and, so far as I know, a very satisfactory mode of getting the opinion of a second person trained to, and in the actual practice of the law as administered by the highest court, and in contact with the best legal minds of the time, aiding him with great advantage in the exercise of his judicial functions; and I think that is proved by the few advocations.

8044. But the number of advocations may be in some degree affected by the cost of litigation elsewhere?—Certainly.

8045. In cases of small amount, do you think the power of review by the Sheriff is expedient and useful?—Yes, and very expeditious, very cheap, and very useful.

8046. And satisfactory?—I think so.

8047. You think it desirable that the judgment of the resident Sheriff should be reviewed by a gentleman who is a practising lawyer in Edinburgh of some position?—Decidedly. I have a very strong opinion upon that.

8048. It is desirable that the gentleman reviewing the judgments should be attending the courts in Edinburgh?—Decidedly. I think that is a very great advantage, and I think upon very evident grounds.

8049. By enlarging the areas of the Sheriffs, do you mean grouping of counties?—Yes; carrying out the principle which was followed in the case of Linlithgow, and Elgin, and other counties, as occasion arises.

8050. You think that might be done to some extent?—Yes; I think the arrangements could be very easily made, keeping always in view the facilities of access which railways afford.

8051. And the amount of business to be done?—Yes.

8052. Do you think it would be inexpedient to make the district or group of counties so large as to preclude your getting the services of a gentleman who is in considerable practice at the bar?—Certainly. I think that should always be considered. I don't know that I have any right to say anything about emolument; but that would involve the increase of his emoluments. Indeed, I think both Sheriffs and Sheriff-substitutes, particularly of the larger counties like Forfar, are much underpaid; and I think a Sheriff, when he travels on the business of the public, should be paid his expenses, and that his inducement not to go to his district should not be affected except by the necessity of the case. Sheriffs now have a fixed salary, and they must pay their own expenses; I think that is a bad principle.

8053. *Mr. Campbell.*—In the case of a gentleman in extensive practice, his personal expenses must be exceedingly trifling compared with the sacrifice of fees which he makes in leaving Edinburgh?—That is so, to a certain extent.

8054. Are you aware that, in the case of gentlemen holding the office of Sheriff-depute in very extensive practice, it has been their object, by changes of Sheriffdoms to which they are appointed, to escape from large counties where important duties were to be discharged, and to take a small one at a smaller salary?—That I can easily understand.

8055. *Mr. Baxter.*—You are aware that the Sheriff-substitutes are generally taken from the bar?—I am. I think there are about fifteen who are not members of the bar.

8056. The record is made up before them?—Yes.

8057. And they take the proofs and see the witnesses?—Yes.

8058. And the Sheriff reviews the judgment of the substitute upon his notes of evidence?—Yes.

8059. Are you aware that that is considered by the profession generally in the country as a weak appeal?—Well, it is a necessity that the appeal judge can't see the witnesses, unless you confine the appeal judge to matters of law. There is a great disadvantage in the judge not seeing the witnesses; but that applies to all appeals.

8060. I was asking whether you know that it is the opinion of the profession, under the circumstances I mentioned, that the present court of appeal is a weak one?—No; I don't know that, nor do I think it necessarily weak if the notes are well taken.

8061. Do you know the opinion of the profession?—I know some are of that opinion. There is no unanimity on any subject now, that I know of.

8062. Do you know it is a general opinion?—No, I don't know that; but it may be. I have never met the opinion but I have tried to controvert it.

8063. Do you know that it is the opinion of the profession in Dundee and Forfar?—No; I don't think it is so much the opinion in Forfar. I believe in Dundee there is a large mass of opinion that that is a weak point, and I admit it is objectionable, and that the resident judge has a decided advantage in many respects from seeing the witnesses; but that can never be avoided as to oral evidence.

8064. *Mr. Gordon.*—It is in that respect that you say the appeal is objectionable, from the Sheriff not having seen the witnesses examined?—Yes. There is a certain class of cases in which that is so; but I don't think that is so in all.

8065. *Mr. Baxter.*—Do you know that it is the opinion of the profession, that it is an appeal from a judge well informed to a judge worse informed?—I don't profess to be a judge of that opinion as applicable to all cases, but in those I do know, the facts are against it most decidedly; and were it otherwise, it must be either accidental, or the fault of the person making the appointments, and not the system.

8066. Do you think that the proposition to strengthen the appeal by having two Sheriffs sitting like the Lords Justices in the Court of Chancery is a good one?—I think that is a very bad plan. In the first place, you must give these two judges larger salaries; and having two, you diminish by one-half the working power of appeal, because the two men will only do as much as one will do,—in point of getting through work, indeed less than one would do.

8067. But do you consider it a stronger court of appeal?—No, I don't think so, if by stronger is meant a better or more useful—more expeditious or cheaper.

8068. You don't think two minds are better than one?—I don't say that, but you are driven to one or three, because I don't see how two would work.

8069. You are aware that that is the constitution of the Lords Justices in Chancery?—I don't think we can compare our work in Sheriff Courts to that of the Lords Justices.

8070. But you know that to be so?—It is a new arrangement since I left business, but that would not change my opinion in reference to the Sheriff Courts, nor generally that only two judges sitting together is a good or a practical arrangement; and you must look to the class of cases with which you have to deal.

8071. Do you think that would strengthen the court of appeal?—It depends on the value put on the word 'strengthen.' If you mean to say it would diminish the expense or expedite the case, I will answer the question. I think it will add to the expense; and it will delay the cases, because, when two minds have to come to a conclusion on a subject, there is greater time taken where difference of opinion arises, than where one man has to act on his own responsibility. You increase the expenses of the judges, and you diminish by one-half the working power of appeal, while you also diminish by one-half the responsibility of the judge; and I don't know what you are to do, supposing the two judges agree that the judgment of the Sheriff-substitute cannot stand, but don't agree as to what is to be done instead.

8072. Would not the judgment stand in that case?—Then the judgment stands, but the appeal judges disagree with it.

8073. Then it is two to one?—No, it is two against the judgment of the one Sheriff-substitute, and yet that judgment is to stand. Supposing they adhere to the Sheriff-substitute's judgment, then there are three judges agreeing. But the case I was putting is this: Where the two judges that have heard the case are both satisfied that the judgment of the Sheriff-substitute cannot stand; but when they come to settle what is to be done instead, they find that they cannot

agree upon that. I don't see how it would practically work. Suppose they come to Dundee, and hear a certain number of cases, they decide so many, and take so many to avizandum; they go on to Forfar and do the same thing there, and they go throughout their district. Suppose they reside in Edinburgh; they have so many cases before the two judges to decide, and just consider the delay that would occur from interchanging documents. It would be a long time before the decision could be known, and who is to have the custody of the records all that time? I look upon the present arrangement not as a regular authoritative appeal, but as offering the most convenient, cheap, and expeditious way of getting the opinion of a trained lawyer, qualified as I have before stated, upon a great number of unimportant cases, which are not fit for two judges such as are proposed. I think you may utilize the existing Sheriffs more as to work, and still keep them at the bar. For instance, I think Dumfries, Wigtown, Kirkcudbright, Selkirk, and Peebles would make a Sheriffship on a workable scale.

8074. *Mr. Booth.*—You have said that the appeals from Sheriffs-substitute to the Sheriff is very easy, expeditious, and cheap?—I am sure it is. It is certainly expeditious in our county; and that it is satisfactory, and at any rate ends most cases, is shown by the few advocations to the Court of Session.

8075. And I suppose most of the cases are appealed to the Sheriff?—No; but a good many are.

8076. May it not be so easy and cheap as to encourage litigation in unimportant cases?—Well, it is difficult to cut off the right of appeal. I think it is most beneficial to a judge to have the feeling that there is another mind to look at what he is doing. Without imputing any motive to a judge, it is most satisfactory for him to have his judgment subject to appeal. The resident judge gets mixed up imperceptibly in local matters; he cannot help it; and it is a most useful control over him which the Sheriff exercises, I think.

8077. *The Chairman.*—Do you think the jurisdiction of the Sheriff should be extended to any class of cases in which he has not jurisdiction now?—My opinion is that, as a principle, he should have jurisdiction in most civil cases; but there are some special cases which I have great doubts about. For instance, I think it most inexpedient to give a Sheriff jurisdiction in cases of divorce, though it is a great hardship on poor people that they cannot get a divorce. A divorce necessarily implies proof of the constitution of the marriage, and so you must give the Sheriff the power of deciding whether a man is married or not. It is not the same question as the question of giving aliment to a wife, because that does not affect the status; but when the court pronounces a decree of divorce, that necessarily implies that the marriage is proved. In divorce cases, the first thing which we proved in the House of Lords was the contraction of the marriage, and that had to be done before the bill could proceed beyond its first stage; and so in the Court of Session now, the marriage must first be proved. In Scotland the constitution of marriage is a much discussed subject, and the facilities now afforded for contracting marriages are much complained of; and if you increase the facilities for dissolving marriages, you will increase the evil.

8078. Then you would except cases of divorce?—Yes; and of the constitution of marriage.

8079. Would you give the Sheriff jurisdiction in declarators of legitimacy?—No; I think that is very nearly the same subject.

8080. Or declarators of bastardy?—I think not.

8081. In regard to the hardship upon poor people which is stated to exist, and which in your opinion does exist, that is consequent upon the expense of the process of divorce—that is the hardship?—I have no doubt of it.

8082. Do you think that would be avoided to any considerable degree by the proof in cases of divorce, instead of being taken in Edinburgh, being taken by a remit to the judge ordinary of the bounds where the parties are?—The objection that the judge who is to decide the case does not see the witnesses would then arise; but that would diminish the expense. In England there is no arrangement of that kind, and the jurisdiction in divorce has been confided by the Legislature there, to a separate court of high dignity.

8083. But do the poor people in England get the benefit of it?—No.

8084. *Mr. Baxter.*—Do you know of your own knowledge, that in many cases the expense of divorce operates as a bar to the remedy?—I have no doubt of it—cases in which the remedy ought to be given.

8085. Do you know many cases where a man has taken the law into his own hands, and lives in immorality and adultery?—I have no knowledge of that; but I think the Conjugal Rights Act, 1861, might be worked out in the Sheriff Court.

8086. *The Chairman.*—In regard to heritable estate, do you think the Sheriff should have jurisdiction in all questions of heritage?—Yes; but if you extend the jurisdiction to such cases, it might be right to put in a provision that either party might have it transferred to the Court of Session if they thought fit, putting a limit of value.

8087. But the choice being absolute to either party?—To either party.

8088. *Mr. Baxter.*—Of course the pursuer chooses his court when he raises the action?—Yes; but he may change his mind.

8089. So that the option would lie to the defender?—Practically, almost.

8090. *The Chairman.*—The pursuer might not expect that a certain formidable defence would be stated; and when he finds that stated, he might consider it desirable to have it disposed of by the Supreme Court?—Yes; but the option should be exercised at an early stage.

8091. *Mr. Baxter.*—And above a certain limit in value?—Yes.

8092. *The Chairman.*—In regard to pleadings and procedure, have you any suggestion to make?—I think the forms in the Sheriff Court Act of 1853 are very good; and if that Act had been carried out more strictly, we would have got rid of a good many of the complaints that have arisen. I think that there should be a simple writ, which might be in a short form, with a mere description of the claim, so as to identify it; the case would thus begin very simply, and a decree in absence would be procured very cheaply. Authority should also be given to the clerk of court to enter up judgment, if there is no appearance, without the intervention of the judge; but I think that, as much as possible, all cases of the same class, where it is a claim for payment of money, should be uniform. At present we have the ordinary form, the debts recovery form, and the small debt form. I think all these should be combined into one form; and in that respect, as well as in a great many others, all the existing Acts should be repealed and the provisions consolidated, so that we might read in one place all the regulations. It is impossible to overstate the great discrepancies and difficulties which we have in knowing what is meant, from the provisions being spread through the different Acts of Parliament.

8093. *The Chairman.*—In regard to procedure after the case comes into court, have you any suggestion to offer?—In the first place, I think something like what is done in the Debts Recovery Act as to making up the record should be adopted. I think the pleadings might be shortened in a great many cases, and greater precision and exactitude enforced.

8094. *Mr. Campbell.*—Do you think it would be of advantage that the pursuer should have a right of replication in a brief note?—I think so. One must be careful in following the English system, because the Sheriff Court is a court of equity as well as common law; and, therefore, if you take the common law forms, you are at sea when you come to an equitable case. But the common law procedure in the Sheriff Court should be assimilated to the common law procedure in England. These forms are very short and distinct. The description of the demand served on the defender

George Webster.

should be short; just sufficient to identify the claim; with a right to the defender to demand particulars, without the intervention of the judge, and through the clerk of court. A great deal might be done in that way to diminish the expenses.

8095. *The Chairman.*—You think that, with a brief statement of replication by the pursuer, a more formal record might frequently be dispensed with?—I think so.

8096. There are various stages at which appeals from the Sheriff-substitute to the Sheriff is allowed. Do you think that any of these might be dispensed with?—I think so. I think the right of appeal, in a great many instances which exist now, ought to be subject to the leave of the judge—I mean at certain stages of the case—the whole being before the appeal judge when it comes to him. When these changes are made, I think it will be necessary that a new table of costs for practitioners should be settled, because it would require to be made applicable to the new forms, so that a professional man is fairly remunerated. If you do away with a number of steps of process at which he has now a fee, you must give him something in substitution for that.

8097. Do you approve of the principle on which costs are regulated under the Debts Recovery Act?—Certainly not.

8098. You disapprove of it?—Most decidedly.

8099. The agent is paid by a slump sum?—Yes; 7s. 6d. for a demand of £25, and 10s. for any sum above that, in the case of decrees in absence. There is a clause in the Act enabling the Court of Session to alter the fees, but they can do so only in 'contested causes.' Somebody has put in that expression, I have no doubt, in the progress of the bill, and the meaning of it was not seen at the time. Therefore the Court of Session cannot alter the fees of 7s. 6d. and 10s.

8100. These are as to decrees in absence?—Yes; and your Lordship knows what has to be done for these fees. The solicitor has an interview with his client, who says, I want to pursue John Smith for £49, 19s. 9d. The first question is, Does the account come within the definition of causes allowed by the Debts Recovery Act? He has then to write a demand on the party for payment. Then he has to consider and find out whether that party is worth powder and shot. Next he has to see whether he can prove his case; and if he is satisfied of all that, he comes to my office and gets a form, which he fills up with the particulars of his demand, and puts it into the hands of an officer to summon the party. The summons is returned to the solicitor with an execution, and he has to see that that is properly done. Then he has to come to my office, and lodge it for enrolment for the next court day. He has then to come up on that day and ask judgment. And for that the statute allows him a fee of 7s. 6d.

8101. Do you think he should have a separate fee for each of those things which you have mentioned?—No; I don't mean to say that. I think you would find a guide in this matter in the procedure in the County Courts in England.

8102. How would you deal with a case of decree in absence? Would you not have the fee a slump sum?—Certainly not. I think each case ought to be judged of by what the solicitor does; and it is not only provided that he can charge only the fees allowed by the Act, but it is illegal to take more from his employer. I object to that as a principle.

8103. Then what do you suggest about it?—I think there should be a new table of fees.

8104. I am talking of decrees in absence?—I don't see any objection to an increase of the sum upon a just principle, removing the illegality of taking more from the solicitor's own employer, if he chooses to give it. I don't see why the sum should not be fixed against the defender.

8105. Then it would be a slump sum against the defender still?—It might be; but I don't think that is a right way of remunerating a professional man.

8106. *Mr. Baxter.*—You would pay him according to the work done?—Yes.

8107. *The Chairman.*—As to the privileges of agents, do you think there would be any advantage in allowing the practitioners of one Sheriff Court to practise in another Sheriff Court as matter of right?—At present there is nothing to hinder a practitioner in one county from being admitted to the courts of another.

8108. Do you think that an entrance examination by a general body of examiners should be sufficient to qualify a person to practise in any of the Sheriff Courts?—I think so. I believe this question really means, whether the country practitioner is to share in the business conducted in the Court of Session.

8109. That is another branch of the question; but I was first asking, whether he ought to be allowed to move, for instance, from Perth to Dundee, and to practise there, without undergoing any other examination, or any entry being required from him? I don't mean to ask whether he should be entitled to get into any Faculty of Procurators, who have other privileges, such as libraries and widows' funds, or rights of that kind; but whether he should be entitled to practise?—I see no objection to a country practitioner applying to the Court of Session to admit him to be an agent there, the court making its own regulations, which should be fair, considering his training as a procurator in the country.

8110. If he wished to go to another county to practise, would you require that he should undergo any examination, or any process of admission, in that county?—I would be very sorry that the judge of the local court parted with the control over the practitioners in his court; and I think he should have the power of regulating the admission. If he is admitted as a procurator, and has done nothing in the other county to disqualify him, I think he should be admitted without examination of a professional kind; but I don't think that would be acted on in many cases.

8111. *Mr. Campbell.*—You think it would be desirable that the Sheriff should maintain his discipline over his own court unimpaired?—Yes; and it has occurred to me, whether the Sheriff has a power of striking a man off the roll now. I think it must be done by the court above; but I think the Sheriff ought to have power over the practitioners in his court, the same as exists in England.

8112. *The Chairman.*—Are there any other matters which you would like to suggest?—I understand it is very much desired that country agents should be admitted to the Court of Session, one of the consequences being that they would then be entitled to be in partnership with the Edinburgh agent as to the costs in the particular cases; and that is founded on the practice in England, where the country practitioners are all admitted to the Supreme Court. The practice there is to divide the profit in every case from the beginning; but that is not a parallel case to the country practitioners in Scotland, because a country practitioner in Scotland has the conduct of the case up to the time that it comes into the Court of Session; and on the assumption that the remuneration of the Edinburgh agent is appropriate to the duties done, I think it is very unjust that he should be called on to contribute to another who did not do any of the work. I know that that principle was discussed in London, between the London solicitor in appeals, and the Edinburgh agent; and I had an opportunity of consulting one of the highest authorities on that very point, and he said: If I find you or any of the solicitors contributing a share of your profit to the Edinburgh agents, who are not practitioners here, I would deal very severely with them. I think it is a vicious principle, and it is not in the interests of the client at all, but the contrary.

8113. In England, the solicitors are all admitted in the Supreme Court?—They are all admitted in the Supreme Court, and they then go to reside in different localities; and they send up a case to the London solicitor, and share in the profits from the beginning. The propriety of that is very much questioned, but it is quite legal. I understand that where it is in a different court, it has never been considered legal that the practitioner of the one court should share with the other.

8114. There are litigations before the County Courts, and in these litigations the London partner participates?—I don't know how that is now; but I don't think

that there is a separate body of attorneys for County Courts.

8115. Have you anything to say in regard to criminal matters?—Yes; I think the system of taking the declaration of prisoners should be abolished. A prisoner is brought up into a private room, in presence of the judge who is to try the case, and the Procurator-fiscal; and he is told that he is to be asked questions, having been previously warned that he is not bound to say anything; but that if he does say anything, it will be taken down and used against him at his trial. I think that is an objectionable thing under any circumstances. But I think it is very objectionable that the judge who is to try the case should have anything to do with this proceeding, or with the getting up of it. The same judge may be a party to the precognitions, and he then comes to try the criminal.

8116. Do you think that is productive of evil?—I can't say that it is. It has been very leniently and fairly administered; but if it had been otherwise, there would have been an explosion long ago.

8117. That has been the state of matters from time immemorial?—Yes; it has, in Scotland.

8118. *Mr. Baxter.*—Does it not occur to you that it gives a prisoner an opportunity of making an explanation, if he has any to offer?—But that opportunity could be given him in a different way. The Procurator-fiscal is engaged in inquiring what evidence exists against a man for having committed a certain crime. He judges of that, and he applies to the judge to have him committed for trial. I would give the prisoner an opportunity of making his statement after he had seen his agent, or at any time before trial, to the Fiscal. He could send the Fiscal a written statement, and that statement should be printed with the indictment, and not, as at present, his declaration only used if the Procurator-fiscal thinks fit. Or he might be entitled to be brought up, and make his statement in court publicly before trial. I think the principle of the private examination of the accused party is objectionable, particularly when it is done by the judge who is ultimately to try him. I think the judge who is to try a prisoner should not know anything about his case till he, the judge, is on the bench and the prisoner is at the bar.

8119. Is it not the practice to read the charge, and ask if he has any explanation to give?—Yes. It is most fairly administered; in our county particularly so; but I think the thing is wrong.

8120. *The Chairman.*—You think it is wrong in principle?—Yes. I also think it is wrong in principle to charge previous conviction in aggravation in the indictment, and send that to the jury. I think the previous conviction should be proved after the verdict, and merely considered by the judge with reference to the extent of the punishment.

8121. You spoke of printing the prisoner's declaration with the indictment. Would you print whatever statement the prisoner chose to make?—Not necessarily; I think there should be a discretion in the judge in that respect.

8122. The prisoner might accuse parties who were not guilty; you would not print that, would you?—No; there must be a certain discretion somewhere, in case the prisoner made use of it for improper purposes.

8123. Do you think the prisoner ought to be allowed to insist on the reading of his declaration at the trial, striking out such parts as I have alluded to?—Yes; and if the declaration contained irrelevant matter, it should be struck out.

8124. But if the prisoner is not to be questioned at his examination, but allowed to make what statement he likes, and if he is entitled to call for that at the trial, and to have it read, is not that practically allowing him to be a witness for himself without cross-examination?—It is, certainly, but I don't know why that should not be. He might be allowed to make the statement, and at present he makes it very often through his counsel.

8125. Have you any other observations to make?—The question as to having jury trials in the Sheriff Court has been much discussed, but I don't think that would work at all. I don't think that a jury is the best tribunal for trying all sorts of cases, and certainly not the most of the kind of cases that we have in the Sheriff Court.

8126. *Mr. Campbell.*—Have you considered whether it might not be expedient to give the Sheriff a power of inflicting sentences of penal servitude?—I think there is no objection to that. I think his power of punishment might be extended.

8127. Do you think that in that view it might be proper that he should try certain cases of robbery?—I don't see why he should not, but I speak with great deference on that subject.

8128. *The Chairman.*—Have you any further suggestion?—There is a question as to whether the judge should reserve an appeal in criminal cases. I don't know whether it might not be proper to allow the Sheriff-substitute to reserve a point at the trial for the opinion of the Sheriff. There is another matter which I should like to mention. New duties are being put on the Sheriff-clerks. For example, under the Lunacy Act we take fees for the work done; but these fees, instead of being remitted with my fees to Exchequer, and thereby enhancing my position as a productive officer, have to be remitted direct to the Lunacy Board, and they go to diminish the apparent expense of their establishment. That was done last session. I am also required to remit all the fees which I receive under the Writs Registration Act to the Lord Clerk Register. That occasions me a great deal of trouble, and it seems very unnecessary for the public interest. It would be far better as a principle, that all the fees which I receive in every department should go direct to Exchequer, instead of requiring me to remit this class of fees to the Lunacy Board, and that class of fees to the Lord Clerk Register, thereby confusing the accounts, because there is no audit of my accounts. I think that all the fees which I receive as Sheriff-clerk should go direct to Exchequer in one account.

8129. Would you classify your account, to show how much was derived from one source, and how much from another?—Certainly. We classify all the fees that we remit to Exchequer.

8130. And you would classify so much as appertaining to the Lunacy Board, and so much as appertaining to the Lord Clerk Register?—Yes.

8131. And the Exchequer would distribute it?—It would go in as a receipt from my office for duties done.

8132. If you had to state your account classified in that way, what saving would there be of trouble to you?—One letter, in the first place, would do. I would only communicate with one department. But I think it is wrong in principle, that all the fees that I receive should not go in with my general account.

8133. But they are destined for a different purpose; and it makes one direct application of them by you sending them to the party who is to get them?—That only applies to diminish the estimate for the Lunacy Board.

8134. It shows how far the Lunacy Board is self-supporting, and how far the registration of writs is self-supporting?—Yes, but the work is done by me.

8135. But the fees are derived from the work applicable to these departments?—Suppose I wanted to go to the Treasury and say I wanted an additional clerk, they would say, You are not productive, your fees only show £1200.

8136. But you could say to the Treasury that you remit fees to the Lunacy Board and to the Lord Clerk Register?—No doubt.

8137. *Mr. Gordon.*—What Act of Parliament do you refer to?—All the warrants for the committal of lunatics in Forfarshire go through my office; the medical certificates are all examined, and they then go to the Sheriff for examination and signature, and I am entitled to a fee as Sheriff-clerk for that. All that is done by me as Sheriff-clerk, and I don't see why the fees should not go in with my other fees.

8138. *Mr. Booth.*—If the fees were collected in stamps, do you consider you would be able to present an equally clear account with as little trouble?—Much clearer. If the number of fees taken by me were

George Webster.

small, it would be easy to put upon me the duty of keeping an account of the stamps that I cancelled. At any rate, it would be possible by an indicative mark on the stamp itself, by marking Forfarshire on it.

8139. You would not have the two systems going on at the same time?—No.

8140. If you took to the stamp system, you would give up taking fees in money altogether?—Yes; and I think the words of the Act of last session are broad enough for that.

8141. *The Chairman.*—Have you any other suggestion?—There is a very important matter as to the making up of the jury list. I think it is very necessary that a new mode of making up the jury list should be introduced, and that the qualification should be more definite and simple. With the valuation of property which we now have throughout Scotland, it would be very easy to combine with the duties of the assessor the obligation to return the names of those qualified to act as jurymen in point of residence and the occupation of property. With the new mode of citing juries we have great inconvenience in Dundee, arising from the imperfection of our lists.

8142. You would have the assessor return to you a list of persons assessed at a certain value of property?—Yes; and it might be, also the exemptions in point of age, and other exemptions.

8143. How would the assessor ascertain that?—He sends schedules to everybody now, and they are obliged to make returns. It would only be asking them to add their age and their qualification, and whether they claim exemption as jurymen. I think it would be possible to combine that with the valuation return.

8144. *Mr Gordon.*—The assessor's returns only relate to real property?—Yes.

8145. Jurors are qualified also with reference to personal property?—Yes, but I think it would be expedient to make some limit as to the occupation value, both as to special and common jurymen.

8146. At present the jury lists are made up by the Sheriff-clerk?—Yes; special jurors £1000, and common jurors £200. They are made up by employing other people, and that is paid for by Exchequer.

8147. But the Sheriff-clerk conducts them?—We keep the jury list.

8148. You are paid by the Exchequer for the jury list which is made up?—I get nothing; the persons who collect the lists are allowed 7s. 6d. a day. The new mode of citing juries seems to work very well; but under the previous system we made a condition with the officer employed to cite them, that he should ascertain in advance the efficiency of the jury list. Now the officer has no interest in that, and it is all done by letter, and we have nobody to get at the correct state of the list. A man may have got above age since he was put on the list, or he may have removed from the town.

8149. *Mr. Webster.*—What mode do you take of ascertaining who are qualified to be on the list?—We select a man who has a general knowledge of the town, and the last man we selected was one of our own officers in Dundee. In the country the work is generally done by the parish schoolmaster.

8150. If you were to lay the duty on the assessors of landed property, how would you deal with those who are not qualified by means of landed property? Would you not require the same sort of staff to take up a list of these parties?—No; I think they would be included as resident occupiers; and I propose to alter the qualifications of jurymen, which are now fixed by the Act 6 Geo. IV. cap. 22.

8151. Would you exclude all who had not a landed qualification?—I said occupation, and there is no man who does not live somewhere. If a man is the owner of property, and does not live in the county, he is not liable to serve as a juryman.

8152. *Mr. Murray.*—Supposing two or three brothers live together, one of them being proprietor of the house?—There may be difficulties of that kind, but they arise just as much now.

8153. *Mr. Webster.*—What I want you to explain is the mode by which you propose to get a list of all the qualified jurors?—The assessor, by himself or the people employed by him, knows the occupiers of all premises within the county and burghs, and the rents of them. I do not think there practically would be any difficulty.

8154. Then you would relieve the Sheriff-clerk of the duty?—No, not at all. I want a simpler, cheaper, and more certain mode of getting at the jurymen.

8155. *Mr. Gordon.*—You are the person who has the charge of making up the list at present?—Yes.

8156. And you are responsible for its general accuracy?—Yes; but I am authorized by Exchequer to pay the persons who take up the list 7s. 6d. a day, and I don't think that is adequate, and I don't think the system or mode a good one.

8157. *The Chairman.*—You wish a better machinery for taking up the list and sending it to you?—Yes, and I would still, as at present, be responsible for the management of it as to particular trials, and seeing that it was efficient; but a great many people escape by the present system who would not escape by the other system.

8158. *Mr. Murray.*—If you take proprietorship or occupancy as the sole test of a juryman, a number would escape?—I don't see that; but I don't propose proprietorship, but occupancy of a certain value, for a common juror, and a higher for a special juror.

8159. What would happen in the case of a man living with his mother, she being the proprietor of the property, or in the case of two or three brothers living together?—In England everybody is asked to return the number of persons living in his house who are qualified to act as jurymen, and he would be subject to penalties if he did not do so.

8160. That is, if you take certain machinery?—I would be prepared to devise machinery to do it. All I mean to say is, that the present mode is not a good mode, and the other mode I think would be more efficient. It would be done by an officer, who is for other purposes going all through the county.

8161. You would lay an additional duty on him?—Yes, which he could discharge cheaper and better than the present system.

8162. *Lord Barcaple.*—Can you tell us what are the main grounds upon which persons do escape now, who should serve as jurymen?—I don't think that applies to the country, but in towns, it is owing to the inefficiency of the people we employ to take up the lists. In the very last case of making up the roll, I ascertained when we were acting on it, that it was so imperfect that I immediately wrote to stop the payment of the man's allowance for it.

8163. Did you find that there were any particular classes of persons who were omitted?—No; it was just a general inaccuracy, putting in people who had left the place.

8164. But I am asking about people who were not put in, who should have been there—people who had escaped?—I think it was entirely a mistake on his part.

8165. Are there any particular classes of persons whose names you miss on the roll?—I don't think so. It is quite open to leave out a man if an improper person is employed to make up the roll, and that is the reason why I think it should be done on the responsibility of a public functionary. I must do it through others.

8166. *Mr. Murray.*—Is not the Sheriff-clerk the functionary charged with the duty?—Yes, for the Sheriff; and being so, I think there is a better mode of getting the information than I am obliged to use. I think what I propose would save the public money,—for, as I have said, Exchequer pays the expense,—and we should have a more correct and efficient list.

8167. When a roll is made up, how long will it last before you exhaust it?—Two or three years; but it depends on the number of cases. We delayed making up our last roll in consequence of its being understood that the present Lord Advocate intended bringing in a bill with the view of regulating the qualification of jurors. We continued that last roll three or four years, and began the present roll last year.

8168. *Lord Barcaple.*—Will the provision of the Act of last session, repealing all exemptions of jurymen

depending on any Act of Parliament passed since 6 Geo. IV. cap. 22, make a great difference in your county?—I cannot say.

8169. You have not the means of saying yet whether it will make a large difference or not?—No.

8170. *The Chairman.*—It will make a greater difference as to special jurors?—Yes.

8171. From your former experience, has your attention been directed to the comparative cost of litigation in the two ends of the island?—I think they are much larger in the southern portion than in the northern. I have no doubt of that, not in the least, looking at the bills of costs in the Sheriff Court. I see that they are certainly not like the bills of costs that I used to see in the south.

8172. *Mr. Booth.*—Do you think there is as large an amount of litigation in the north, in proportion to the population?—It varies with localities. I cannot give an opinion as to that.

8173. *Mr. Murray.*—Do the Sheriff Courts give satisfaction?—I think the Sheriff Court an admirable institution; and in judging of them, we should not compare them with the County Courts in England.

8174. *The Chairman.*—Why?—The Sheriff Courts ought not to be compared with the County Courts of England, because the County Courts are limited in their jurisdiction, and try merely a simple class of cases. I should wish further to suggest that I think no warrant for arrestment should be granted before final decree; at any rate, no general warrant, but only of a particular fund on cause shown *ex parte* to the judge; arrestment on dependence is often oppressively used, and without adequate remedy.

KENMURE MAITLAND, Esq., examined.

8175. You are Sheriff-clerk of Edinburgh?—I am.

8176. How long have you been so?—Since 1859.

8177. How many assistants have you in your office?—In the office in Edinburgh I have eleven clerks, two of whom are deputes. I have also a depute at Leith, and one at Dalkeith.

8178. Is the system of payment of the office you hold one of payment by salary?—By salary.

8179. And do you provide the staff for carrying it on, and pay that out of your salary?—I do.

8180. That is the system?—Yes. There is a salary of £2000 a year, out of which I have to provide the salaries of the clerks, the office expenditure in the shape of stationery, printing, etc.

8181. Do you pay office rent?—Not now at Edinburgh—not since the building of the new Sheriff Court-house. I had to pay office rent before.

8182. At Leith and Dalkeith is an office provided?—At Leith the office rent is paid by me. At Dalkeith, which is a Circuit Small Debt Court merely, and the expense of which was not taken into account at the time of calculating the salary, the rent of a court-room is paid by Exchequer; but it is only £3 or £4 a year.

8183. *Mr. Murray.*—Out of the £2000 are you not obliged to expend a certain amount on clerks?—At the time the salary of £2000 was fixed, it was calculated that £1100 a year was required for clerks, and that the office expenditure in respect of stationery, printing, etc., was £200 a year; so as to leave the Sheriff-clerk an allowance of £700 a year for himself.

8184. Do the Exchequer call on you to show that you have paid £1100 for clerks?—No; they do not.

8185. So that, if you could conduct the business of the office for a smaller amount, your own emolument would be so much the larger?—Yes; but just now, and for some years, I have paid more than £1100 for clerks. I see, on looking back, that it was the custom to make a return of the salaries paid to the Exchequer; but I have not made any return for some years, and I have not been asked to do it.

8186. Then it is a sort of contract between you and the Exchequer to do the whole work for £2000 a year?—Yes.

Kenmure Maitland.

8187. You draw certain fees, which you account for to Exchequer?—I account for all fees to Exchequer, with the exception of certain fees accounted for to the Board of Lunacy.

8188. Can you give us any general statement as to the amount of the fees?—I make a sworn return quarterly.

8189. What may they amount to in a year?—I think the fees are about £1200 a year. The amount is rather increasing now, but it fell off for some time.

8190. Do you think the system of payment by contract is a good one—beneficial to the public and to the office?—I would rather have a fixed sum, and that the clerks were paid by Government. I find my office expenditure increasing yearly; and there are disadvantages in the system of my having the clerks to pay. I may state an example of this. If a clerk has been in the office a long time, and has grown old, he has no claim on any one except me for a retiring allowance. If I discharge him, I must throw him on the world, or give him a pension out of my own pocket; and as these are men who have been working in the public service all their lives, I think it a hard case that they should be thrown on the world in that way.

8191. *Mr. Webster.*—The longer a clerk remains with you, and becomes efficient, you feel he is entitled to a larger salary?—Yes.

8192. And that has to come out of your own pocket?—Yes.

8193. *Mr. Murray.*—At present the clerks are all appointed by you?—Yes.

8194. If they were paid by Government, Government would expect to appoint them?—It would be questionable how that would work.

8195. Do you see any practical difficulty in working the establishment under that arrangement?—There might be a difficulty as to the control I would have over them, seeing they were my deputes, and yet paid by Government. I have a great responsibility at present in the office; I am responsible for all my clerks, and for all the fees collected.

8196. *The Chairman.*—Do you see any difficulty in the Government controlling the appointment, you suggesting the persons to be appointed, and the Government giving their approval?—That, I believe, would obviate the objections which I would have otherwise.

8197. And as to the removal of a clerk, the same would apply?—If my reasons were submitted to Government for their approval.

8198. And that, you think, would be upon the whole a better system than the present?—I think it would.

8199. Fairer for the clerks?—Fairer for the clerks, and better for the public service.

8200. Have there been any instances of clerks who have been worn out in the service or laid aside in consequence of infirmity, being left destitute?—I have in my office just now more clerks than one whom I cannot retain much longer. From their advanced age, I should like to have others in their place. But if I throw them on the world, they are either destitute, or I must pension them. They do their work just now, but not so efficiently as they used to do, and they will soon be unfit for work.

8201. *Lord Barcaple.*—From their time of life?—Yes.

8202. *The Chairman.*—You have charge of the jury lists, both for civil and criminal trials?—Yes.

8203. Do you think that the mode of preparing these lists at present is a good one, or have you any suggestions to make for improving the system?—I may mention, first, the statutory provisions under which the jury books for the county of Edinburgh are made up. In terms of the Acts 6 Geo. IV. cap. 22, and 7 Geo. IV. cap. 8, they are made up in three divisions—those for the city of Edinburgh, for the town of Leith, and for the rest of the county. I shall be glad to explain the mode of making up the roll of jurors within the county of Edinburgh, under these provisions, the different courts for which assize lists are furnished from

Kenmure Maitland.

the books made up by me, and the proportions of special and common jurors for each of these assize lists, and the number of jurors required in the course of the year; and also to show the operation of the Justiciary Act, and the Court of Session Act of last session, by which a new mode of citation is introduced which tells very seriously on the duties of my office; in so far as, under the old system, jurors were cited for the High Court of Justiciary by the macers of the court, or by Sheriff-officers when the macers were otherwise engaged; and for civil causes before the Court of Session, and in the Sheriff Court, the jurors were all cited by Sheriff-officers. The citations were either served personally on the jurors or left at their dwelling-houses. By the Acts of last session these modes of citation are abolished, and the citations are now made through the Sheriff-clerk's office. The Sheriff-clerk has to 'fill up and sign a proper citation addressed to each such juror, and shall cause the same to be transmitted to him in a registered post letter, directed to him at his place of residence, as stated in the roll of jurors; and a certificate under the hand of such Sheriff-clerk or his depute, if the citation of any jurors or juror in manner herein provided, shall have the like force and effect as an execution of citation according to the present law and practice.' In evidence of the great additional work which has thus been thrown upon the office of the Sheriff-clerk in Edinburgh, I may specify that, since this new mode of citation came into operation, viz. 15th October last to the present time, 25th January 1869, I have cited—For the High Court of Justiciary, 5 lists of 45 jurors—225 citations; 1 list of 65 jurors—65 citations; for Court of Session jury trials, 15 lists of 39 jurors—585 citations; and for Sheriff Court of Edinburgh, 13 lists of 45 jurors—585 citations; in all, 1460 citations in three months, or little more. This involves, besides the making out the assize list from the general jury book, the careful filling of a proper citation, with the name, designation, and address of each juror, the date of trial for which he is cited, and other necessary particulars, and also the direction on the outside for delivery by post. Moreover, on taking the letters of citation to the General Post Office to be registered, the authorities there require that the Sheriff-clerk shall present two copies of the list of assize, one of which copies, after comparison with the names and addresses on the letters, is retained at the Post Office, and the other is returned to the Sheriff-clerk with a certificate of registration of the letters therein specified. No provision was made for remuneration to the Sheriff-clerk for all this, nor even for the outlay, which comes to something considerable, because there is a fee of 4d. for the registration of each letter, and 1d. for postage.

8204. *Mr. Webster.*—But in civil causes the parties are charged with that?—No regulation has yet been made by Act of Sederunt or otherwise as to the fees to be charged by the Sheriff-clerk for the citation of jurors in jury trials in the Court of Session; and in order to save myself from loss on account of my outlay in the meantime, I have hitherto, since the operation of the new mode of citation, charged the agents in the cause as follows for the assize lists furnished, and the citation of the jurors, viz. a fee of 10s. 6d. always in use to be charged as a fee for making out the list from the jury book (and which goes to Exchequer with the ordinary office fees), and 1s. for each letter of citation, inclusive of the registration fee and postage. In this way the whole charge for each assize list in civil causes is—For making out list, 10s. 6d.; for 39 citations at 1s. each, £1, 19s. — total, £2, 9s. 6d.; whereas formerly the accounts rendered by the Sheriff-officers for citing a jury in these cases generally amounted to between £5 and £6 in each case. They were allowed so much a day for their travelling expenses, and so much for each citation. Jurors were cited from each of the counties of Edinburgh, Linlithgow, and Haddington. I have had to employ an extra clerk in my office since the operation of these Acts, in order to overtake the work.

8205. Eightpence comes practically to be what is left for the postage and the filling up, because there is 4d. to pay for the registration?—Yes.

8206. That leaves 7d. for the stationery and the filling up?—Yes, that is what I have charged at present, but I thought that the Act of Sederunt would have embraced that matter.

8207. *The Chairman.*—Have you any further remarks to make on that subject?—I am not sure that the present mode of making up the books is altogether satisfactory. I have a great many complaints as to the frequency with which jurors are called upon to serve in this district, especially in Leith and in the county.

8208. *Lord Barcaple.*—Would you explain how the books are made up?—The mode of making up the roll of jurors within the county of Edinburgh (in its three divisions) is as follows: Sheriff-officers, or other persons competently qualified, are appointed, whose duty it is to deliver schedules at every house within the district assigned to them, unless where it is known that no male resides who is qualified to act as a juror. These schedules specify the several qualifications for special and common jurors, and also the grounds on which exemption may be legally claimed. The schedule is addressed to the householder or person supposed to be qualified, and the name of each individual for whom a schedule is delivered is entered in a book kept for the purpose; in which book the streets, if in the town, or parishes, if in the county, are arranged alphabetically; and under each street or parish the names of the persons therein to whom schedules are delivered are also alphabetically arranged. A direction is printed in the schedule, that the same must be filled up and returned to the Sheriff-clerk's office within six days. There is no penalty, however, for not returning the schedule filled up, and in fact it is often not returned. But the person delivering the schedules is instructed to use his best endeavour to have the schedule filled up and returned to him at the time of calling, whenever this is practicable. In the towns especially, where this can be more easily done, the schedules, which may not have been promptly returned, are now usually called for again by the person making up the lists; and if not recovered, further inquiry is made regarding the qualification of the persons to whom these schedules were addressed. After getting in the schedules as well as possible, those which have been filled up and returned, or which may have been called for and filled up from information obtained by the Sheriff-officer or person employed, are arranged in the order of the names in his book, and the qualification of special or common is inserted in columns for that purpose in the book. Opposite to the name of any person claiming exemption a marking to that effect is made; and it is also noted where the schedule has not been returned. The next step is that the Sheriff-clerk, to whom the book is handed when ready, copies the names from it on separate sheets of paper, so prepared that they may be readily divided into separate slips, each containing the name, address, and qualification, as special or common, of one juror; and these are revised and compared with the officer's books and schedules. The claims of exemption are then considered; and in cases found entitled to exemption, the names are struck out from the prepared slips and from the officer's book. In the cases of persons whose schedules have not been returned or recovered, the names are allowed to remain in the book and prepared slips, unless there is reason to know that there is no proper qualification. After being so revised, the prepared slips, each containing the name, address, and qualification of one juror, are separated and placed in a ballot-box by the Sheriff-clerk, drawn out one by one at hazard, and the special and common jurors' names made into separate parcels. The names are afterwards entered by the Sheriff-clerk in the order in which they are drawn from the box, in the general jury book for the district. In entering the names they are so arranged that about one-third of the names on each page of the general jury book shall be special jurors. It is found that this is, as nearly as may be, the proportion in which the special and common jurors appear on the lists for the several districts. And moreover, with this proportion it is found that the special and common jurors in each book are generally

exhausted about the same time. By the 7th section of 6 Geo. IV. cap. 8, it is provided that in all criminal trials one third of the number of jurors required, or if the number required cannot be divided into thirds, a number as nearly as can be to a third, more or less, at the discretion of the Sheriff, shall be persons qualified as special jurors, and shall be distinguished in the return accordingly. The general jury book is provided with columns for the name, address, and qualification of each juror, and also for insertion of the date of the precept, or signing of the assize list, by virtue of which the juror is summoned to serve, the particular court he is cited to, and the date of holding the same, and the number of each juror in that assize list. While the current books are being used, others are in the meantime in preparation in the same way, in order that a new jury book may be in readiness when the former one is exhausted. The jury books for the counties of Haddington and Linlithgow, which are made up under the care of the respective Sheriff-clerks of these counties, are, when completed, transmitted to the Sheriff-clerk of Edinburgh, who supplies from them the names of jurors when required, as directed by the Act of 1825.

8209. What is precisely the proceeding you adopt in the cases where the schedules are not returned?—The officer or person employed has to make what inquiry he can, and according to his report the juror is put down as special or common.

8210. But he always is put down?—Yes, unless there is reason to know that he is disqualified from age or some other disability.

8211. But unless the Sheriff-clerk is made aware of a real disqualification, do you always put down the name of the party with whom a schedule was left, which has not been returned?—Yes.

8212. *Mr. Webster.*—I think you described the delivery of schedules as being also to the occupier of the house, without knowing who he was?—Generally the officer takes the *Directory*, or has some other means of finding out who the occupier is.

8213. Has he any inducement, in the shape of remuneration, to make a complete return?—No; he is paid 7s. 6d. a day for 10 hours' employment.

8214. *Lord Barcaple.*—The schedules are addressed to residences, not to places of business?—Not to places of business. It is to parties resident.

8215. Are you satisfied that, as the result of the whole matter, you do get a fair return of the names of all the parties within the county who are liable to serve?—I think, with the person who is employed just now, who is not a Sheriff-officer, but whose whole time is devoted to the duty, I get a better return than when I employed the Sheriff-officer; but I am not satisfied that it is the best way that could be adopted.

8216. Have you any apprehension that there is a large number of persons who ought to serve, whose names are not upon the list?—No; I don't think there can be a large number now, under the present system.

8217. How many have you upon the list at present?—The general jury book last in use for the city of Edinburgh contained 4061 names. It was commenced on 13th March 1867, and was exhausted on 6th November 1868, lasting nearly 20 months. It was rather larger than usual, and that book was a fuller book. It was made up more carefully, I think, than previous ones. The general jury book last in use for the town of Leith contained 374 names, and was exhausted in little more than 6 months. And the general jury book last in use for the county of Edinburgh (that is, exclusive of the city of Edinburgh and the town of Leith) contained 1036 names, and was exhausted in about 6 months. On an average of the last 4 years, the jurors in the city of Edinburgh have been called on to serve once in every 15 or 18 months; and in the town of Leith and county of Edinburgh, once in every 6 months, or thereabout. The jury book for the county of Haddington, which contains on an average about 650 names, is generally exhausted in about 8 months; and that for the county of Linlithgow, with an average of 550 names, is exhausted in about 8 months also.

8218. *Mr. Campbell.*—Can you tell me whether, by the increased care which has been taken in collecting the names of the jurors, you have got any considerable increase in number on the jury roll within the last two or three years?—Yes, certainly I think so.

8219. A material difference?—Yes.

8220. *Lord Barcaple.*—Can you say in what class of persons that increase has taken place? Have they been special or common jurors?—It tells upon both.

8221. You have not noticed that there has been a great preponderance in one or other?—No; the proportion remains much the same.

8222. There are disqualifications. How do you ascertain these?—In the schedule delivered to the householders the grounds of exemption are stated, so that a person may see whether he is entitled to exemption or not, and there are columns left that the party may state whether he is a special or a common juror. The different qualifications are mentioned, and the parties fill in under what qualification they choose to be classed, or their ground of exemption, if they have any.

8223. There were some statutory exemptions which have been recently abolished by the Court of Session Act?—Yes; but they are very few.

8224. Were there many instances of that in the city district of Edinburgh?—No; it is income tax commissioners, keepers of lighthouses, and a very few others. In Edinburgh, it does not tell much. The principal exemptions here are advocates, writers to the Signet, and all members of the College of Justice, and medical men.

8225. *Lord Barcaple.*—What means have you of knowing what schedules are left originally?—I have merely to take the word of the person delivering them. He gets the schedules from me, and fills them up, and enters them in his book.

8226. It depends on him who are the persons with whom the schedules are left?—Yes; but he brings me his book, and all the schedules which he recovers, and he lays them before me. It lies with him to say whether he has delivered them.

8227. Suppose some one to say to him, 'I am above 60 years of age,' what would he do?—If he had any doubt of it, I would consider myself entitled to ask for a certificate.

8228. But what would the man do, supposing a person with whom he proposes to leave the schedule says, 'I am above 60 years of age?'—And does not fill up the schedule?

8229. Yes?—Then the officer, if sufficiently satisfied that it was true, would write, 'Above age,' and take the person's name out of the book.

8230. Upon his own statement?—Yes.

8231. *Mr. Harrison.*—If there was any very obvious case in which you had reason to doubt whether the man was above age, I suppose you would check it?—Yes, if I had a knowledge of my own on the subject; or if I had doubt, I would ask for a certificate of age from the person claiming exemption.

8232. *Mr. Murray.*—Don't a number of persons, who are entitled from their qualifications to be entered as special jurors, return themselves as common jurors?—I have known instances of that.

8233. And do you accept these persons' returns?—Yes; but such a case is very rare.

8234. What object have they?—I cannot tell what their object may be.

8235. Is there any advantage to be gained?—No; there is rather a gain in being a special juror. There are more special jurors required for civil cases in the Court of Session, and there they get paid. A special juror has more chance of being employed in a civil case than a common juror.

8236. Then it must arise from some misconception on their part?—I cannot tell.

8237. *The Chairman.*—Have you any further suggestions to make?—If it shall be deemed expedient to have new legislation on the subject of the jury lists, I would respectfully suggest that there should be some rearrangement of the divisions within the county of Edinburgh from which the jurors are taken, and of the re-

Kenmure Maitland.

spective proportions to be taken from these divisions. The jurors from the town of Leith, and the rural part of the county of Edinburgh, are called upon to serve twice as often as those resident in the city of Edinburgh. Leith is now so much a place of offices and warehouses that there are actually fewer persons resident there who are qualified as jurors than there were formerly, in proportion to the population and extent; and as the jurors from Leith are now of the same classes as those in the city of Edinburgh, there would seem to be little or no reason why it should be kept up as a separate division. In the event of a re-arrangement, Edinburgh and Leith might form one division, and the rest of the county another division, and the proportions to be taken from these in future assize lists should be calculated on a comparison of the numbers of jurors contained in the jury books made up for each of these divisions. And further, in place of taking as at present the old police bounds of 1822 as the limits of the city of Edinburgh division, the Parliamentary bounds might be substituted. It may further be suggested that perhaps a simpler and less expensive, and also a more effective mode of making up the jury lists than that at present followed, would be to employ the assessors for this purpose, as they have the information as to all the occupiers, and the amounts of rent, and value and nature of the possessions occupied. In the notices of assessment issued from the assessor's office to occupiers, an addition might be inserted (to be struck out where, in the knowledge of the assessor, it did not apply), that the name of the person addressed would be put on the roll of jurors for the district unless a legal claim for exemption could be substantiated to the satisfaction of the assessor within so many days. As the possession of personal property, which constitutes certain of the present qualifications, does not come within the knowledge of the assessor, the qualifications might perhaps be advantageously simplified, say, as follows: That all persons rated at £10 of yearly rent for their residence, and up to £ , should be taken as common jurors, unless they could show that they were otherwise possessed of a special qualification; and all persons rated as occupiers at £ of yearly rent and upwards, to be taken as special jurors. I have thought that some such method might be a more effective way of taking up the jury books; but it is a very difficult subject, and it presses very hardly on the jurors in the districts of Edinburgh, Haddington, and Linlithgow, who have to serve not only for trials in their respective Sheriff Courts, but also in cases before the Court of Justiciary and the Court of Session.

8238. Have you any further suggestions as to jurors?—No.

8239. Have you any suggestions to offer as to the mode of procedure and pleading in the Sheriff Court?—No.

8240. Are you in use to attend in court personally?—I attend personally in the criminal courts, and take a personal superintendence of the general business in the office—records, fees, exchequer accounts, etc. etc. I leave the process department and the sitting in the ordinary court very much in the hands of my depute (Mr. Whitten), who has been in the office for 25 or 30 years, and I have no doubt he may be able to give valuable evidence as to the practical details of that department.

8241. *Mr. Baxter.*—Are you Commissary-clerk?—I am not.

8242. *The Chairman.*—In regard to the matter of exemptions, you have said that if a man states to the person taking up the list that he is beyond 60 years of age, the person taking up the list strikes him out, and does not return him to you, or takes his statement for it. Would it not be some check that a person so stating should always be obliged to put it into the return, and write it in the column of exemptions?—Yes; but there is no authority for enforcing their filling up of the schedule. The schedule is not a statutory proceeding. It is merely followed in this county from use and wont.

8243. You might not give effect to the exemption unless it was filled into the schedule, and then the party would have the trouble of attending and pleading his exemption?—But it is our object to keep the jury roll as perfect as possible, so as to save persons being called upon to serve, who, when they come up, will claim exemption.

8244. And also to require all persons not legally exempted to attend?—Yes.

8245. *Mr. Murray.*—You give personal attendance at your office daily?—Yes.

8246. And you personally superintend the different departments?—I do.

8247. And I suppose there are few days in which you are not in communication with one or other of the Sheriffs?—I am every day. I take a large share in the business.

8248. Are you aware that the business of the Sheriff Courts of Mid-Lothian could not be satisfactorily conducted except by one giving personal attendance to it?—Certainly it could not.

8249. *Mr. Campbell.*—You have been for some years in the habit of attending regularly the sittings of the Sheriff Court in criminal cases tried by jury?—Always.

8250. You are therefore well acquainted with the classes of cases which the Sheriff tries?—Yes.

8251. Do you see any reason why the Sheriff should be so much limited as he is in his power of punishment; or do you think that he might, with advantage to the public, be entrusted with the power of sentencing to penal servitude?—I think it certainly would be for the public advantage that his power in that respect should be extended.

8252. Are you aware that there are cases tried by the Sheriff and punished with periods of imprisonment, similar to those tried in the High Court and Circuit Courts of Justiciary and punished habitually with penal servitude?—I am.

8253. Don't you think, then, that it is a great disadvantage to the public service, that such cases, which would be punished with penal servitude in the Supreme Court, should be punished with sentences of imprisonment if tried before the Sheriff?—That is my opinion.

8254. *Mr. Shand.*—In that class of cases, Crown counsel have considered the cases, and have come to the opinion that they are not suitable for penal servitude?—I am talking of cases which so came out in evidence, that in my opinion a heavier sentence than two years' imprisonment was merited, and probably would have been given, if the Sheriff had been empowered; also of cases where there have been a large number of previous convictions—cases where I know that the party has undergone penal servitude before, and that has been ignored in the libel under which he is brought before the Sheriff.

8255. But all of these cases have been before Crown counsel, and Crown counsel have considered that in the particular case imprisonment should be the sentence, and consequently it is sent to the Sheriff?—That particular case has been remitted to the Sheriff.

8256. After consideration by Crown counsel, who have come to the conclusion that penal servitude would be too severe a punishment?—That may be so.

8257. Do you propose that that extension of criminal jurisdiction should be limited to the Sheriffs in Edinburgh, or extended all over Scotland?—I have understood that, under a pressure of business before the High Court of Justiciary, cases have been remitted to the Sheriff of Edinburgh, which would not have been sent to him to try but for that pressure of business.

8258. Do you mean that this provision should be confined to Edinburgh?—I speak from my own experience, sitting in the Sheriff Court of Edinburgh, that I have seen cases tried by the Sheriff where I believe a severer sentence than two years' imprisonment was merited. Similar cases may occur in other counties; and I should like to see Sheriffs entrusted with the power of sentencing to penal servitude.

8259. *Mr. Murray.*—In this county the Commissary-clerkship is held by another party than the Sheriff-clerk?—Yes; the offices are quite distinct.

8260. Do you think they could be conjoined with advantage to the public service?—I think so, certainly.

I think the offices could be combined with economy and advantage.

8261. Both in this county and in other counties?—Yes; and I have thought so all along. There is an inconvenience to the public in having the offices separate, seeing that the Sheriff is Commissary.

8262. *Lord Barcaple.*—They are separate offices at present in this county?—They are; and they are not in the same building.

8263. Are you familiar with the nature or amount of the business done in the Commissary Court?—No, except what I have seen in the returns.

Kenmure Maitland.

8264. But you think one principal clerk could fully undertake both offices?—Clearly; and with a slight extension of the staff in the Sheriff-clerk's office, I believe they could be so undertaken, with benefit to the public service.

8265. *Mr. Webster.*—In the Sheriff Court you are limited to business proper to the Sheriffdom of Edinburgh, but in the Commissary Court there is a wider jurisdiction. It is the *commune forum* for all parties not having a domicile in Scotland?—It is so, but I cannot say farther as to the Commissary Office.

FRIDAY, 29TH JANUARY 1869.

Members Present:—

LORD COLONSAY.	GEORGE HARRISON, Esq.
THE LORD JUSTICE-GENERAL.	JAMES ADAM, Esq.
LORD BARCAPLE.	T. G. MURRAY, Esq.
JAMES CAMPBELL, Esq.	J. B. BAXTER, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

JAMES WEBSTER BARTY, Esq., examined.

James Webster Barty.

8266. *The Chairman.*—You are a practitioner before the Sheriff Court in Perthshire?—And in Stirlingshire also.

8267. You are Procurator-fiscal at Dunblane?—Yes; for the Western District of Perthshire, in the Sheriff and Justice of Peace Courts; and I am secretary to the General Council of Procurators.

8268. How is that council constituted?—It is composed of the dean or other chief office-bearers of each local society, both those incorporated previous to the passing of the Procurators' Act, and those incorporated under its provisions.

8269. The deans for the time?—The deans for the time being.

8270. How long does a dean hold his office?—It is different in different societies.

8271. How many of these societies are there?—The following are the societies incorporated previous to the passing of the Procurators' Act:—Faculty of Advocates of Aberdeen; Society of Solicitors of Banffshire; Faculty of Procurators and Solicitors in Dundee; Society of Solicitors at Law, Edinburgh; Faculty of Procurators, Glasgow; Faculty of Procurators of Paisley; Society of Procurators and Solicitors of Perthshire. The societies incorporated since the passing and under the provisions of the Act, which are also entitled to be represented at meetings of the General Council, are:—Society of Solicitors of Airdrie; Ayr Faculty of Solicitors; Faculty of Procurators for Dumbartonshire; Faculty of Procurators of Dumfriesshire; Society of Solicitors of Elginshire; Faculty of Procurators, Greenock; Faculty of Procurators for the Rhinns of Galloway; Faculty of Solicitors of Inverness-shire; Faculty of Procurators of the County of Linlithgow; Society of Solicitors and Procurators of Western District of Perthshire; Faculty of Solicitors of Ross and Cromarty; Faculty of Procurators of the Lower District of Wigtown; Society of Solicitors of Hamilton; Society of Solicitors and Procurators of Kincardineshire; Society of Solicitors and Procurators of Forfarshire; Society of Solicitors of Fifeshire, Dunfermline. These are all the societies at present represented in the General Council.

8272. The General Council consists of the deans or presidents of all these societies?—Yes; and failing any dean being present at a meeting, a representative member from each of these local societies may represent him in the council for the time being.

8273. May be sent by the Society to represent them at the council?—Yes.

8274. Is the council constituted by Act of Parliament?—By the Act 28 and 29 Vict., entitled 'An Act to Amend the Laws Relating to Procurators in Scotland,' which received the Royal assent on 5th July 1865.

8275. The council is part of the constitution created by that Act?—It is. I can state shortly what are the chief duties and powers of the council under that Act. They are—(1.) To frame bye-laws providing for the appointment of office-bearers, and the time and place of meetings. (2.) To frame a curriculum and regulations as to the legal study of all persons applying for admission as procurators within Scotland, with the exception of those whose admission is regulated by the charters of incorporated Faculties conferring exclusive privileges, and as to the subjects for examination of such persons in general knowledge and law, and legal training and practice, and also as to extending the period of apprenticeship of apprentices failing satisfactorily to undergo the compulsory examinations provided by the Act. (3.) To fix the time, and place, and fees of examination of persons applying for admission as procurators. (4.) To act as examiners of such persons. (5.) To exact from all incorporated Faculties such contributions as shall be required for the necessary expenditure of the General Council and office-bearers. Bye-laws, curriculum, and regulations, in terms of the powers and duties above referred to, having been prepared by the General Council, were approved of, in terms of the Act, by an Act of Sederunt of the Lords of Council and Session, dated 22d June 1866. I produce a copy of these bye-laws.

8276. How often does the council hold meetings?—By the Act it is necessary that they should hold at least one annual meeting, and they do in fact hold meetings much more frequently.

8277. *Mr. Baxter.*—There is power given in the Act to call special meetings?—Yes; and the bye-laws also contain regulations as to the calling of meetings.

8278. *The Chairman.*—Has the council had under its consideration any matters connected with the inquiry that the present Commission is engaged in, as to the Sheriff Courts?—I may explain that, in July 1868, after it was known that a Royal Commission was to

James Webster Barty.

be issued to inquire into the law courts, a series of queries was prepared by the General Council with reference to various points connected with the supreme and inferior courts, in regard to which amendments were likely to be proposed, in order that the opinions of the local Faculties on these points might be ascertained. Answers were received from 17 Faculties; but as 5 of these did not supply me with printed copies, I can only at present produce the answers of 12 Faculties. After these answers were received, several meetings of the General Council were held to consider them, and much discussion took place in regard to them. At a meeting held on the 10th December, I was instructed to obtain printed copies of the answers, and to send them to each of the Faculties for their consideration. Thereafter a meeting of the General Council was held on 26th December, attended by, I think, 13 representatives of those Faculties, and they unanimously, and after anxious deliberation, agreed on certain propositions, and requested Mr. Caird to state these to this Commission as the views of the General Council. That he accordingly did on 28th December. Thereafter I received instructions to report the statement which he had read to the Commission to the various local Faculties for their consideration and opinion, and to request them to communicate their opinion to me. I have received in reply resolutions from 19 Faculties, copies of which I produce.

8279. *Mr. Harrison.*—Will you state in a general way what the purport of the answers is?—Fifteen of the Faculties, containing 795 members of the profession, have by unanimous resolutions given their unqualified adhesion to the views of the General Council as expressed in Mr. Caird's paper, read by him to this Commission. These 15 Faculties are,—The Society of Advocates, Aberdeen; the Ayr Faculty of Solicitors; the Faculty of Procurators and Solicitors, Dundee; the Faculty of Procurators, Glasgow; the Faculty of Solicitors of Inverness-shire; the Faculty of Solicitors of Fifeshire at Dunfermline; the Faculty of Procurators of Dumfriesshire; the Faculty of Procurators for the Rhinns of Galloway; the Faculty of Procurators of Dumbartonshire; the Faculty of Procurators in Paisley; the Society of Solicitors, Airdrie; the Faculty of Procurators for the county of Linlithgow; the Society of Solicitors of Hamilton; the Faculty of Procurators, Greenock; the Society of Solicitors of the Western District of Perthshire. There were four other Faculties, numbering 149 members, which approved (also unanimously) of Mr. Caird's paper with exceptions.

8280. *The Chairman.*—They approve of Mr. Caird's statement?—Yes.

8281. *Mr. Harrison.*—What exception do they make?—Elgin would abolish Sheriffs-depute; Banff would prefer an appeal court of three Sheriffs; Forfar excepts to a jury of three Sheriffs,—a minority numbering three also wished to except two appeal Sheriffs. The Faculty of Ross and Cromarty is satisfied with the present records; does not approve of short printed summonses, nor of the proposed summary and unexpensive jurisdiction up to £50; and is against reciprocal opening of courts to all practitioners. I may mention that the Ayr Faculty of Solicitors gave one or two special suggestions in addition to those contained in Mr. Caird's paper; namely, (1) They think that a shorthand writer should be attached to each court, by whom all proofs in civil causes should be taken down under the superintendence and direction of the Sheriff. (2) They are of opinion that the judicial functions of all Justices of the Peace and unpaid magistrates should cease, and that a stipendiary magistracy should be established in Scotland. (3) They are further of opinion that Procurators-fiscal should be appointed by Government, receive adequate remuneration, and be precluded from taking civil business in their respective courts. (4) They think the attorney tax should be brought before the Commission, and an effort made for its abolition.

8282. *Mr. Murray.*—What was the answer of the Society of Solicitors of Elginshire?—They approved generally of the statement read to the Law Commission by Mr. M'Neel Caird; but stated their opinion—1. That the proposed appeal court of Sheriffs is entirely objectionable. That the office of Sheriff-depute should be abolished, and that the appeal should be made by reclaiming petition and answers to the resident Sheriff in the first instance, from whom, after reconsidering his own judgment, there should be an appeal to the Lord Ordinary in the same way as there is to the Sheriff-depute at present. 2. That there should be no restriction in the jurisdiction of the Sheriff Courts, the litigants being the best judges of the courts they wish to resort to. 3. That the small juries proposed for the Sheriff Courts would be objectionable and mischievous.

8283. Is that a sample of the small differences which you said existed?—They are mistaken in supposing that small juries was a recommendation of the General Council. That was simply one of Mr. Caird's own views, and it was not stated by him as the view of the General Council, but the reverse. I must also remark that the second head stated by the Elgin Society, to the effect that there should be no restriction of the Sheriff's jurisdiction, is not a dissent from, but is in entire conformity with the paper read to the Commission by Mr. Caird; so that the only substantial difference between the Elgin procurators and the rest of our body is that, while they would abolish the Sheriffs-depute, we would attempt to utilize them. But if we should not be permitted to utilize them, the main difference between the Elgin gentlemen and the rest of the Faculties would probably disappear. A blind attempt to keep things as they are for a little longer might reconcile us to greater changes than we at present advocate.

8284. *Lord Barcaple.*—Then the assent given by this body generally, you say, was to resolutions come to with reference to Mr. Caird's report?—It was to the resolutions contained in Mr. Caird's statement. His statement contains the resolutions come to at the meeting of the General Council.

8285. *Mr. Murray.*—And the solicitors of Elgin do agree with these?—They approve generally of the statement, with the exceptions I have stated.

8286. *Mr Baxter.*—But it was the statement itself that was communicated?—Yes; and I produce a printed copy of it.

8287. *Mr. Harrison.*—How many bodies of procurators are still unconnected with the General Council?—There are no bodies unconnected with the General Council, but in various counties there are no Faculties,—the most important of these counties is Stirling. I believe the procurators in one of the districts in Stirlingshire are about to be incorporated. There is also no incorporation in the large district of Cupar in Fifeshire.

8288. *The Chairman.*—You mention that the meeting was held in July, and that the heads of subjects were distributed to the different Faculties for their consideration?—Yes.

8289. And you produce these heads?—Yes.

8290. You said answers were sent to the General Council by the different bodies to whom these heads were sent?—Yes.

8291. Have you got these also?—I am not provided with all these answers. A good many of them were in manuscript, but copies of most of them were printed.

8292. Have you got copies of the whole of them?—Yes; they are all in my possession.

8293. Will you produce them?—I shall produce them all.

8294. You mentioned that afterwards the council met and considered these answers.—Yes.

8295. What did they do upon considering these answers?—Upon considering these answers, they obtained printed copies from the various Faculties, and distributed them among the Faculties. They sent copies of the answers by each Faculty to each of the other Faculties, and requested the Faculties to consider them.

8296. So that in that way each Faculty had intimation of what were the opinions of every other Faculty?—Just so.

8297. What followed upon that?—After they had time to consider these replies, meetings were called for

the purpose of endeavouring, if possible, to ascertain the prevalent views of our branch of the profession.

8298. Did the several Faculties send back observations on the views of the other Faculties?—Not in writing; but their deans expressed their views at subsequent meetings of the General Council.

8299. The paper distributed to the Faculties at that time was a printed paper?—Yes.

8300. And along with it there were in print the answers that had been made by all the different Faculties?—As far as I could obtain them from the various Faculties.

8301. Had all the Faculties sent in answers?—They had not. Seventeen of them sent in answers.

8302. And it was the answers sent by these seventeen that were so distributed among the others?—They were, so far as printed.

8303. They were printed and distributed?—They were.

8304. These are in print?—Yes; and I produce all those that I have in print.

8305. You say there were some in manuscript?—I have these in my possession.

8306. Are they part of the seventeen?—Yes.

8307. They would be printed when they were sent to the different Faculties?—All I could send were those that were printed.

8308. How many of the answers did you so send?—Twelve; five were not printed. These five I have in my possession, and I will produce them.

8309. Whom were these five from?—They were from Paisley, Dumbarton, Dundee, Airdrie, and Greenock.

8310. Which of the Faculties made no answer at all?—I am not quite sure of the names at present without looking at the minute-book. The Solicitors at Law in Edinburgh was one, and the Society of Solicitors of the Western District of Perthshire was another. Three others did not return answers. The Faculty of Ross and Cromarty did not; but I cannot state the others in the meantime.

8311. Did you send the answers of those who did make answers to the Faculties that did not make answers?—Yes; as secretary, I sent communications to all the Faculties.

8312. The printed copies of the answers you had received you sent even to those who had not made any answers at all?—I did.

8313. And in return did you get observations from the Faculties?—No.

8314. What was the next step?—The next step was the calling of meetings of the General Council. I think there was an adjourned meeting to consider the whole question again.

8315. Was that in December?—Yes; between 10th and 26th December.

8316. What was done then?—The whole subject was fully discussed at that meeting, which was fully attended. Certain resolutions were unanimously adopted, which Mr. Caird put into the form of a statement to be read by him at this Commission.

8317. How many were present at that meeting?—I think the representatives of thirteen Faculties. I am not quite certain, without looking at the sederunt, if there were more or less.

8318.—The next thing was that Mr. Caird appeared as a witness and read the statement?—Yes.

8319. After that you say that his statement was circulated?—Yes.

8320. Who was it sent to?—It was sent to the whole Faculties.

8321. How many returned answers to it?—I produce to-day answers from nineteen Faculties. I understand there has been a return sent from the Society at Perth to the secretary of this Commission; but that return is not from the Society itself, but merely from the Committee of Management. I may explain, that four Societies, including Perth, and numbering 121 members, returned no answers.

8322. The Society itself has sent you no return?—No; I may explain that the original answers were the first and crude opinions of the Faculties, arrived at without having the benefit of knowing the opinions of the other Faculties, and, as might be supposed, are in some points very diverse. The resolutions come to on the 28th December, and the opinions expressed in the minutes of meetings of the Faculties which finally considered these resolutions, are the mature views of all these bodies, arrived at after full discussion, and after hearing the views, and being in the knowledge of the opinions of their brethren in the different parts of the country.

8323. Does it appear from the returns that you got that there was any division of opinion in any of the Faculties?—In the first return there is a considerable division of opinion.

8324. Does it appear what the division was?—I have been unable to frame any analysis so as to tell the Commission what it is. It was on various points.

8325. In the next return was there division of opinion, or did it appear that there had been, or had not been division of opinion?—There had been to a certain extent, but to a very trivial extent indeed.

8326. Did it appear that they were unanimous?—It does.

8327. Do the materials now put before us give all the opinions that have been collected by the General Council, and the opinion of the General Council itself?—The whole.

8328. Did you mention the procurators of Kincardine as among the number?—They sent in answers to the first series of questions.

8329. But not to the second?—There were no second questions. Mr. Caird's statement was sent to them, but they have expressed neither assent nor dissent.

8330. Are their answers to the first series of questions among the papers you produce?—They are.

8331. They sent no answers to either of the other communications?—No. But they were represented at the first general meeting of the General Council at which the whole subject was discussed.

8332. In December?—Yes; they were represented by their dean.

8333. He was one of the thirteen?—Yes. He was one of those who attended the first meeting.

8334. Who is their dean or chairman? — Mr. Tyndal, the Procurator-fiscal of Kincardineshire.

8335. Do you think that he was at that meeting?—Yes; to the best of my recollection.

8336. *Mr. Adam.*—Do you know the aggregate number of members belonging to the Society of Procurators?—I have the list we made for the year 1868, and the aggregate number of members represented in the General Council was 1060.

8337. *The Chairman.*—Among those inquiries is there anything connected with the criminal department?—There is one query as to extending the Sheriff's jurisdiction, and also as to giving him a power of sentencing to penal servitude.

8338. How long have you been Procurator-fiscal?—I have acted as Procurator-fiscal for nearly six years.

8339. What is your opinion as to the extension of the jurisdiction of the Sheriff in matters criminal?—I think it might be safely extended to cases of small robberies, and also to cases of aggravated thefts, where thefts are merely aggravated by previous conviction. I have had several cases of this kind in my own short experience, where the criminal is tried twice for small thefts, and a third time for a serious case of housebreaking. Afterwards he steals perhaps half-a-crown's worth of coals, or some small thing, and he has to be tried before the Circuit. I think the Sheriff might have jurisdiction to try cases of that sort.

8340. He has jurisdiction to try; but you think he ought to have jurisdiction to punish adequately?—Yes.

8341. Do you mean by penal servitude?—Yes; probably for a limited period.

8342. You don't propose to extend his jurisdiction to other offences than robbery, which are not within his power now?—No; I don't think so.

8343. Cases of robbery and theft sometimes run very closely into each other?—They do.

James Webster Barty.

8344. And when the violence is small, the punishment is substantially the same; and therefore you think it would be inexpedient that the Sheriff should not have the power to deal with a case of that character?—I think it would be desirable that he should have the power to deal with such a case.

8345. If a man were tried for theft, and it turned out that there was some degree of violence, he might escape altogether?—Yes.

8346. You have been in the use, I suppose, to attend at the taking of the declarations of prisoners?—I have.

8347. In presence of the Sheriff?—In presence of the Sheriff.

8348. Is it consistent with your experience that the prisoner is always warned that he is at liberty to speak or not to speak as he thinks proper; but that if he does speak, what he says will be taken down and may be used as evidence against him?—It is.

8349. Is there any pressure put upon him to speak?—None whatever. Quite the contrary. My practice is to ask him generally if he is guilty, and if he chooses to make any special statement, that is taken down; but he is in no way questioned minutely.

8350. *Mr. Adam.*—Do you or the Sheriff dictate the answers?—The Sheriff dictates the answers in all cases.

8351. *The Chairman.*—It does not consist with your experience that any unfair advantage is taken with the prisoner in the matter of declaration?—I have never seen that in any case.

8352. You take precognitions?—I do.

8353. I suppose the Sheriff is sometimes present at the taking of these precognitions, and sometimes not?—Very seldom, as matter of practice, does the Sheriff now attend. In a very serious case he probably does so, but in minor crimes he never does.

8354. I suppose he would attend if he were apprehensive that a witness would not speak truly, or if you ask his presence?—Yes; in order that a witness may be put on oath if necessary.

8355. *Mr. Baxter.*—Supposing that the criminal investigations were to be conducted publicly, and that the Sheriffs were to preside, would you require an additional staff of Sheriffs?—Yes. It would be quite impossible for one Sheriff to do the whole business, both civil and criminal, in that case.

8356. Such investigations in populous places would occupy his whole time?—I think it would.

8357. *The Chairman.*—Do you investigate cases of sudden death?—I do frequently, according to the demands of the district. In the year 1867 I investigated 14 cases of sudden death, and reported them to the Crown; and in 1868 I investigated 15 cases.

8358. *Mr. Campbell.*—You have received explicit directions on the subject from Crown counsel?—We have.

8359. Do you always adhere to these regulations?—Always.

8360. *The Lord Justice-General.*—Is the Sheriff always present at taking the prisoners' declarations?—Always, and he always dictates them.

8361. *The Chairman.*—Are there any alterations you would suggest in regard to criminal practice?—I think that the form of the criminal libel might be altered. Mr. Gair prepared an amended form, which I saw and wrote out with my own hand; and I entirely approve of his suggestion in that respect.

8362. That is with a view to shortening and simplifying the libel?—It is. With reference to the summary form, I consider that the forms of the Summary Procedure Act, 1864, are perfectly suitable, and that no change is desirable on these. Probably it might be more correct to have the prayer of the complaint in certain cases slightly altered; but that is a very small matter.

8363. *Mr. Baxter.*—What is your practice when a constable brings in a prisoner accused of a petty offence?—I present the complaint to the Sheriff, and put the man on his plea at once.

8364. The same day?—Yes.

8365. You never commit such a man to prison?—No, never. I never take a declaration from him, nor put him in prison, unless there is some likelihood that he is to be tried by a jury.

8366. *Mr. Campbell.*—Do you think it desirable that Circuit Criminal Courts should still be held by judges of the Court of Justiciary?—I think, on the whole, it is.

8367. Supposing a power of sentencing to penal servitude were conferred on the Sheriff, don't you think that all the remaining cases of a serious nature might be more conveniently tried in Edinburgh?—In all the central districts that might be so; but that is a matter on which I am not prepared to give an opinion in the meantime.

8368. *The Chairman.*—Have you any suggestions to make as to criminal procedure?—I understand that there has been a question raised by several Faculties, whether the Procurators-fiscal ought not to be restricted to their public duties. I think they ought not to be so restricted. There are 13 Fiscals, I think, with incomes under £300. In the first place, then, unless a large increase was made, the same class of men as the present could not be got. My own salary from all sources is £385, which by deducting outlays is reduced to £300. My income from private business is considerably larger. In the second place, the Procurators-fiscal would not have sufficient work to occupy their time, and the enforced idleness would produce either aversion to do any work at all, or a habit of magnifying every petty offence into an important crime. In the third place, the present system has worked exceedingly well, and has certainly been an economical one. If it be resolved to restrict Procurators-fiscal to their public duty, it will be necessary—(1) to increase salary; (2) to give retiring allowances; (3) and for the sake of economy to do away with the smaller districts, and to give each Procurator-fiscal a larger jurisdiction. But this extension of jurisdiction has its drawbacks. With the present small districts, you secure that the Procurator-fiscal himself shall personally attend to each case; whereas, if he has a very wide district, he must very frequently employ his clerks to do the work which ought to be done by himself.

8369. *Mr. Murray.*—In a county where a Procurator-fiscal has a sufficient salary, don't you think it would be an improvement to debar him from private practice?—I am not sure. At present the duties are very well done, and I am not aware of any cases where the two interests have clashed—the public interest and the private interest of the Procurator-fiscal. Probably in some large places, where the Procurators-fiscal have sufficient work to do, it might be a good thing.

8370. *Mr. Baxter.*—Are you aware that in large places, Procurators-fiscal do confine themselves to their duties?—I understand so. I understand that in Edinburgh and Glasgow the Procurators-fiscal do not attend to private business.

8371. *Mr. Murray.*—Would not the same thing apply in some of the larger counties?—In a few cases it probably might.

8372. *Mr. Adam.*—Could one Fiscal do the whole work with advantage in your county?—I think he might.

8373. You think it is not too much?—It is not too much.

8374. You mean, without taking private practice?—Yes, without taking private practice.

8375. *The Chairman.*—In that case, would the drawbacks that you have alluded to exist?—No; not in that case.

8376. *Mr. Murray.*—But your objections are that it would be more expense to the country, and that in some cases the Procurator-fiscal would have too little to do?—Yes.

8377. If these were removed, your objection would disappear?—No; I have a third objection, that if you increase a district to too large an extent, the Procurator-fiscal cannot do the work himself, and must employ clerks to do it.

8378. *The Lord Justice-General.*—Do you think that objection would apply if there was one Procurator-fiscal for the whole of Perthshire?—Probably not to a district of that extent.

8379. *Mr. Murray.*—The facilities of railway communication have made a great alteration in that respect?—In many districts, and especially in Perthshire.

8380. *Mr. Baxter.*—Are you satisfied with the present mode of appointing Procurators-fiscal by the Sheriff?—It is impossible that the appointments could have been better than those which have been made by the Sheriff.

8381. *The Chairman.*—The Sheriff has a material interest to have an efficient Procurator-fiscal?—He has.

8382. He is responsible, as chief magistrate, for the peace of the district, and for the prevention of crime?—Yes; and the Procurator-fiscal directly represents the Sheriff in these matters.

8383. *Mr. Baxter.*—Do you think there should be any check with reference to his dismissal when once he is appointed? Should he be an independent officer, or should the Sheriff have power to dismiss him?—I think that there should be a check with reference to his dismissal. I know that the Sheriff has the power of dismissal, and I also believe that the Lord Advocate may present a complaint to the Court of Justiciary for the purpose of having him dismissed; by allowing the latter to be the sole means of dismissal, it might put the appointments on a better footing than they are at present.

8384. *The Lord Justice-General.*—Are there many examples of a Sheriff dismissing a Procurator-fiscal?—There are not.

8385. Do you know any?—I don't know any cases of absolute dismissal. I know cases of resignation, which nearly amounted to dismissal.

8386. *Mr. Murray.*—In these cases, was it not for the benefit of the public service that the resignations should be accepted?—I thoroughly believe that.

8387. *Mr. Baxter.*—You don't know any cases of capricious dismissal?—I do not.

8388. *The Chairman.*—Have you anything more to say with reference to criminal matters?—I may also say that I am Justice of Peace Fiscal.

8389. Is there criminal jurisdiction exercised by a Justice in Perthshire, except the apprehending or taking declarations occasionally?—Not as matter of fact. They don't exercise their criminal jurisdiction in any way in the western district of Perthshire.

8390. Do you think it would be an expedient thing if the Justices in distant parts of the county took up petty offences without bringing parties to the seat of the Sheriff?—As a general principle, I don't think they are well fitted for criminal investigation, or for sentencing criminals. I think that is much better done by a Sheriff-substitute. I may state, that the only jurisdiction which the Justices exercise in Perthshire—and they exercise none in civil matters—is with reference to prosecutions under the Poaching Acts, the Road Acts, and the Inland Revenue Acts, and other Acts of a like kind. I prosecute in these cases.

8391. Is that duty well done?—While I think it is, I am not quite sure whether it would not be better to do away with that jurisdiction altogether where there is a Sheriff-substitute. There is a public complaint, that in poaching cases, and other matters of that kind, the Justices have a personal interest, and the public are not satisfied in all cases with their decisions.

8392. Do you think, on the whole, the decisions are fairly given?—I am of that opinion. I was only mentioning an opinion which I have heard stated by the public.

8393. *The Lord Justice-General.*—Then you think that is popular prejudice?—Yes.

8394. *Mr. Murray.*—But you would give in to it?—I should prefer the Sheriff as a judge upon the whole.

8395. Do you think the public would be better satisfied?—Yes.

8396. *Mr. Campbell.*—And you don't think the work would be worse done?—Certainly not.

8397. *Mr. Murray.*—Don't you think the poachers would sometimes get severer sentences?—I cannot say.

8398. *The Chairman.*—The Justices act in granting licences to public-houses?—They do.

8399. They sit in Petty Sessions for that purpose?—Yes.

8400. And their judgments are reviewable in Quarter Sessions?—Yes; but in Perthshire there are very few appeals indeed.

8401. Do you think that business is properly done?—It is very well done. And I think they are peculiarly well fitted for that business, because they know intimately and personally the various cases that come before them.

8402. Do any Excise prosecutions come before them in your district?—A few. I appear for the Excise when there are cases.

8403. Is that business well done?—It is sufficiently well done, I think. I may state that the forms adopted by me, are the forms under the Summary Procedure Act of 1864, with the exception of the Excise prosecutions, which have special forms, under the various Acts.

8404. Have you any criminal officers attached to your staff at Dunblane, or do you rely on the constabulary?—Entirely on the constabulary now. At one time we had criminal officers; but we have ceased to have them for a good many years.

8405. *Mr. Adam.*—Do you find any increasing difficulty in proving previous convictions?—A very great difficulty indeed. In many cases, I have had to depart from the previous conviction altogether, because I could not get officers to prove it.

8406. *The Lord Justice-General.*—What does that arise from?—I think it arises partly from this, that the officers are not well paid for proving convictions. The sum allowed them as witnesses and for going to a distant court is so small, that they far rather say they know nothing about the conviction.

8407. *Mr. Baxter.*—Does that not arise from the shifting nature of the police?—No doubt of it, from both causes.

8408. *Mr. Adam.*—You have not the same officers continuing about the court?—No; they are changed very frequently, and from one district of Perthshire to another.

8409. *The Chairman.*—Would you suggest any mode of meeting that difficulty by having the identification done in some other way?—Probably, if we had a special detective officer attached to the seat of every Sheriff Court, under orders of the police, but attached more or less to the Fiscal's office, that would do.

8410. *Mr. Baxter.*—If there was a superannuation fund for police-officers, would that make them more stationary?—No doubt of it. That is much required. After a few years' service in the police, the best men generally leave.

8411. *The Lord Justice-Clerk.*—Do you think that is because there is no superannuation fund?—I have no doubt of it.

8412. *The Chairman.*—It would require very great care to frame a system of superannuation, would it not?—It would. It would be a difficult matter.

8413. *Mr. Baxter.*—Do you know that it is the opinion of the Council of Procurators, and generally of the various Faculties, that the review in the Sheriff Court should now be by two judges instead of one?—I do. They hold that view very strongly, and it is the result of long and wide experience under the present system of appeal from a single judge to a single judge. Perhaps I may be allowed to say, that it is a striking fact that the Sheriff Court practitioners should have arrived at that opinion with such unanimity.

8414. Have you framed any table showing what you would propose with regard to dividing the country into districts?—Yes; and I now produce it. I think five districts would be sufficient; and the number of Sheriffs being thus limited to ten, much higher salaries than the present could be given, and the services of better men could therefore be obtained. I have made out from the returns of business done in the Sheriff Courts during the year 1863, a scheme of division of the country into appeal districts, which, I

James Webster Barty.

think, in a general way shows how this plan might be carried out. This scheme is founded on the presumption that the work in Lanarkshire is sufficient for one district, as I understand that the time of the present Sheriff is sufficiently occupied, and, therefore, if the work in the other districts be less than in Lanarkshire, the other appeal judges will be able to undertake it. This scheme divides the country into five districts, and several modes of ascertaining whether such a division would work in practice have been adopted. In the first place, the actual amount of work to be done by the appeal judges ought to be ascertained by the number of appeals shown by the tables to have been taken in any particular year. In the tables I have made out, I have therefore shown the number of appeals taken in the year 1863; but as I believe that the Sheriff-clerks have not followed the same principle in calculating the number of appeals, their returns may not be reliable. I have accordingly taken the number of actions for debt enrolled, and also the population in each district, as criteria to a certain extent of the business in these districts, calculating that the number of decrees *in foro*, and appeals in all districts, bear very much the same proportion to the cases enrolled, and also that the business in one district containing a certain population will be very similar to that in another district containing the same amount of population. The table shows, *first* the northern district, comprehending Aberdeen, Banff, Caithness, Cromarty, Ross, Elgin, Nairn, Orkney, Sutherland, Zetland, and Kincardineshire. The population of these counties is 581,460; the number of actions for debt, enrolled in 1863, is 1238; the number of decrees in absence, 649; the number of defended cases, 589; and the number of appeals, 453. The *second* district, I suggest should comprehend the counties of Forfar, Perth, Kinross, Clackmannan, Stirling, Inverness, and Dumbarton; population, 598,036; number of actions for debt, enrolled in 1863, 1591; number of decrees in absence, 951; number of defended cases, 640; and number of appeals, 437. The *third* district comprehending the county of Lanark, alone comprehending a population of 631, 309; number of actions for debt, enrolled in 1863, 1517; number of decrees in absence, 692; number of defended cases, 825; and number of appeals, 514. The *fourth* district to consist of Fife, Haddington, Berwick, Peebles, Roxburgh, Selkirk, Linlithgow, and Edinburgh; population, 618,035; number of actions for debt, enrolled in 1863, 1159; number of decrees in absence, 653; number of defended cases, 506; and number of appeals, 292. The *fifth* to consist of the counties of Argyle, Renfrew, Ayr, Bute, Wigtown, Kirkcudbright, and Dumfries; population, 620,405; number of actions for debt, enrolled in 1863, 1085; number of decrees in absence, 576; number of defended cases, 509; and number of appeals, 265. These are actual numbers taken from the returns made on Mr. Baxter's motion in 1866, and the figures are perfectly correct so far as I can ascertain them, except for the county of Fife, from which no returns are made except of the population. I have, therefore, put in a number which may be fairly characterized as no more than the average number of other counties in proportion to the population. This scheme I offer as my own. It has not been under the consideration of the General Council.

8415. *Lord Barcaple.*—You have said 'actions for debt.' Do all the figures you have given refer exclusively to actions for debt?—Yes, with the exception of the appeals.

8416. Are not the appeals in actions for debt alone?—No; they embrace actions *ad facta præstanda.* These appeals include all classes of actions.

8417. Do you know what the number of actions for debt was, separately ascertained?—I am not aware. I take them merely from Mr. Baxter's returns.

8418. *The Lord Justice-General.*—Can you give us any notion what proportion the number of actions for debt bears to the total number of actions in the Sheriff Court?—I could not answer that question at present. The number of appeals seems to give the amount of work which the appeal judges would have to perform; but in some Sheriff Courts the Sheriff-clerk has gone upon different principles in calculating the number of appeals from those upon which other Sheriff-clerks proceeded, and it became necessary to verify the amount of work which the number of appeals appeared to put upon the judges of each appeal district, by taking other methods of calculating the amount of work. I might in this table have also inserted the number of actions *ad facta præstanda;* but as these are few in number, and could have no effect in changing the constitution of any particular district, I have not thought it necessary to do so. In framing this table, my object was not to show the particular number of each class of actions, but the mode in which appeal districts might be formed. I, therefore, took the population and the other particulars contained in the table as sufficient indications of the probable amount of work in each district, and as corroborative of the results shown by the number of appeals.

8419. The appeals you have given is the number of appeals from the Sheriff-substitute to the Sheriff?—Yes.

8420. Do you think if the new plan which you have suggested were adopted, the number of appeals would be increased, or diminished, or remain stationary?—I think they would remain stationary. There seems to be no reason to expect either a diminution or increase, unless the stages at which appeals be taken be increased, or diminished as we proposed.

8421. Might not the expense of an appeal under your new system be greater?—I don't think so; certainly not more than a few shillings greater.

8422. *Mr. Baxter.*—I suppose there are very few cases not appealed?—There are very few cases not appealed from the Sheriff-substitute to the Sheriff.

8423. *Mr. Adam.*—Would you have the appeal judges go to every place where there is a seat of a Sheriff-substitute?—Yes, where there was business to be done; but in some places there could be only one or two cases in a year, or at all events very few cases.

8424. *Lord Barcaple.*—What do you understand by actions for debt?—I understand them to be all actions except *ad factum præstandum.*

8425. You mean all actions with pecuniary conclusions?—Yes.

8426. No matter what the grounds of the action?—Yes.

8427. *The Lord Justice-General.*—Including actions of damages?—Yes.

8428. *The Chairman.*—And of aliment?—Yes. Although in England, I believe, damages are not looked on as debts, I mean by 'debts,' any money which one man owes to another, whatever the ground of his liability.

8429. *Mr. Murray.*—You would have the machinery of the court at each of these places?—Wherever a Sheriff-substitute was retained.

8430. You would not have them to go to places beyond that?—No; only to places where there is a Sheriff-substitute. I don't think it would be desirable that they should go to other places.

8431. Then you confine it to the Sheriff-court towns?—Yes.

8432. *Mr. Campbell.*—Are there any instances where it would be desirable to concentrate the business to be done before the Sheriff on appeal, which you suggest, in some one town easily accessible from one or two of the smaller towns?—I think that might be done, after a careful examination of the tables.

8433. *Mr. Baxter.*—The great mass of business would be in the large towns?—Yes, and in the large districts.

8434. Can you give me any idea of the present expense of appointing factors or tutors?—I have had cases frequently of the appointment of judicial factors, and I don't think in any case the expense in the Court of Session is less than £20 or £25. I can give instances of that.

8435. Have you accounts showing that?—Yes. In one case where I am judicial factor, my appointment cost £25. There was a heritable bond besides, to

which I had to make up a title, and that cost other £25. Of course that latter item is now done away with.

8436. Had you paid £25 for your appointment?—Yes; between £20 and £25. It cost the estate that sum.

8437. Do you know anything about the expense of the discharge?—I am at present being discharged as judicial factor on the same estate, and I have no hesitation in saying that the expense will be much greater—probably between £40 and £50.

8438. Have you got the account for that?—No; but I know the amount of business that has been done.

8439. *Mr. Adam.*—Have you any idea of the expense that would have been saved by an application for the appointment in the Sheriff Court?—The same case in the Sheriff Court would have cost from £5 to £10.

8440. *The Lord Justice-General.*—What are the chief items of expense in the present system?—There is a good deal for printing, and also for counsel's fees.

8441. Are these the two chief items?—So far as I remember, they are.

8442. *Mr. Adam.*—In cases of appointments of that kind, it is very often necessary to serve a petition on a considerable number of persons having interest?—It is; and that is specially the case with reference to the discharge.

8443. In that case, the printing would be cheaper than making copies?—After a certain number of copies, printing is cheaper; but it is rarely that so many have to be served as to make printing cheaper than copies.

8444. Do you know practically, in your business, when it becomes as cheap to print as to make copies?—As far as I remember, it is twenty copies. That is what the printer who prints for me told me.

8445. *The Chairman.*—You think that it is as cheap to print only when there are twenty copies required?—I think so; but I really cannot give a definite answer to that.

8446. Would you be surprised if it were only six copies?—I think six is less than according to the rates that I pay; but I cannot be positive on that point.

8447. *Mr. Adam.*—Does your Sheriff-clerk ever do duty in your court in person?—He has never been in Dunblane since I have been a procurator before the Sheriff Courts in Perthshire.

8448. The work is done by a deputy?—The work is done by a depute. I believe the depute's salary is £110, and out of that he has to pay the whole expense of the office, and do the whole duties.

8449. *Mr. Murray.*—The Sheriff-clerk of Perth must necessarily do the duties in Dunblane by depute?—Of course; he must do the duties less or more. I merely said he had never been in Dunblane.

8450. Is there a Commissary Court in Dunblane?—There is.

8451. With a separate commissariat?—It is in Perthshire. There is a principal Commissary-clerk for the whole of Perthshire, with a depute at Dunblane.

8452. Is confirmation extracted at Dunblane?—Yes.

8453. Who acts?—The Sheriff-clerk depute. He is Commissary-clerk depute.

8454. Having a separate appointment?—Yes.

8455. *Mr. Baxter.*—Then the Sheriff-clerk of Perthshire is Commissary-clerk?—No; it is another gentleman.

8456. The Commissary-clerk is paid by fees?—Yes.

8457. Are these fees much complained of?—Yes, they are.

8458. As being too high?—Yes; the fees for the procurators are very small, but the fees of the Commissary-clerk for doing a very formal act are as much as the procurator gets for his whole trouble. In the very last confirmation I had, my whole account was £5, 10s., of which £2, 11s. was paid to the Commissary-clerk.

8459. *Mr. Murray.*—Might not that include the recording of the testament?—It includes all he does; but the work he does is very small, and almost mechanical, in comparison with what the agent has to do.

8460. But according to the present system a will or statement must be recorded?—Yes; in certain cases.

8461. *Mr Adam.*—Do you practise in Perth as well as in Dunblane?—I practise in Perth occasionally, and I am frequently in Stirling.

8462. Do you think that one Sheriff-substitute could do the whole work of your county?—I believe he could do the whole civil work, but I don't think he could do the whole criminal work with advantage to the public.

8463. Why?—Because great expense would be caused by the agents, prisoners, police, and witnesses going to Perth in criminal cases; and that in the course of a year would amount to a larger sum than the salary of the Sheriff-substitute at Dunblane. The amount of criminal work in the Dunblane district for the year ending 15th May 1867 was as follows, viz.—reported cases, 34; unreported, 93; jury trials, 4; inquiries into sudden deaths, 14; as to accidents in mines, etc., 9; as to fires, 1. For the year ending 31st March 1868, as follows, viz.—reported cases, 37; unreported cases, 119; jury trials, 4; inquiries into sudden deaths, 15; accidents, 7; fires, 1.

8464. *Mr. Baxter.*—Have you a table of the Commissary-clerk's fees?—I can produce a copy.

8465. *Mr. Murray.*—Did you ever see the principal Commissary-clerk of Perthshire at Dunblane?—Occasionally.

8466. *The Chairman.*—When you have criminal trials with a jury from the western district, are they tried at Perth?—They are tried at Dunblane. They were tried at Perth for a considerable period, but now they are all at Dunblane.

8467. *Mr. Baxter.*—What do you think of the present division of the county of Perth?—It is a very bad one at present. The Sheriff at Perth has too much to do, and if the jurisdiction is extended he will have much more to do; and the Sheriff at Dunblane has too little.

8468. Are the duties of Sheriff-clerk well done by the depute at Dunblane?—The duty of Sheriff-clerk is excellently done by the depute at Dunblane.

8469. Do you know whether the Sheriff-clerk does duty in Perthshire at Perth, or by depute?—I have scarcely ever seen him when I have been at Perth. He occasionally appears in jury trials, but I believe that is the most of the duty he does.

8470. He has a depute at Perth?—He has an excellent depute who does the work, and is paid by a salary a very little higher than that of the depute at Dunblane. With reference to Sheriff-clerks, it is generally thought that it would be very desirable that they might act as interim Sheriff-substitute. They have no particular interest in cases, and in many cases it is very desirable that they should take pleas in absence of the Sheriff. We have great difficulty in many districts in getting a proper party to act as interim Sheriff-substitute.

8471. *The Chairman.*—Does the Sheriff-clerk not act sometimes as Sheriff-substitute?—No, never now. There was a decision, or some remarks made against it.

8472. But you think that would be expedient?—Yes.

I am anxious to state with reference to writs, pleadings, and procedure, that I think that the Recovery of Debts Act ought to be repealed, and that the Small Debt Act ought to be extended to cases of £50 in value. If this were done, several amendments would require to be made in the Small Debt Act, the most important of which are: (1) Power to agents to appear in all cases; (2) A suitable table of fees to be fixed; (3) The first diet to be a diet for hearing merely; (4) Appeals on points of law on cases stated, to be allowed in cases beyond £5 in value; (5) The defender to be allowed to remove any case above £25 to the ordinary courts on finding caution, provided the crave be made at the first calling of the case. The present Sheriff Court Act should apply to all cases beyond £50, with the following amendments: (1) The summons to be a short printed writ, calling the defender into court, with particulars annexed, for which the procurator should be allowed a small fee, so as to make decree in absence inexpensive; (2) Proofs to be taken, by the Sheriff

James Webster Barty.

dictating to a shorthand writer; (3) Power to advocate for jury trial all cases above £50; (4) Summons to contain warrant to arrest and inhibit; (5) In all cases condescendences and defences cannot, I think, be dispensed with, but where they can, I think pleas of parties, as provided for by the Recovery of Debts Act, a better form of making up the record than a minute of defence.

8473. *Mr. Baxter.*—Have you anything to say about the extension of the Sheriff's civil jurisdiction?—I would extend it to all cases generally, and specially in regard to questions as to heritages. I know many hard cases in my own practice, with reference to small properties especially. In regard to divorce, the want of an available court for dealing with such cases, when the parties are in humble life, is an evil which it is impossible to exaggerate. Suppose a man separates from his wife for causes which would warrant divorce, and she continues her cohabitation with another man, by whom she has a family, the unfortunate husband being undivorced, continues legally bound for her maintenance and that of the adulterous children, and that responsibility may be enforced by them or by the parish.

SATURDAY, 30th JANUARY 1869.

Members Present:—

Lord Colonsay.
The Lord Justice-General.
The Lord Justice-Clerk.
Lord Barcaple.
Edward S. Gordon, Esq., Q.C.
Dr. Hugh Barclay.
James Campbell, Esq.
George Harrison, Esq.
James Adam, Esq.
A. B. Shand, Esq.
Charles Morton, Esq.
John B. Baxter, Esq.
Adam Paterson, Esq.

The Right Hon. LORD COLONSAY in the Chair.

Alexander Nicholson.

Alexander Nicholson, Esq., examined.

8474. *The Chairman.*—You are a practitioner in the Sheriff Court of Fifeshire?—I am.

8475. In the Cupar district?—Yes; in the eastern district.

8476. Is that the larger or the smaller district?—It is the larger district.

8477. Have you been long a practitioner there?—For sixteen years.

8478. Do you hold any official position?—No; I am a solicitor and banker.

8479. There are a good many practitioners at Cupar?—Yes, upwards of 20 in the town of Cupar, besides those in the other towns in the eastern district. There are probably 50 or 60 practitioners in the eastern district altogether.

8480. Attending the Cupar court?—Yes; or entitled to practise there.

8481. These practitioners are scattered in the different burghs along the coast?—Yes; from Kirkcaldy to St. Andrews.

8482. Have you any observations to submit to the Commissioners in regard to the constitution of the Sheriff Courts?—I don't know that I could suggest any alteration upon the constitution of the Sheriff Court. I am in favour of retaining the double Sheriffship.

8483. Do you think that a review within the court is an expedient thing to have?—I think it is.

8484. A review by the Sheriff of the judgment of the Sheriff-substitute?—In my opinion, it would be an advantage to have the judge in habitual attendance on the Supreme Court, in considerable practice, and having opportunities of coming in contact with the heads of the law here. I think it is an advantage to give the Sheriff the power of reviewing the judgment of a person residing in the district.

8485. That is the present constitution?—It is.

8486. You think there is an advantage in his attending the courts, so as to familiarize himself with the progress of the law, and the decisions and practice of it?—That is clearly the opinion that I have formed.

8487. The appeal to the Sheriff is a cheap system of appeal?—It is very cheap, and I think that is one of its chief recommendations; that even those who would go to the higher court, will get the opinion of a competent lawyer at very little expense.

8488. Are there many of the decisions of the Sheriff-substitute at Cupar appealed to the Sheriff?—I think I may say that the whole of them, or nearly the whole of them, upon the merits, are appealed to the principal Sheriff. There are also other judgments appealed, such as the judgments allowing a proof, and disposing of preliminary objections under the Sheriff Court Act of 1853.

8489. But these are not so uniformly appealed as the others?—No; they are seldom appealed—especially interlocutors allowing a proof; but the judgments on the merits are almost universally appealed.

8490. *Mr. Paterson.*—Is what you have stated the prevailing opinion of your colleagues?—I don't think it is universally so, but it is the opinion of a very large majority of them.

8491. *Mr. Baxter.*—Has your body met and considered it?—We had it under consideration on Monday fortnight.

8492. Did you come to any resolution about it?—We came to no resolution. We had just a discussion among ourselves. There were some dissentients, but the prevailing opinion was what I have expressed.

8493. You came to no resolution on the subject?—No; nor was I instructed to say anything particular upon the subject.

8494. *Mr. Paterson.*—What are your reasons for preferring the double Sheriffs, as at present constituted, to an ambulatory court of appeal of two Sheriffs?—I think it is very likely that if such a tribunal were constituted, they would dispose of the cases offhand, without taking them to avizandum, as the principal Sheriff does. When a debate takes place before him, he very seldom disposes at once of the case, unless it is a very plain and simple one. He takes it to avizandum, and has an opportunity of considering the arguments and the authorities quoted, as well as any authorities which he may turn up himself. I think, therefore, that is a more mature judgment than would be pronounced by the ambulatory court.

8495. *Mr. Baxter.*—Why should not the ambulatory court take the cases to avizandum?—There is nothing to prevent that, but I think it is more convenient for one judge to do so than two judges. If they took it to avizandum, they would have to meet and consult about it afterwards. I think it would be necessary for them to dispose of it immediately after the debate.

8496. *Mr. Paterson.*—But supposing they find themselves not quite at one, do you see any harm in their making avizandum, just as the Sheriff would do?—No, I don't see any harm; but I think it would cause some inconvenience to meet and have consultations afterwards.

8497. *Mr. Adam.*—If they found that their impressions agreed, do you think they would be likely to dispose of the case then and there, without fully considering it?—That is my opinion.

8498. *Mr. Baxter.*—Would that not be equally the case with a single judge?—I don't know that the opinion of two Sheriffs is much superior to the opinion of one Sheriff in a matter of that kind; and I don't know that much respect would be paid to these ambulatory judges. I think it would be attended with inconvenience.

8499. Where would they fix the hearings?—They would need to go to every seat of court.

8500. *Mr. Morton.*—While nearly all the judgments on the merits are appealed to the Sheriff-principal, can you give us a notion how many are advocated?—A very small percentage is advocated from our courts.

8501. Then the judgment of the principal Sheriff is generally accepted as conclusive?—Unless in very important cases. There are very few advocations from our courts.

8502. *Mr. Baxter.*—Has the expense of the Court of Session anything to do with that?—I would not say that it has not.

8503. *The Chairman.*—Do you think it has?—I think it has. I think there is a very strong feeling in the provinces that the expense of obtaining a review of the judgment of the Sheriff is so disproportioned to the sum in dispute, that parties are very reluctant to take it.

8504. Do you think that there would be any advantage in making the judgment of the Sheriff final up to a certain point?—In my opinion, it would be an advantage to make it final up to £50.

8505. You think that below that the expense of the Court of Session review would be so great as to make it either difficult to be obtained, or a hardship to go through with it?—I think it would be a hardship, at any rate; and I think, from the experience of the Sheriff-principal and the Sheriff-substitute, cases of that pecuniary amount may safely be left to their decision.

8506. Have the cases that have been advocated from your court been generally cases of much importance?—They have been cases of importance mostly; but sometimes there have been cases of very little importance advocated, in order to obtain delay, and probably with a view of forcing the opposite party into a compromise. I am afraid there have been cases of that description, though I cannot say they have been numerous.

8507. Perhaps there have been cases in which the litigants displayed temper, although the subject-matter was of little value?—Sometimes.

8508. Does it appear to you that there are any alterations which could be made with advantage on the form of proceeding within the Sheriff Court?—I think the Sheriff Court Act of 1853 works very well, upon the whole; but I think some alteration might be expedient in the pleadings. At present the record may be made up in two ways: either by a minute of defence appended to the summons; or when parties don't agree to close in that way, which they too often don't do, then a record is ordered to be made up by condescendence and defences. I think it would be better to allow the record to be made up in one way. My opinion is—and I know that the opinion of my brethren in that respect is—favourable to doing away with the minute of defence; and, in defended cases, to have the pursuer to give in a short condescendence, and the defender a short defence.

8509. Has any mode occurred to you of ensuring that these papers shall have the character you ascribe to them, of being short?—In our court, I think, they generally are short; and the Act of 1853 is very well framed to accomplish that purpose, if the judge enforces the provisions of it.

8510. *Mr. Baxter.*—You would have no short record at all?—We very seldom close upon a minute of defence. When the case is called, we are appointed to state the ground of action and the nature of the defence. Generally we come with a short minute of defence, if we think it is possible to close upon that; and the opposite agent may be allowed to see it for eight days, or to consider whether he shall consent to close on it. Very frequently—I would say three out of four times—there is a declinature to close on that. Delay occurs, trouble has been occasioned in framing the minute of defence, and an order to make up the record by condescendence and defences follows.

8511. Does the Sheriff always grant that when it is asked?—I think he cannot refuse it, under the Act of 1853, if the parties don't consent.

8512. *The Chairman.*—It has been suggested that perhaps a note of reply by the pursuer would supersede any further record in many cases?—It might. That is another way of looking at it; but it might be short, or it might be long, and it would certainly not be so conveniently framed as an articulate condescendence and an articulate statement of facts for the defender. The minute of defence is generally a statement of the defence without being put under substantive heads, and the reply would be very much in the same way. It is very apt to get into an argumentative document rather than a mere statement of facts.

8513. An argumentative document would be an irregularity?—It might be so. The difference in point of expense would be very little.

8514. If an action is merely a claim for debt, say upon an account, and the summons states that the party is owing an account herewith produced, and the defence is that the account is paid, or that the debt was never contracted, would there be any occasion for more than a reply by the pursuer that it was contracted at a certain time?—Nothing more in such a case, and sometimes not even that.

8515. In the great majority of cases of pecuniary claims, would there be any reason for going into a separate articulate statement of fact?—Sometimes explanations require to be given, if the case is going to a proof, which it would be convenient to have on record, so that the parties might be tied down to a certain line of examination of their witnesses.

8516. *Mr. Paterson.*—As I understand it, you are quite in favour of short records?—Quite.

8517. But you think they ought to be made up in general by condescendence and revised defences?—By condescendence and defences—not revised defences.

8518. You think that could be done with economy and despatch, provided the court and the practitioners see that the case is stated succinctly?—Yes; and it would be very convenient to have the record made up in that way preparatory to a proof, and the expense of such a record is no reason against it.

8519. Is the practice in your court at Cupar in favour of what is called the short defence, or in favour of condescendence and defences?—It is in favour of condescendence and defences.

8520. Do you find that to work well?—We do.

8521. Does it not induce delay as compared with the other?—Well, there are only six days allowed to lodge a condescendence. If an order for condescendence is taken at the calling of the summons, there are only six days allowed to lodge the condescendence, and ten days thereafter for the defences. If you have the option to close on the minute of defence, there is more delay. Very generally there is an adjournment to consider whether you can close on the minute of defence.

8522. Have you heard of any such thing at the Cupar court as closing on summons and defences?—I have heard of such a thing, but it is not very common. The closing on condescendence and defences is more frequent.

8523. *Dr. Barclay.*—In the case of a prescribed account, if it is denied, would you make up a condescendence and defences?—Not necessarily.

8524. You would just deny resting-owing?—Yes.

8525. *Mr. Campbell.*—In cases of affiliation how

Alexander Nicholson.

would you do?—In cases of affiliation it is invariably the practice to make up a record by condescendence and defences. You have to be very specific in averment, and I don't think I could put my finger on any case where the record was closed on a minute of defence in such a case.

8526. *Dr. Barclay.*—In that class of cases do you not find also that the defender frequently alleges familiarity with other men?—Very frequently, and we always make up the record by condescendence and defences.

8527. *The Chairman.*—Have you any suggestion to make with reference to the procedure in the Sheriff Court?—No; it does not appear to me that anything calls for amendment in the procedure prescribed by the Act of 1853, except that the records should be closed either in one way or the other, and that there should not be any option given.

8528. Do you think that the opportunities for appeal are too frequent in the course of preparing the case?—It does not appear to me to be so, and I don't think it has been abused in that way. There is a right of appeal on questions put during the proof, but the proof is closed before any appeal is taken, and an appeal is taken after that. I cannot say that there has been any abuse of the right of appeal, so far as my experience goes.

8529. Are there many appeals upon preliminary defences?—They are not very frequent. Sometimes it happens in order to get delay.

8530. Is it common to order a proof at the same time that the preliminary defences are disposed of?—The preliminary defences are sometimes disposed of before a proof is allowed, and sometimes they are reserved, and a proof allowed.

8531. Then are there many appeals against the allowance of proof?—No; that is not a common thing.

8532. Are your appeals to the Sheriff generally considered upon oral or upon written argument?—Generally on oral argument. We minute an appeal, and crave to be heard orally. Sometimes there is a reclaiming petition, but they are not frequent in our court; and I would suggest, in regard to that, that a party might have the option of lodging a reclaiming petition, but I don't think he should get a larger fee for it than for the oral hearing. Sometimes reclaiming petitions by their length are abused, when they are allowed to be charged by the sheet. I think a litigant or an agent ought to have the option of one or the other, but I think one fee should be applicable to both.

8533. That would enable a practitioner to rely more upon his pen than upon his speech, and to conduct his clients' cases at the same expense?—Every person is not so able to state a case orally as he would be to state it in a reclaiming petition, and I think it would be but fair to the bar and to the litigants to allow the option; but I think when a person resorted to the reclaiming petition, he should just get the same fee as for the oral hearing.

8534. And the time should be limited?—Yes. Sometimes a reclaiming petition is necessary in this way: a crave for an oral hearing is sometimes lodged to obtain delay in a case requiring despatch. If a person wants to obtain delay, the Sheriff of his own motive orders reclaiming petition. That sometimes happens in cases of ejection, and in summary cases of that description. But in any case, whether ordered by the Sheriff or done by the agent himself, I think the fee ought to be as I have stated.

8535. Have you any further observations to make on the course of procedure?—I cannot say that I have. As I have already said, I think the Act of 1853 is very well framed with reference to the procedure.

8536. Do you approve of the form of summons?—I think it is a very good form of summons. I don't know that I would desire it to be altered or improved on. It is very short, and any agent in any practice at all can state his case in the form in use.

8537. Do you think the jurisdiction of the Sheriff ought to be extended in any direction?—I think it ought to be extended. There are several points in regard to which I think it would be an advantage to extend it. I think it should be extended to heritable rights. Probably we feel the disadvantage of the present system as much in our county as anywhere. We have a great many small properties. Feuing is conducted in a very extensive way in our county, and we have numerous small properties of little value, ranging from £20 to £100. I think it would be very desirable that the judge ordinary should have jurisdiction with respect to heritable rights.

8538. Would you limit the amount of value?—I think adjudications should be competent before the Sheriff; and probably they might be limited to properties from £150 to £200, or to claims from £150 to £200.

8539. But in other heritable questions you don't propose any limit?—No. We have just now irritancy of feus under the Act of 1853, where the subject is of the yearly value of £25. I think that is too limited.

8540. Would you have that to go to any extent?—I would say so. Then, in possessory questions, questions of heritable title come up every now and then, and it is a very great inconvenience and hardship for the litigants under the present system; for instance, when a question arises as to possession, they are limited to the seven years' possession. The Sheriff cannot go into any other question, because it involves competition of titles; and in the most trifling disputes there is considerable expense incurred, and sometimes the Court of Session differs from the Sheriff in such cases. I think the Sheriff should have power, at any rate, to dispose of questions of competition of titles, in order to enable him to give a decision regarding the question at issue.

8541. Would you give him jurisdiction in actions of declarator of right?—I don't know that that would be of very great advantage.

8542. As to these possessory questions, do you mean that he should decide the matter of right, or that the raising of a question of right should not obstruct his disposing of the possessory question?—The raising of the matter of right should not obstruct him disposing of the whole question at issue between the parties.

8543. As, for instance, a question of road?—Yes; a question of road, or the like of that; or a question of boundary or encroachment.

8544. That would be substantially a declarator of right?—It would have that effect. I don't think a process should be sisted in a case such as I have put, in order to bring a declarator in the Court of Session.

8545. You would supersede the necessity of a declarator of right, by allowing that to be disposed of in the cause?—I think that would promote the ends of justice in such cases, and save a deal of expense and trouble.

8546. *Mr. Paterson.*—Do you apply any limit in value to the cases of the kind you are speaking of?—No; I would not. I don't know that you could very well do so. Such a question might arise as between two large proprietors, as well as between two small proprietors.

8547. You would give the Sheriff the power of determining any matter of heritable right, where the question involved possession?—Yes.

8548. That is, virtually, unlimited heritable jurisdiction?—In that department.

8549. Most questions involve possession?—I don't know that. In many questions you can bring your declarator without the question of possession coming up.

8550. *The Chairman.*—Would you give to the parties the power at an early stage to remove such a case to the Court of Session?—I would not be disposed to do that. I don't see any advantage in doing that. I would take the judgment of the Sheriff upon it, and let that be appealed to the Court of Session.

8551. Would you think it expedient to introduce trial by jury in civil causes into the Sheriff Court?—I would not be in favour of that. I don't know that the present mode of forcing the Sheriff to take the evidence in his own hand is a good thing; but I think the taking of the proof just now is so very admirably done by the Sheriff-substitute, that there is no special call for introducing the system of jury trial into the Sheriff Court.

8552. You say you don't think he should be required to take it in his own hand. Would you allow him to use an amanuensis for the purpose?—Yes; I would recommend that. It is a very great deal of labour for the judge to take down the substance of the evidence—first to try to find out the true meaning of the witnesses' answers, and then to take it down himself. The Sheriff-substitute is frequently engaged at proofs for seven or eight hours a day.

8553. And he may not be a very swift writer, and that adds to the delay?—I think it would be an advantage if there was power given to employ an amanuensis or a shorthand writer.

8554. *Dr. Barclay.*—Have the Sheriffs not that power by the Act of 1853?—Not excepting in cases of sickness or inability. I think it would be also convenient if inhibitions were allowed in the Sheriff Court; that is to say, if the short form of a warrant of inhibition were introduced into the summons, the same as in the Court of Session summons. A very great improvement has been effected by the last Court of Session Act in that respect, and I think it should be allowed in the Sheriff Court summons as well. We can arrest moveable property to any amount, and I think it is very inconvenient not to have a right to inhibit also, and let notice of such inhibition be recorded in the register in the same way as in the Court of Session. It is a very hard case when a person is pursued who has only a small property worth £20 or £30, and it is the only thing the creditor can get at, that he is obliged to come to the Court of Session for letters of inhibition on the dependence, or after he gets his decree.

8555. It has been suggested that the giving the warrant on the summons might lead to too frequent and oppressive use of inhibition; and that although there might be power to grant warrant to inhibit, that had better be done by a separate application in the Sheriff Court?—I am not very particular as to the way in which it should be done, excepting as to the matter of expense; but I think the jurisdiction ought to be extended as to that.

8556. *The Chairman.*—Are there any other classes of cases to which you think the jurisdiction should be extended?—I think the proceedings under the Conjugal Rights Act should also be competent in the Sheriff Court. That is, at any rate, that the Sheriff should have jurisdiction co-ordinate with the Lord Ordinary. There are sometimes very small sums involved in such questions, and frequently injustice is sustained by the party in not having a cheap way of getting the property protected. There are also alimentary cases between husband and wife. At present the Sheriff has only power to award temporary aliment, and the time must be fixed. A summons is raised in the Sheriff Court, and our practice is to fix the time within which an action must be raised in the Court of Session. I think the jurisdiction of the Sheriff should be extended to awarding aliment in cases of that description.

8557. Do you think that questions of status should be brought under the jurisdiction of the Sheriff, such as divorce, declarator of marriage, declarator of legitimacy, and declarator of bastardy?—I would leave that with the Supreme Court.

8558. It has been said that it is a hardship on poor people, that they cannot get divorce cheaply in the Court of Session, and that they are obliged to put up with the evil, or that it has the effect of driving them into a course of immorality?—I don't know that the expense of the Court of Session, where the proof is necessarily taken, is much more than it would be in the Sheriff Court. If you were to extend the jurisdiction there, I am afraid you would require to include all cases.

8559. *Mr. Baxter.*—Have you had any experience of divorce in the Court of Session?—No, I have not.

8560. *The Chairman.*—Are there any other matters that you think the Sheriff ought to obtain jurisdiction in?—It occurs to me also that he ought to have the power of appointing factors under the recent statute.

8561. Judicial factors?—Judicial factors and factors *loco tutoris.*

8562. *Mr. Baxter.*—And other such officials?—Yes. I know a case of that description, where a farmer died leaving a widow and a young family, and the person entitled to the office of tutor-at-law does not care for the appointment, and another competent person who would manage the farm during the remainder of the lease, or till the majority of the children arrived, can be got, but they are afraid of the expense of applying to the Court of Session. A petition to the Sheriff, and decerniture, would be got at a very trifling expense, and would be quite satisfactory to the parties.

8563. Is that an actual case which has occurred?—Yes; a case of that description has happened under my own notice.

8564. *Dr. Barclay.*—Would you place them under the Accountant of the Court of Session?—Unquestionably. I think that appointment of the Accountant of Court is one of the best pieces of legislation we have had of recent years. It is an immense check on factors to have their accounts carefully made up and audited every year.

8565. *The Chairman.*—Is there any other matter to which you think the Sheriff's jurisdiction should be extended?—No, it does not occur to me that there is any other matter which I should specially advocate the Sheriff's jurisdiction being extended to.

8566. Does it occur to you that there is any mode of cheapening the expense of litigation in the Sheriff Court?—I don't know that there is, unless there was to be a fee given to the agent for the process according to its amount, in the same way as is fixed—I am sorry to say, in my opinion, at too low a rate—under the Debts Recovery Act. I don't think that the fees of agents in the Sheriff Court are extravagant; and the proportion of the expense of conducting a litigation in the Sheriff Court that goes into the agent's pocket is not very considerable. The expenses of such an action are generally very much increased by the number of witnesses, and the fees paid to witnesses.

8567. You think that slump payment is not a bad principle?—I would not say that it is. I rather think that it is not bad in principle. It would be a check on any abuse of the forms of process, for unnecessary precognitions, and various other steps that one agent might think it his duty to take, where another would not do so.

8568. Would you have an uniform charge, because that would not be paying an agent according to the amount of work he had to do in each case?—There would require to be a scale according to the valuation of the cause. There would be less, of course, in a case where no proof was necessary; and there would require to be a scale in cases where no proof is led, and in cases where proof is led.

8569. *Mr. Baxter.*—You would require to have a scale according to the work done, as well as according to the value of the cause?—Yes.

8570. *Dr. Barclay.*—You make the distinction between cases that go to proof and cases that don't go to proof?—Yes.

8571. *Mr. Paterson.*—You are in favour of an *ad valorem* scale, distinguishing the cases which go to proof and those which don't, under the Debts Recovery Act?—No; I mean to extend the principle which has been introduced by that Act. I think the fees in the Debts Recovery Act are too small, especially where there is a proof. Witnesses require to be precognosced and examined; there is a debate in the case; and there is all the preparation for that, and I think the fee is too small. I would be afraid that it would turn out that the agents just do less work because of the smallness of the fee, and probably don't always do justice to the cause.

8572. *Mr. Baxter.*—Don't you think the scale of payment by a slump fee would have that effect?—I don't believe it, if the fee was something like adequate, which I believe the Sheriff could very easily fix, by looking at an average of what the cases had cost for a certain period of time.

8573. *Mr. Adam.*—Do you think that the fees under the Debts Recovery Act would be sufficient if proofs were paid for extra?—No; my opinion is that they

Alexander Nicholson.

are still inadequate to command proper services upon the part of the agent to his client.

8574. *Mr. Paterson.* — Could you suggest to the Commissioners a scale of fees that would be more suitable?—I think it might be safely left to the Sheriff, but I could give my own impression of it.

8575. You say that the amount of the fee may in some cases occasion negligence or carelessness in the conduct of the cause on the agent's part. Do you find that in practice?—The Act has only lately come into operation.

8576. Then you mean it is a temptation in that direction?—I don't say it has occurred, for the Act has not been long in operation. But the highest fee allowed to an agent is £4, for recovering a debt of £50. A proof might be led, and a considerable number of witnesses examined; precognitions require to be taken, and so forth. No doubt, in the ordinary case, that is by far too inadequate a fee for the work which has to be done.

8577. *Dr. Barclay.*—But in another case, where there is no proof, may it not be a great deal too much; for example, where there is a mere reference to oath, which often takes place under that Act?—In that case it would be sufficient.

8578. *Mr. Baxter.*—Would it not be more than sufficient?—I don't know.

8579. Suppose you had a scheme of payment in that way in the ordinary court, might it not be much more than sufficient?—I don't think it would. At present it is not so. You have the fee for the summons, and for calling, and all that sort of thing.

8580. You don't think the better way would be to remunerate the agent according to his work?—Well, I am not wedded to the suggestion I have made; but that has been enacted, and I don't see any great objection to its being extended.

8581. *Mr. Adam.*—Do you think that in the Sheriff Court at present there are too many small fees allowed, and that it would be better to have larger fees and fewer of them?—We find a good deal of squabbling and fighting before the auditor, and I think it would prevent that. It would have a tendency to prevent a good deal of the keenness exhibited before the auditor.

8582. *The Chairman.*—With regard to the mode of appeal from the Sheriff to the Court of Session, do you think you could suggest a mode of appeal more economical than that which has been lately introduced?—I think it is as economical as any that could possibly be introduced. There could not be a simpler appeal than a minute on the interlocutor sheet; but with reference to that, there is a point of practice which may turn out to be inconvenient. A party is now allowed 20 days to minute an appeal. He may not do so, and the decree in the inferior court cannot be extracted for 20 days. I think, in a case of that description, inconvenience and loss may frequently occur by the delay in issuing the extract; and I think it would be better that the time for appealing should be limited to 8 or 10 days—8 days, I think—and then some further time allowed in maturing the proceeding after the appeal is proceeded with. Perhaps the party should be obliged to minute his appeal in a shorter time; and failing his doing so, that the extract should go out, and prevent any misapplication of funds by the debtor, or anything that would be injurious to the creditor.

8583. Allowing him some time afterwards to complete the proceedings or to drop them?—That would be a preferable plan.

8584. *Dr. Barclay.*—But if the party were to minute the appeal, that would equally stop the extract, and he might fall from it?—Yes; but at present, where they don't even intend to appeal, there are 20 days allowed.

8585. But parties would note the appeal, and fall from it?—They might be subjected in expenses if they noted an appeal, and if they did not follow it up.

8586. The court have the power just now, on cause shown, to allow summary extract, without waiting the days, where it can be shown that the party is *vergens ad inopiam:* might that not be done on special motion to the court to allow the extract?—In a special case of that description there is a remedy; but parties are not always in a position to make an averment that the party is in that condition, and it is not always safe to do so.

8587. Your remedy is, that they should note the appeal within a shorter period than is allowed by the statute?—That is my view.

8588. *The Chairman.*—You think an agent would hesitate to note an appeal, if he had no intention that it should be taken?—I think so. I don't think that respectable agents would note appeals merely for the sake of noting them, or obtaining delay.

8589. But it is a more simple mode to remain silent, and say or do nothing, which of itself operates the delay?—Yes; an agent is not then committed to any practice that might be condemned by his opponent.

8590. *Mr. Paterson.*—But you think the remedy would be to shorten the time for appealing?—Yes; otherwise I admit it is as simple a way of taking the case to the Court of Session as could be devised, and it is a great improvement on the old process of advocation.

8591. *The Chairman.*—In regard to the ultimate time that should be allowed, it may be necessary to make it longer than in many localities would be required, because parties in certain localities may wish to communicate with their clients who may be at a distance, and wind and weather may interfere with their getting their answers; and therefore to make it so short a time as 8 days absolutely everywhere might not suit?—It might not; there might be places where a longer time should be allowed.

8592. *Dr. Barclay.*—Have you formed any opinion on the new provision, allowing parties to appeal without finding caution?—I am of opinion that that is not a good provision. I think, if causes are taken to the Court of Session, the party ought to find caution.

8593. *The Chairman.*—For expenses?—For expenses. I think a party who is able to do so is put to no inconvenience; and the form of juratory caution is so easily carried out, that I regret that that change in the law has taken place.

8594. Do you think it has added to the number of appeals to the Court of Session?—It has hardly had time to tell yet. But I should think it would add to the number of appeals where the parties had not a very good case, and where they might expect, by dragging their adversary to the Court of Session, to effect a compromise. I think it is calculated to increase the number of appeals of that class.

8595. Parties who are not in the condition that would induce their friends to become cautioners for them?—I think it has a tendency in that direction.

8596. *Mr. Paterson.*—You think the finding of caution tests the good faith of the advocator, in short?—I think it is calculated to do that. The advocator comes to the court of review, then, really desirous to have the judgment of the court, and not for the purpose of punishing his adversary or obtaining delay; and I don't think there is hardship in that case in finding caution for expenses.

8597. *The Chairman.*—Have you any suggestion to make as to the privileges of agents?—I am not specially desirous to see agents having exclusive privileges.

8598. It has been suggested that it would be expedient that agents, who are admitted upon an examination, should be entitled to practise in any Sheriff Court that they choose; to settle down in one place, and to move to another without undergoing examination there—not that they should be necessarily admitted to the benefit of the Faculties who have property and rights of another kind, but merely that they should have the privilege of practising. What is your opinion as to that?—If any agent were to remove permanently from one Sheriffship to another to commence business, I think he should be entitled to do so; but I don't see any advantage of giving an agent in one county the privilege of going to conduct a particular case in another county. I don't think an agent in large practice would ever do so, and I think the advantage to other agents is too insignificant to alter the rule. I think it is a great advantage to country

practitioners to be confined to their own Sheriffdoms, while they are resident within their own district.

8599. *Dr. Barclay.*—Are there not a number of Forfarshire practitioners in your court?—Some are admitted as procurators in our court.

8600. And still reside in Dundee?—They reside principally at Newport. They carry on business at Dundee, and are admitted procurators in our court; but in almost every case they employ a correspondent in Cupar to conduct their business. Occasionally they come themselves; but that must occasion inconvenience to them, and it must add to the expenses of the client. They can conduct the business much more economically by a correspondent at the seat of the court.

8601. I presume they always give a receipt when they borrow a process?—No; we would not like a process to go to Dundee, except on the receipt of a procurator residing at the seat of court.

8602. Who would be liable to the process of summary caption?—Yes, who would not trifle with the process and keep it up, because he is in contact with his brother agents every day.

8603. *The Chairman.*—It has been suggested that local practitioners should be permitted to follow their cases into the Court of Session, and conduct them there?—I am not at all in favour of that. I think the agents in the Court of Session should conduct the business in the Court of Session; and I don't think it would pay any country practitioner to follow his case to the Court of Session, and conduct it there. No practitioner in extensive practice would do so, and I don't think it would pay a practitioner not in extensive practice, unless he were to make extra charges against his own client, and I don't think that should be encouraged.

8604. Some suggestions have been made as to the charges of country agents not being allowed in the Court of Session against the losing party, when expenses are given. Have you any experience in that matter?—Yes, I am sorry to say I think there is great hardship occasionally in that case. When a proof is conducted on commission, for instance, it is almost necessary for the interests of the client that the country agent, who frequently takes the precognition, should be present at the examination of the witnesses. It is also necessary and proper that the Edinburgh agent should be present. I understand that the Edinburgh agent gets the fees, and that the charges of the country practitioner are disallowed, and must go against his own client. I think there is a hardship in a case of that description. I admit that to allow his charges would be double agency; but in special cases such as I have mentioned, I think that should be allowed.

8605. *Mr. Paterson.*—Have you considered what the instruction to the auditor should be in such a case?—I think, when the auditor saw that the precognitions were taken by the country agent, he should allow the attendance of the country agent at proof.

8606. That is in regard to the proof?—That is what I refer to. Attending a proof taken on commission or jury trial.

8607. *The Lord Justice-Clerk.*—You mean the proof before the judge ordinary?—Yes; my remarks would apply to the proof before the Lord Ordinary in the same way, but I have experienced the hardship of it in the case of proofs on commission.

8608. *Mr. Paterson.*—Would it meet the difficulty if the auditor had it as an instruction to allow all the charges of the country agent which were necessary or incidental to the cause, and did not infer a double charge?—That would be depriving the Edinburgh agent of his charge.

8609. I mean that the two agents should not be paid for doing one and the same thing?—It would be doing one and the same thing if they both attended at proof before the Lord Ordinary.

8610. *Mr. Baxter.*—Do you think that many clients in the country are able to give the Edinburgh agent efficient and proper information to conduct their causes?—In my experience, very few are able to do so.

8611. Suppose it is necessary to take the aid of the country agent to do that, do you think the country agent's account should not be allowed if he gains the case?—I think a portion of it should be allowed. It is done on both sides. Very few country clients are able to correspond and instruct the Edinburgh agent, so that it is absolutely necessary to instruct the country agent, if they are to have the slightest prospect of success.

8612. Don't you think that work which is absolutely necessary should be allowed for in the expenses of the cause?—Yes; but that principle applies to precognitions and getting up evidence.

8613. Does it not apply to correspondence also?—As to correspondence it might be abused. The auditor might check that; but I think it would meet the case, without incurring a very great deal of double agency, if the precognitions and the attendance at the proof, and probably the attendance at the debate, were allowed.

8614. *Dr. Barclay.*—Is not the principle that the auditor goes on, that the Edinburgh agent should correspond directly with the client?—That is the theory of it.

8615. And the practice too?—Yes; and it places the country agent in a very disagreeable position. Even when the client gains his case there is a very large bill to pay to the country agent; and the country agent has all the responsibility of the case, and unfortunately he gets no little of the odium after the case is finished.

8616. And is not that very frequently put down to the debit of the Court of Session?—I am afraid it is sometimes put down to the debit of the Court of Session unjustly.

8617. And people who have gained their case say that they have to pay a large sum to their country agent?—I have often heard that said, and that nothing would induce them to go to the Court of Session again. I have often heard that remark. It is too common in the country.

8618. *The Chairman.*—Have you any other suggestion to make?—No.

8619. Have you any suggestion to make with reference to the criminal business before the Sheriff?—I think the jurisdiction might be extended there also.

8620. Would you give the Sheriff the power of inflicting heavier punishment?—Yes.

8621. Penal servitude?—Yes; and I think the class of gentlemen we have as Sheriffs and Sheriff-substitutes would conduct the business with an extended jurisdiction so efficiently, that probably the Circuit Courts might be dispensed with.

8622. Would you extend the Sheriff's jurisdiction to all classes of cases?—No; I would not extend it to cases of murder; but I don't see why fire-raising, and some of those other pleas exclusively belonging to the High Court, should not be made competent before the Sheriff.

8623. *Dr. Barclay.*—Such as robbery?—Yes; robbery and fire-raising, and probably rape too. But I would not be disposed to take the trial for murder out of the hands of the Supreme Court.

8624. *Mr. Paterson.*—Why would you exclude murder, when you take all the other pleas of the Crown to the Sheriff?—I don't think they are at all to be compared in enormity to murder.

8625. *Dr. Barclay.*—Are you not aware that by the common law of Scotland, the Sheriff has jurisdiction in certain cases of murder just now?—I am.

8626. And that he has also the power of inflicting capital punishment; the last case in which he did so having taken place in Glasgow in 1798, for housebreaking?—I think the jurisdiction of the Sheriff has been rather curtailed than otherwise. In connection with that, I should also wish to mention that, in my opinion, both the Sheriff-substitute and Procurator-fiscal should get their appointment from the Crown rather than from the Sheriff-depute.

8627. *The Chairman.*—Do you think the appointments have not been satisfactory?—I think the appointments have been satisfactory, and the duties have been very well discharged in all cases, both by the Sheriff-substitute and by the Procurator-fiscal; but I think it

Alexander Nicholson.

would be better that the appointments should be in the hands of the Crown.

8628. *Mr. Baxter.*—Why?—I don't know that I would go very minutely into my reasons for that.

8629. *The Chairman.*—Has the Sheriff a special interest in selecting the best person he can get for his substitute?—I should think he has; and he generally does so; but I think a Crown appointment would have more the appearance of an independent appointment than one by the judge who is to review the judgment of the Sheriff.

8630. Do you think that the selection by the Sheriff of his substitutes has been less successful than the selection of the Sheriff-deputes by the Crown?—I don't know that it has; and from anything I have seen, the selection by the Sheriff-depute has been very judicious; but probably it is more a matter of sentiment than anything else, and probably some of the litigants might view it in that light too.

8631. *Mr. Campbell.*—You think it is not consistent with the respectability of a judicial office, that the person holding it should be appointed otherwise than by the Crown?—I would not put it so strong as that. I don't say it is inconsistent with the respectability of the office; but I think it would give greater public satisfaction, and would be more calculated to prevent observations from the public as to the performance of the duties, if the appointment came from the Crown.

8632. *Mr. Paterson.*—And it would be more compatible with the independence of the Sheriff-substitute?—Yes. I would go that length; at least I think that might be the popular opinion. At the same time, I think that in practice the Sheriff-substitutes are quite independent, and exercise their independence; and I believe Procurators-fiscal are in the same position; but still I think it would be better that the appointments should be vested in the Crown.

8633. *The Chairman.*—The Sheriff is the person who is responsible for the criminal duty in his county?—Yes.

8634. Is it not important for him to select the best person he can get for his Fiscal?—As a matter of course, it is of the utmost importance that he should get the best talent that he can command, and I could not point out a case where that has not been the rule.

8635. Would your object not be accomplished by having certain checks upon the appointment and dismissal?—I think there are checks upon the removal of the Sheriff-substitutes at present.

8636. But as to the Fiscal?—I have not given any consideration to what checks might be effectual. I have never known a case of the removal of a Procurator-fiscal.

8637. *Mr. Shand.*—Nor of a Sheriff-substitute?—Nor of a Sheriff-substitute.

8638. *Dr. Barclay.*—You are aware that, whilst the Sheriff makes the selection of the substitute, his selection must be indorsed by the heads of court?—I understand so. But I presume that is matter of form. I don't think that the Sheriff would present a name to the heads of court that would likely be refused.

8639. *The Chairman.*—That is a check on the Sheriff's nomination?—Yes, and I believe the Sheriff's nomination would be good without such a check, for I think the Sheriff would take care, for his own credit and the good of the Sheriffdom, to make a judicious appointment; but I think it would be better that the judge who reviews the judgment of the Sheriff-substitute should not have the selection.

8640. You say you think the approval of the heads of court is a matter of form. Are you aware that they never do approve without having personal knowledge of the individual, or very satisfactory testimonials as to his qualifications?—I quite believe that. I was not aware of the process gone through; but I can quite believe that, so far as the heads of the court are concerned, every precaution would be taken to have that properly done.

8641. *Dr. Barclay.*—May there not be something in this, that a Sheriff would not wish to put in as a substitute a better man than himself?—There are a great many considerations that would induce me to adhere to the view I have expressed. I have one other suggestion to make on that point; and it is, that the Procurators-fiscal should not only be—as they are, I believe, throughout Scotland—men of eminent capacity for performing their duties, but that they should be remunerated, so that it would not be necessary for them to conduct civil business.

8642. *The Chairman.*—Have you considered what the cost of that would be in some localities?—I understand that the salaries generally are very adequate even at the present moment for the duties performed—at least they are very fair; and suppose some little addition were made to ensure their devoting their time to the criminal business, I think it would be an advantage. Suppose £700 or £800 a year is given to a competent man in a moderate-sized county for conducting the criminal business, I think that is very fair remuneration, and much more than the average incomes of practitioners in such a county, who perhaps perform more onerous and more arduous duties.

8643. *Dr. Barclay.*—Does your Fiscal carry on any separate business?—The Fiscals in our county carry on civil business.

8644. Both at Cupar and Dunfermline?—Yes.

8645. In your experience, which has been considerable, do you find that that has been attended with any evil?—I never observed any case where the Fiscals in our county, or elsewhere, have neglected their Fiscal duties; but I think that they should be so remunerated that it would not be necessary for them to conduct civil business. These duties are not always compatible; for in the discharge of their official duties they may come in contact with clients of their own in civil cases, which in my opinion renders the present arrangement unsuitable. I think it would be a relief to the gentlemen themselves, that they should not be put into such a position.

8646. *Mr. Baxter.*—Then you would require to rearrange the districts?—That would be necessary.

8647. And I suppose you would give them retiring allowances?—Certainly, after certain periods of service.

8648. *Dr. Barclay.*—Have you thought whether a new arrangement could be made in regard to the Dunfermline and Cupar districts?—I have not considered that specially.

8649. Or whether there should be an amalgamation with Kinross?—I have not considered that; but it might be expedient. I quite admit that the duties in the western district don't occupy the time either of the Sheriff-substitute or of the Procurator-fiscal nearly to the extent that the duties in the eastern district of the county do.

8650. Do you consider that it could be done by one man in each office?—I think it would be too much for one man as Sheriff-substitute.

8651. And the Fiscal?—I think the Fiscal might do the whole duties of the county if he conducted no civil business.

8652. That would enable his salary to be increased?—Yes; but if there was anything about the rearrangement of the county under its present officials, I don't see why Kinross and the western district of Fifeshire should not be allied; but the time of the Sheriff-substitute in the eastern district is fully occupied with his duties.

8653. *The Chairman.*—Does your Sheriff-depute come frequently to Fife?—He comes pretty frequently; and that reminds me of a suggestion which occurred to me, that if the Sheriff-deputes are to be maintained, they ought to be obliged to come more frequently than they are under the Act of Parliament. The Sheriff-depute comes pretty frequently—probably once in six weeks or two months; and we have no reason to complain of any undue delay in fixing diets of hearing. He comes very frequently.

8654. *Lord Barcaple.*—That is to say, he comes to the eastern district once in six weeks or two months?—Yes.

8655. And he may visit the western district at times when you have not access to know of it?—I cannot speak to that; but I think I am near the mark,

when I say that he is not longer away from our district than six weeks or two months.

8656. You know that he pays separate visits to the western district?—I don't doubt that he is as attentive to the western district as to the eastern district.

8657. *Dr. Barclay.*—But there is not such a great call upon him there?—Not nearly.

8658. *The Chairman.*—He tries cases by jury?—Yes; it is very seldom that our Sheriff-substitute is called on to try jury causes.

8659. *Dr. Barclay.*—You mean that the Sheriff takes the second diet?—Yes; the Sheriff-substitute takes the pleas at the first diet, and the Sheriff-depute presides at the trial.

8660. *The Chairman.*—He exercises a surveillance over the police of the county generally?—I think he does; but I am not particularly conversant with that.

8661. Have you any Burgh Court in Cupar?—We have the ordinary Bailie Court.

8662. Do they dispose of civil causes?—There is no such thing before them.

8663. Do they dispose of any criminal matters?—Trifling cases.

8664. Police matters?—Police matters.

8665. Do they do so under a special Act, or under the General Act?—Under the General Act. They have also jurisdiction under the Police Act of 1850. We have not adopted the last Act of 1862.

8666. Is that jurisdiction satisfactorily exercised?—I have not heard any complaint about it, but I have little experience of it. I don't think there are any serious cases tried there. They are handed over to the county Fiscal. They are just small breaches of the peace, and trifling cases of that description. The cases that are tried in the Burgh Court are not of any importance.

8667. Do the Justices of the Peace hold Petty Sessions in the county?—They do very frequently.

8668. What kind of cases do they dispose of?—Statutory cases—cases under the Road Acts, the Trespass Acts, and the Public-Houses Acts. In the Cupar district, very little, if anything, is done under their civil jurisdiction in small debt cases. These are all done by the Small Debt Court.

8669. They grant licences for public-houses?—Yes; that is peculiar to them in the county, and the magistrates in the burgh.

8670. Their acts are reviewed by the Quarter Sessions?—Yes; and I think a remedy is required there. The judges in Petty Sessions should not sit in the Quarter Sessions when their judgment comes to be reviewed.

8671. You mean that the particular judges who granted or refused the licence should not review their own judgments?—I think they should not; but they do so regularly at present. I don't know that much injury is caused by it, because the other members of the court are generally more numerous than the Justices of the Petty Sessions; but I don't think that it is a right principle.

8672. The Justices in Petty Sessions are probably better acquainted with the circumstances and the wants of the locality than the other Justices?—Yes; but they can get Justices from all the localities to attend Quarter Sessions, who know sufficient of the circumstances of the district to enable them to dispose of the case justly.

8673. *Dr. Barclay.*—Have you ever heard of Quarter Sessions being packed for that purpose?—Yes; it is too often the case, I believe; and sometimes the judges in the Petty Sessions, probably without meaning it, show a little zeal in defending their own judgments, which is not at all commendable.

8674. *The Chairman.*—If they are satisfied that the judgments are right, ought they not to maintain them?—It would be difficult to persuade them that they are wrong.

8675. Is the review of the magistrates' acts in that matter satisfactory?—They are very much the same as in the other cases. The Provost of the burgh is generally a Justice of the Peace and a member of the Quarter Sessions, and he appears there to defend the judgments.

8676. Then the same observation applies there?—It applies both to the county and to the burghs.

8677. *Dr. Barclay.*—Do the magistrates or the Sheriff in Cupar exercise jurisdiction in the aliment of civil prisoners?—The Sheriff alone.

8678. Are you aware that the Prison Act gives a cumulative jurisdiction to both?—Yes; but it is never exercised. They don't clash.

8679. *The Chairman.*—Have you a Dean of Guild Court in Cupar?—We have.

8680. Does it exercise any jurisdiction?—Yes; in the matter of new buildings, or alterations on buildings.

8681. What jurisdiction does it exercise in regard to these?—They approve of plans; and when an encroachment by one proprietor on another in altering his property takes place, there is a petition presented either for interdict; or when a party wishes to make alterations, a petition is presented for the approval of the Dean of Guild, and answers are allowed by the neighbouring proprietors; and the Dean of Guild and his assessors visit the place, and pronounce judgment.

8682. Do you think that a useful jurisdiction?—I think it is.

8683. Do you think it would not be so convenient to have it vested in the Sheriff?—From my experience of it—and I have had some experience—I think there is no injury done by leaving it in the hands of the Dean of Guild.

8684. How is it as to expense?—The expense is very trifling. The town-clerk, who is always a professional man, and generally a high class professional man, keeps the Dean of Guild and his assessors right in point of form.

8685. *Dr. Barclay.*—Is he not the assessor?—He is the clerk of court.

8686. Has the Dean of Guild a council?—The Dean of Guild has three or four assessors, appointed to him by the magistrates, that he may advise with them on questions of practical difficulty; but so far as the forms of procedure are concerned, and the judgment to be pronounced, the town-clerk practically does that.

8687. *The Chairman.*—The Dean of Guild signs the judgment?—Yes; but the town-clerk frames the interlocutor or judgment.

8688. *Dr. Barclay.*—Are the Sheriff-clerk and the Commissary-clerk one in your county?—Yes.

8689. Do you find any advantage in making the same individual act in a double capacity?—I don't see any disadvantage in it at all.

8690. Have you had any questions arising, where he had to act in the one character as well as in the other?—I have not had experience of such; but I don't see why he should possess, or be supposed to possess, two separate characters.

8691. *The Chairman.*—Are the records of the Sheriff-clerk and the Commissary-clerk kept in the same building?—Yes; they are kept in the County Buildings.

8692. *Dr. Barclay.*—Do you see no objection to there being one clerk?—No; I think it is a convenience. I would rather recommend the offices to be combined.

8693. You are aware that the one is a salaried officer, and the other is paid by fees?—Yes; I know the Commissary-clerk is paid by fees.

8694. Is that right?—I think the Commissary-clerk should be put in the same position as the Sheriff-clerk, having a fixed salary, and accounting for the fees. Sometimes we think the fees of the Commissary-clerk are too high. That is our opinion. I don't say they are too high, or that there is anything improper in the charges; but we think they are too high in proportion to the Sheriff Court fees.

8695. *The Chairman.*—There is a table of fees for the Commissary-clerks?—Yes, but a very old one. It has not been revised so frequently as the Sheriff Court table of fees.

8696. Do you think the recent revisal of the table of fees has tended to reduce the amount of the charges?—I think so. I think the table of fees has been very judiciously revised of late years.

Alexander Nicholson.

8697. You think the tendency has been to reduce them?—I think the tendency has been so upon the whole, and to prevent any unnecessary multiplication of business or steps of business.

William Bishop Dunbar.

WM. BISHOP DUNBAR, Esq., examined.

8698. *The Chairman.*—You reside in Dundee?—I do.

8699. Are you in the Procurator-fiscal's establishment there?—I am one of the Procurators-fiscal.

8700. For the county of Forfar?—For the county of Forfar at Dundee.

8701. Is there a separate Fiscal for the burgh?—There is a burgh Fiscal.

8702. *Dr. Barclay.*—And one at Forfar?—Yes. There is one in the Forfar district of the county.

8703. You were assistant for some time at Perth?—For about six years.

8704. *The Chairman.*—How long have you been in Dundee?—I was in Dundee from 1851 till 1857. Thereafter I was about six years in Perth as assistant Fiscal; and after that I returned to Dundee, where I have been since.

8705. Then you have seen a good deal of the working of the Fiscal establishments?—I have.

8706. I believe you have devoted a good deal of attention to matters of form, the difficulties and inconveniences that may result from them, and the improvements that may be made upon them?—I have.

8707. Have you any suggestions upon these subjects to offer to the Commissioners?—Yes, I have several suggestions.

8708. I think you have written a treatise on the subject?—I have written a pamphlet on *Escapes of Prisoners on Technical Grounds.* The first matter which I should like to call the attention of the Commissioners to is the amendment of criminal libels.

8709. You think there should be a power of amendment?—I do.

8710. Would you limit that in any way, either as to the extent of the amendment, or the stage at which it should be made?—I would allow it to be made either before or during trial.

8711. What as to the extent of the amendment?—I would allow it on any matter as to time, or place, or *modus*, or person, or any other particular.

8712. *Dr. Barclay.*—Without altering the crime?—Yes, without altering the nature of the crime.

8713. *The Chairman.*—Would you have any check on these amendments, by the judge allowing or not allowing them?—Certainly.

8714. If you alter the time, and place, and name, and *modus*, that would be a very large alteration on the libel?—Yes; but I do not contemplate amendment in *all* these particulars in any one libel; and it is just in one or other of these matters that discrepancies have occurred in our practice, whereby parties have escaped punishment.

8715. Are not these the circumstances that constitute the act charged, and bring it within the description of the offence alleged?—No doubt they are; but still it is just in these matters that discrepancies sometimes occur between the indictment and the matter brought out in the evidence.

8716. Does it occur to you that the prisoner might be placed at an unfair disadvantage by such a change on the case that he was called upon to answer?—No, it does not occur to me that the prisoner would suffer prejudice. But I would leave that matter to the court. If the court were of opinion that the prisoner would suffer prejudice, they might adjourn the case, if necessary, to give the prisoner further time to prepare for his defence.

8717. What are your reasons for the alteration which you suggest?—My reason is, that justice would be prevented from being defeated on mere technical grounds by these amendments being allowed.

8718. Do guilty prisoners sometimes escape because such amendments are not allowed?—They do.

8719. *Mr. Shand.*—Would you leave it in the power of the court to refuse the amendment asked by the prosecutor?—I would be inclined to do so.

8720. *The Chairman.*—If the court thought it was placing the prisoner at a disadvantage, they would have power to refuse it?—Yes; I would be inclined to leave that in the hands of the court.

8721. What other suggestion have you to make?—I think that if the present form of indictment—the syllogistic form—is to be retained in our practice, the court, in considering the major proposition, ought to look to the minor, to explain the major, and show whether the matter set forth in the major is really criminal or not.

8722. Is not that done?—It is not.

8723. Would you explain what you mean by that? The court sees the major proposition; they judge whether that is an offence or not; then they look to the minor to see whether the circumstances there stated amount to an offence, and amount to the offence which is set forth in the major?—With deference it is not so, and I may refer to a case in point. I refer to the case of Michael Hinchy, who was for some years Chief Constable of Forfarshire. He was charged with fabricating false accounts against Exchequer, and with rendering these accounts with intent to defraud Her Majesty's Exchequer. An indictment was raised against him, which charged, in the major proposition, the fabrication of false accounts with intent to defraud, and uttering false accounts with intent to defraud. The case was brought before the Circuit Court of Justiciary at Perth a few years ago, and the counsel for the panel pleaded that this major proposition might include a mere innocent error in arithmetic, or the mere rendering of an incorrect account. The court sustained the objection to the major proposition, and did not look to the minor, which consisted of about 100 pages, to see whether that minor would support a criminal charge or not.

8724. In that case it came to this, that the statement set forth in the major might or might not be an offence?—Precisely so. But the matter set forth in the minor undoubtedly was an offence, and detailed a long list of fraudulent practices.

8725. *The Lord Justice-General.*—Would it not be a better amendment in that direction, to abolish the major proposition altogether?—I think so, decidedly.

8726. *The Chairman.*—Your suggestion would be, that the syllogistic form should not be continued?—Or if continued, that the minor ought to be looked at in determining whether the major sets forth criminal matter. I would rather that the major were abolished. I think it would simplify our libels very much.

8727. It would just be in the form of a complaint against a party for having done certain things?—Very much like our summary complaint.

8728. Would you have any statement of what the offence was that had been committed? Perhaps you would bring it in at the conclusion, 'whereby he was guilty of murder,' or how would you make it?—I would be inclined to adopt very much our present form of indictment, which I think is much neater than our criminal letters, abolishing the syllogistic form, and simply setting forth that a certain party is accused, at the instance of Her Majesty's Advocate or the Procurator-fiscal, of having, at a specified time and place, committed a certain crime.

8729. *Dr. Barclay.*—Would you name the crime there?—Yes; that, for instance, the accused did at a certain time and place steal certain articles, the property of a certain person.

8730. Would you not say that he did commit theft, in so far as, etc.?—I see no objection to that, provided the naming of the crime before the narrative is not to be construed as a major proposition, and judged of *per se*, but to be explained by the minor.

8731. *The Chairman.*—In the case you quoted, it

would be that the prisoner committed the crime of fabricating certain documents, in so far as he did so and so?—Yes; under the foregoing explanation.

8732. Have you any further suggestion?—I am of opinion that the Sheriff's power of punishment ought to be extended to penal servitude, in order that the Sheriff might try the various cases of theft aggravated by previous convictions, which are now generally punished by a term of penal servitude. They are cases of a very simple character; and merely because of this aggravation, they are deemed worthy of a sentence of penal servitude. I think the Sheriff might dispose of these cases.

8733. *Dr. Barclay.*—Would you include house-breaking?—Certainly.

8734. *The Chairman.*—Any other classes of cases than thefts aggravated by previous convictions?—Yes. I think ordinary robberies ought to be sent also to the Sheriff. The distinction between robbery and theft is exceedingly thin; and sometimes those cases called robbery, which are tried by the Supreme Court, result in a mere Sheriff Court sentence.

8735. Would you extend the power of sentencing to penal servitude, to any length of penal servitude, or would you limit it to a certain period?—I think it might be limited to seven years.

8736. Do you think that the public prosecutor should send to the Sheriff the trial of such cases as did not appear to him to imply a larger amount of punishment than the Sheriff had jurisdiction to award?—Just so.

8737. Have you anything further to suggest?—I think that previous convictions should not go to the jury except in special cases, as an element in proof of guilty knowledge. I think also that convictions for all offences ought to be admitted, and taken into consideration in determining the question of punishment.

8738. *The Lord Justice-General.*—You mean that they should not be proved till after the verdict has been returned?—I mean so.

8739. *The Chairman.*—Would you say the same of 'habit and repute?'—I propose to abolish 'habit and repute' altogether, for these reasons: officers differ very much as to what constitutes 'habit and repute.' Some officers think it invidious to be called upon to prove that aggravation, and at present it cannot be proved for a less term than twelve months; whereas I would propose that in any case, whether a party has been previously convicted or not, if he has borne a loose character, although for a less period than twelve months, that loose character should be proved in the same way as the previous convictions.

8740. Would you give him notice that that was intended to be proved?—I have not thought of that.

8741. He might disprove it?—I think a prisoner ought to be prepared to defend his character.

8742. Ought he to bring witnesses if he does not know that his character is to be impeached?—Well, that would be impossible; but I cannot conceive a man's character being challenged, unless it were notoriously bad.

8743. *Mr. Baxter.*—Suppose at the trial he should attempt to set up a good character for himself, would you not allow the previous convictions to be proved in that case?—Certainly.

8744. *The Lord Justice-General.*—At what time in the course of the trial would you allow the prosecutor to prove the previous convictions?—It would necessarily require to be after the evidence had been led by the prisoner in support of his good character.

8745. Then it must be a replication?—Yes; and it is so in England.

8746. *The Chairman.*—Would you allow the prisoner to adduce evidence of his good character before the jury?—Certainly.

8747. And in that case you would allow the proof of previous conviction to be brought before the jury?—Certainly.

8748. But unless the prisoner attempted a proof of good character before the jury, you would not allow the previous convictions to be proved till after the verdict?—Just so.

8749. And if it was a verdict convicting him, you would allow them to be proved in aggravation of punishment?—Yes.

8750. *Dr. Barclay.*—Would you allow 'habit and repute' to be proved in the same way as previous convictions?—I would allow evidence of bad character; but I would drop the denomination of 'habit and repute.'

8751. But you would adduce that evidence after the verdict, with the view of aggravating the punishment?—Yes.

8752. You must give notice in the indictment that that is to be done?—I have not considered that; but, for the reason above explained, I do not think that would be necessary.

8753. What objection have you to the term 'habit and repute,' if you are going to prove bad character? Is it not a *nomen juris* which we have been accustomed to?—Yes; but it has got rather into bad odour, and has been so for a long time, and officers think it invidious to be called on to prove it. They don't like it.

8754. If you find a difficulty in proving it before the jury, would not the same difficulty occur before the judge?—No; I do not mean to prove habit and repute before a judge, but bad character generally. In the one case the officer speaks to repute or opinion, and in the other case he would speak to facts—such as, that the prisoner associates with certain known parties of bad character, or lives in a disreputable house. These facts may be patent to him.

8755. The officer is always asked by the judge why he comes to the conclusion that the prisoner is habit and repute a bad character, and he states the very things you have mentioned?—Sometimes he is cross-examined, and states reasons such as these; but sometimes it appears that the prisoner works occasionally, and therefore the judge directs the jury to find the aggravation of 'habit and repute' not proven.

8756. *The Lord Justice-General.*—And what is the evil arising from that?—If the aggravation of habit and repute is found not proven, then he gets the benefit of a good character, when in point of fact he has not a good character.

8757. You mean, of not having a bad character?—Yes.

8758. *Dr. Barclay.*—Have you observed that lately the aggravation of habit and repute has gone very much out of practice?—I have.

8759. Have you not observed that, where there are previous convictions, it is seldom supplemented by habit and repute?—It has very much gone out of practice.

8760. At one time every indictment had the words 'habit and repute' on the back?—Yes; it was almost stereotyped at one time.

8761. *The Chairman.*—Have you any other observations?—In regard to the matter of bail, I think the practice at present is unsatisfactory, and that it works unequally: for example, three acts of theft, or one act of theft with two previous convictions, preclude bail. We are constantly saying that the resetter is as bad as the thief; but a person charged with reset, to any amount whatever, is entitled to demand bail. A person charged with embezzlement or fraud, to any amount, is entitled to demand bail, although he may be a much worse offender than the parties charged with theft.

8762. What do you suggest about that?—I would suggest that, as bail is regulated at present by determining whether the offence charged is capital or no, those offences now theoretically capital should be declared to be no longer so, and that whether a person should be entitled to bail or no should be a matter for the judge.

8763. *The Lord Justice-General.*—In any case?—In any case.

8764. *Mr. Shand.*—Are there not some offences that you would still say were not to be bailable?—Yes.

8765. The highest class of offences you would still leave without the right to bail?—Certainly. Undoubtedly murder should not be bailable; also rape and wilful fire-raising.

8766. *The Chairman.*—Do you think the amount of

William Bishop Dunbar.

bail ought to be in the discretion of the judge?—I think so.

8767. *Dr. Barclay.*—Without any appeal?—I think the judge to whom the application was made should be quite competent to decide as to the amount. But I would further suggest, that in all cases where bail is applied for, intimation ought to be made to the prosecutor, in order that he might appear for the public interest, and object if he thought proper, or see that a fair amount was fixed.

8768. *Mr. Paterson.*—In your experience, are bail bonds frequently or rarely forfeited?—There have been a number of bail bonds forfeited in my experience.

8769. In those cases where the bail bonds were forfeited, was the amount of the penalty less than the amount of the stolen property?—Yes, very much less.

8770. Supposing stolen property to be of the value of £100, and it is a first case of theft, what would be the amount of penalty in the bond?—At present it would not be bailable.

8771. Suppose the value of the stolen property to be £50?—It depends very much on the judge.

8772. *Dr. Barclay.*—And the class of the individual?—Yes; but I have seen such a case as has been mentioned, in which the bail was fixed at a sum of about £20.

8773. *Mr. Paterson.*—Where the stolen property amounted to £50?—Yes.

8774. Is that the class of bail bonds that are more generally forfeited?—The cases in which parties have more frequently, in my experience, failed to appear, have been cases of fraudulent bankruptcy. There are two or three cases in my mind, and one in particular, which I may cite. A party fraudulently put away property to the value of about £600; and had he been charged with theft, he would not have been admitted to bail. The bail was fixed at about £40, and he did not appear. In that case the Procurator-fiscal had no voice in the matter.

8775. *Lord Barcaple.*—Have you many cases of theft in which bail is taken?—We have not very many cases of theft.

8776. Because you were asked a little while ago as to the bail forfeited being small in proportion to the pecuniary amount of the offence, it being an offence involving the making away with property or money?—Yes.

8777. Like embezzlement or fraudulent bankruptcy?—Yes; the amount fixed is much smaller than the pecuniary value of the property stolen or fraudulently put away.

8778. *Mr. Shand.*—Would you extend the class of bailable offences?—Some robberies, with slight violence, might be bailable. At present, a theft aggravated by two previous convictions, or by housebreaking, is not bailable.

8779. *The Chairman.*—Would you have these made bailable?—I would rather not. I don't think they are cases for bail.

8780. *Mr. Campbell.*—Does not the Lord Advocate frequently sanction bail being accepted in cases which do not fall within the class of cases ordinarily bailable?—Not frequently. He has the power, but it is rarely exercised.

8781. *The Chairman.*—Have you any other suggestion to make?—In the matter of special defences, with which a list of witnesses is lodged, the time at present is much too short for lodging that list. It requires to be lodged on the day before the trial; and in practice it is often lodged the night before the trial, so that it is impossible to examine the witnesses on that list, even suppose they were residing in the town where the list is lodged, and often they are miles distant. I would therefore propose that a list of witnesses for the defence, or any special defence, should be lodged some days before the trial.

8782. *Mr. Adam.*—Have you seen a fictitious list given in immediately before the trial?—Frequently.

8783. A list of people who knew nothing about the matter?—Yes.

8784. *Mr. Baxter.*—A long list?—Yes; I had a case a few weeks ago, in which a list of about thirty witnesses was lodged. None of these witnesses in point of fact knew anything about the matter, and I have no doubt the list was lodged for the purpose of causing the prosecutor to move for the desertion of the diet *pro loco et tempore*.

8785. And that has been done frequently?—Yes; and I knew a case where justice was very nearly defeated; the panel was running his letters.

8786. *Mr. Shand.*—Would you refuse to allow the panel to examine witnesses unless the names were communicated eight days before the trial?—If a time is fixed within which the panel is ordained to lodge his list, I would refuse to let him examine them, unless notice was given before that time had expired, or unless some special cause was shown.

8787. Would that course at Circuit not often lead to grievous injustice?—I don't think so.

8788. Is not the list of panel's witnesses very frequently sanctioned after counsel have arrived at the Circuit town?—Sometimes.

8789. Would you deprive the prisoner of that benefit which he now has?—I think if an order was made that the panel should within a certain time before trial lodge a list, there would be no difficulty in obeying that requirement. At present the practice is exceedingly loose, because the prisoner does not require to lodge a list till the day before the trial.

8790. *The Chairman.*—Anything further?—In regard to parties taking a run through different counties, and committing offences in each, such as theft or fraud, unless the case is of a very serious nature, and worthy of the consideration of the Supreme Court, the practice at present is to try that party in one only of the counties for the offence committed in that county, and he escapes from all the other offences.

8791. He can only be tried for the offence he committed within that county?—Yes, at present.

8792. *Mr. Adam.*—The same thing occurs at Circuit, where crimes are committed in different counties, some of which are not in the same Circuit?—Yes.

8793. *The Chairman.*—What would you suggest?—I would suggest that there should be power to try the accused for the various offences which he has committed, or with which he is charged, in the county or place where he was apprehended.

8794. Although that may not be one of the counties in which he committed the offence?—I am afraid we would require to make it a condition that it should be in one of the counties in which he committed the offence. I was thinking of the probability of his being apprehended in a county in which he committed the offence.

8795. *Mr. Campbell.*—I presume you mean that he ought to be tried for all the offences which he has committed in counties in Scotland, in any one of the counties in which he committed any one of the offences?—Yes.

8796. *Mr. Paterson.*—Would it not be a simpler remedy to send him to the High Court?—No doubt, but it might be a case which was not deemed worthy of the High Court.

8797. *Mr. Adam.*—If you send to England for a criminal, is it not a hardship that he must be taken to a Border county to be committed?—Yes. That is the statutory requirement at present.

8798. Can you not bring a criminal from London by sea?—No; that would be against the terms of the statute. I think there is a case in which Lord Colonsay was counsel a good many years ago, where a warrant was suspended, because the prisoner, on being apprehended in England, was brought to Scotland by sea instead of by land.

8799. *The Chairman.*—What was that case? Was it a bank robbery?—It was the case of *Matthews* against the *Glasgow Iron Company*.

8800. *Mr. Adam.*—At present, in practice, criminals are taken to a Border county, and committed there?—I am rather afraid that the officers wink at the statute; and I would suggest that the prisoner, instead of being detained at a Border county, should be brought immediately to the place where the crime was committed.

8801. *Mr. Baxter.*—The requirement of the statute is, that they shall be brought before the magistrate of

the Border county, and that he shall indorse the warrant?—Yes.

8802. I believe that that is very seldom done, now that there is such rapid communication by railway?—I believe it is very seldom done. If the statute were carried out, it would lead to considerable delay.

8803. *The Chairman.*—You think the statute ought to be amended in that respect?—I think so, decidedly. The provision is unnecessary now.

8804. And inconvenient?—Yes.

8805. Have you any further observation?—I think that the Baron Bailies' jurisdiction in matters criminal ought to be abolished.

8806. Is it much resorted to in Forfarshire?—I am happy to say it is not much resorted to.

8807. *The Lord Justice-General.*—Is it much resorted to anywhere?—I am not aware that it is much resorted to. But there was a very strong case which came under my own observation—a case in Abernethy. A party was cited at the instance of the Procurator-fiscal of Perth to appear to answer to a charge of assault. He appeared, and pleaded *res judicata*, in respect that he had been already convicted before the Baron Bailie of Abernethy. There had been something like a trial and conviction; but the proceedings were very ludicrous. The complaint was a most informal document. It did not set forth the date or the place, and the court was held in a baker's loft. The sum of 2s. 6d. was imposed as a fine, which the Baron Bailie put into his own pocket. Altogether it was a farce; and it appeared, on inquiry being made, that this was purposely done in order to prevent a conviction before the Sheriff.

8808. Was the defence sustained?—The defence was sustained. I remember Dr. Barclay ordered the whole proceedings to be transmitted to Crown counsel, and the matter was considered by Crown counsel, and no further proceedings were taken.

8809. Then it did not come to trial?—It did not.

8810. *Dr. Barclay.*—Did not the Lord Advocate send down a very severe censure?—He did.

8811. *Mr. Harrison.*—That Baron Bailie, I suppose, did not hold regular courts?—He did not.

8812. He got up this one for the purpose?—Yes.

8813. *The Lord Justice-General.*—I suppose he did not hold any more courts after that?—I am not aware that he did. We did not hear of any. But that is not the only case in which a Baron Bailie conviction has been sustained as *res judicata*. There are several.

8814. *The Chairman.*—But that was a fraudulent case?—It was.

8815. Have you any other suggestion?—There is a small matter as to the practice in jury trials. In cases where, upon a second diet under a Sheriff and jury criminal libel, the diet is deserted *pro loco et tempore* from the absence of witnesses or otherwise, I think it should be unnecessary to go through the formality of having another first diet when the party has already pleaded not guilty, and that he should be cited on short *inducie* to a diet at which jurymen and witnesses would be present. In this way a good deal of delay would be saved.

8816. *The Lord Justice-General.*—Cannot that be done at present?—No; we have to go through the formality of two diets.

8817. Are the two diets indispensable in the Sheriff Court?—Yes.

8818. *Dr. Barclay.*—Might not the plea of not guilty be entered by a procurator at the first diet in the absence of the prisoner? Don't you remember cases in Dunblane where parties came from Callander, I think a distance of forty miles, to enter the plea of not guilty? Might that not have been done equally well by a procurator?—I cannot see any objection to that.

8819. *Mr. Paterson.*—With special mandate?—Yes; of course the court would require to see that the procurator was fully empowered.

8820. *Mr. Adam.*—Don't you think a man who meant to plead guilty might plead not guilty by a procurator at the first diet, and come up himself at the second diet, and then plead guilty?—Yes; and I don't see that that would be objectionable.

8821. *The Chairman.*—Have you any further suggestion?—No.

8822. *The Lord Justice-General.*—With reference to the amendment of the criminal libel, I think you said you would allow that to be done at any stage?—Yes.

8823. After the prosecutor has led his evidence?—Yes.

8824. And after the evidence has shown that the offence was not committed at the time or in the place specified in the libel?—Yes; but I do not contemplate discrepancies in both these particulars in the same instance, nor such as could have misled the panel.

8825. And in the case of an assault, that it was not committed upon the person libelled?—Well, I would not go the length indicated in your Lordship's question in regard to the case of assault. If it appeared that the assault was committed on a totally different person, I should say the prisoner would be entitled to be assoilzied. But if there was some little mistake in the Christian name—if the party was called John instead of James—or there was some little mistake in stating his trade or his residence, but plainly showing that the party assaulted was the party meant to be set forth in the indictment, I would allow an amendment in that case.

8826. If it sufficiently appeared that he was the same person?—Yes.

8827. But suppose, in a case of theft, that it turned out after the evidence was led that there was a mistake both in time and place, and also in the person whose property the stolen goods were, what would you say then?—Well, I should certainly not say that the panel under that libel should be convicted.

8828. Then there must be some limit?—Yes.

8829. What limit would you propose?—I should like to refer your Lordship to the English statute on that matter.

8830. What is the substance of it?—By the English Act 14 and 15 Vict. cap. 100, amendments on criminal libels are allowed. That Act proceeds upon the preamble that offenders frequently escape conviction by reason of technical strictness of criminal proceedings in matters not material to the merits of the case, and that strictness may safely be relaxed so as to ensure punishment of the guilty without depriving the accused of any just means of defence. The first section sets forth, that whenever, on any trial for felony or misdemeanour, there shall appear to be any variance between the statement, in the indictment, and the evidence or proof thereof in the name of any county, city, parish, or place, or in the name or description of any person stated as owner of property, or persons injured, or in name or description of any person or matter whatsoever, the court may order the indictment to be amended according to the proof; and if they think fit, they may order the trial to take place before another jury. They may adjourn the case, if they think it prejudicial to the panel to go on and finish the trial at that diet.

8831. That is the rule which you would be inclined to adopt?—Yes, substantially.

8832. I understand that to be a permission to amend the libel where there is a variance that under our existing practice would be fatal to the prosecution, but which is not material to the merits of the case. Is that so?—That is so. But the Act sets forth, that an amendment may be allowed where the variance occurs in the name of the county or city, or the description of the person or owners of property—just such discrepancies as occur in our practice. That would exactly meet the evils of our practice.

8833. And the amending of which would not be prejudicial to the interests of the prisoner?—It would not.

8834. It would not take him by surprise in any respect?—I don't think so.

8835. Then that is the limit you would put on the power of amendment?—Yes.

8836. *Mr. Adam.*—Or to meet the case of surprise,

William Bishop Dunbar.

the judge might order the case to be tried by another jury on another day?—Yes.

8837. *The Chairman.*—That is, in fact, making a new libel, which is to be tried before another jury?—It is amending the libel.

8838. Making it a different libel, to be tried before another jury?—Perhaps it may be so called.

8839. *Mr. Shand.*—Rather than allow the prisoner to escape?—Yes. I should like to mention a case which occurred recently. A party was charged with the theft of certain property, which was said to be the property of John Hally. John Hally, when he was examined on precognition, said that the property was his. On the trial, it came out that the property belonged to John Hally & Co. The case was tried before Dr. Barclay in Perth, and I prosecuted it. The objection was at once taken, that the prisoner was not guilty of stealing John Hally's property, but he was guilty of stealing the property of John Hally & Co., and he was assoilzied. That is the kind of objection we meet with.

8840. *The Chairman.*—The English rule would enable you to correct that, and to try the case before another jury, so that the prisoner could not plead that he had tholed an assize. It would be a very different question, if you had then tried him for stealing property belonging to John Hally & Co.?—I apprehend, in such a case as that, the court would amend the libel and go on with the case.

8841. In England generally, the prosecutions are at the instance of private parties?—Yes.

8842. And in Scotland they are rarely—almost never—at the instance of private parties?—I have never known a case at the instance of a private party.

8843. We have in Scotland a public prosecutor, who is supposed to be a person well skilled in these matters, and who can devote his time and attention to them?—Yes.

8844. And to be very accurate in his proceedings, to an extent that can scarcely be expected in private prosecutions?—No doubt.

8845. Do you think there is no risk of giving encouragement to slovenliness, if that sort of power were introduced into Scotland?—I think not.

8846. *Mr. Adam.*—Do you think the Crown prosecutor would have a sufficient regard to his own reputation?—I have no doubt of it.

8847. *The Lord Justice-General.*—But his reputation would not suffer so much if these amendments could be made, as it does now by his libel being thrown out. Is not that so?—I do not think that the reputation of the prosecutor suffers at present by any such objection as I have stated.

8848. *Dr. Barclay.*—You think that the prosecutor is misled by the precognition?—The case I cited is a case in which the prosecutor was not to blame.

8849. *Mr. Shand.*—And many such cases will occur even with the most careful prosecutor?—No doubt.

8850. *Dr. Barclay.*—Are you aware of a case of theft from Fife, which was tried by the Sheriff and a jury, where the parish was put in as Collessie; and it was found to be another parish, and the verdict and sentence were quashed?—Yes; I have that case noted. The man was tried for theft in his own house at Rossiebrae, which was libelled as situate in the parish of Auchtermuchty, but in the evidence it appeared that the house was in the parish of Collessie.

8851. *The Chairman.*—It was not necessary to state the parish at all; and one of the greatest improvements in libels of late years has been omitting unnecessary expressions in them?—Yes.

8852. *The Lord Justice-General.*—You have spoken hitherto entirely of amending the libel in the course of the trial, and after evidence has been led. To what extent would you allow amendment of the criminal libel before the trial begins?—I would allow it to be amended in any words of form which were omitted. For example, there was a case at the Circuit Court of Perth about two years ago (Mr. Adam acting as Advocate-depute), in the indictment in which the words 'actor, or art and part,' were omitted.

8853. *Mr. Adam.*—Was that a case of forgery?—Yes; the omission was discovered, and the case was not called. That is a case in which I think the court ought to have allowed the words to be supplied.

8854. *The Lord Justice-General.*—You mean, ought to have the power of allowing it?—Yes; I mean so.

8855. Would you allow an amendment in anything more essential than that before the trial begins?—I think the amendments before the trial would relate merely to formal parts of the libel, because discrepancies are, generally speaking, only discovered during the trial.

8856. *Mr. Adam.*—I suppose, with consent of the prisoner, you would allow that to any extent?—With consent of the prisoner, I would.

8857. *The Chairman.*—You have had a good deal of experience in regard to taking the declarations of accused parties?—Yes.

8858. Both in the county of Perth and in the county of Forfar?—Yes.

8859. Has it been consistent with your observations that such parties are always warned before they emit their declarations?—Certainly.

8860. Have you witnessed any undue pressure put upon them to answer questions?—I have never done so.

8861. They are told they may speak or not as they please?—Yes; to answer or not as they please.

8862. *Mr. Adam.*—Do you think it is an advantage to an innocent man that the declaration should be taken at the very beginning?—I do.

8863. Have you seen, in your practice, that an innocent man frequently gets away at once?—Not frequently. I think very few innocent men are apprehended; but there have been a few cases in my experience in which a party emitted a declaration which was forthwith verified, and he got away at once, and the matter was not made public.

8864. *The Lord Justice-General.*—I suppose there is not a very large percentage of innocent men apprehended for crime?—A very small percentage.

8865. *Mr. Adam.*—In your practice, do you ask a party if he wishes any witnesses examined?—We do, generally; and particularly in cases which we think are doubtful.

8866. And if he names any parties, you at once examine them?—Yes.

8867. *Dr. Barclay.*—Especially if he says so in his declaration?—Yes; but we frequently ask prisoners, especially in doubtful cases, whether they wish any witnesses examined; and if they give a list of witnesses, they are forthwith examined.

8868. Do you think it is right to withhold the declaration from the prisoner, if it is libelled on?—No. I would be inclined to concede to the prisoner the power to call for the declaration in all cases.

8869. *Mr. Baxter.*—You make it a practice to examine into the defence in all cases?—Yes; and to bring out the whole facts.

8870. *The Lord Justice-General.*—Do you mean that you would give the prisoner a right to have his declaration read to the jury?—I would.

8871. Do you not think that that might sometimes be misunderstood by the jury, as if it were evidence on which they were entitled to rely?—It might; but of course the court would instruct the jury as to that.

8872. But even with the direction of the judge, if the declaration is read, and it contains a very detailed and circumstantial account of the particulars of the supposed offence, or of the transaction which was supposed to constitute the crime, would they not be apt to take it as evidence?—I think those cases would be exceptional in which the jury would be inclined to accept the declaration as evidence.

8873. *The Chairman.*—To what effect do you think it should be read on behalf of the prisoner?—Simply as his account of the matter.

8874. As the account he gave from the beginning?—If the account which he gave in his declaration was similar to the account which he gave when apprehended, it would be in his favour.

8875. Do you not mean similar to what he gave through his counsel at the bar?—Or to parties who apprehended him, before he was examined.

8876. But if the prisoner is allowed to state in his declaration any story he chooses, and to read it to the jury, without the prosecutor having had any opportunity of cross-examining him on the statement so made, don't you think there is a danger of the jury being led to adopt the prisoner's statement? He is then made practically a witness for himself, without being cross-examined?—Your Lordship puts a very strong case. I must say, from my experience of prisoners' declarations, that they have not contained such statements as I think would be very likely to influence a jury to adopt them as true.

8877. They not unfrequently cast the blame upon other persons—sometimes on other prisoners at the bar along with them?—Frequently.

8878. That of course is not evidence against the others according to our law, and sometimes the court desires such things to be struck out, and not to be read, because they unduly prejudice other prisoners. But in the case I put, might not the prisoner practically make himself a witness for himself?—I do not think, under the judge's direction, the jury would be misled; and there has been so much complaint by prisoners' counsel for being denied the use of these declarations, that the admission of them would remove that complaint.

8879. Is the declaration often refused when it is asked for?—No.

8880. Therefore there cannot be much complaint?—In cases where it is refused, of course the counsel makes a complaint to the jury.

8881. *Lord Barcaple.*—Is it your proposal that the prisoner should have power to call on the prosecutor to read the declaration before closing his case, or that the prisoner should be entitled, through his counsel, to have it read as part of the prisoner's case?—I have not considered at what part of the trial the declaration might be read for the prisoner. It would be immaterial at what stage that was done.

8882. Do you think that, being read by desire of the prisoner, it should be entitled to any different effect from that to which by law it is at present entitled?—No. *William Bishop Dunbar.*

8883. You don't propose to give it any higher effect?—No; by no means.

8884. And it is not evidence in his favour at present, in so far as regards the facts which he states?—It is not.

8885. Sometimes the prisoner's counsel makes an observation to the effect that the declaration which has been read is not inconsistent with what he is putting to the jury, as a fair interpretation of the import of the evidence at the trial?—The counsel does so.

8886. I suppose it is with that view that you think the prisoner should be entitled to have it read?—It is not only with that view. I would be inclined to let the prisoner have his declaration put to the jury in all cases, and let the jury judge of the truth or falsehood of the story. I don't think the jury, under direction of the judge, would be misled.

8887. *The Lord Justice-General.*—Do you think that if the prisoner was entitled to require that his declaration should be read to the jury, it might lead to the authorities examining him a little more severely than is now done?—I have not considered the question in that light. Your Lordship has broached a new question to me: but I should think not.

8888. *Dr. Barclay.*—Would not all these objections be removed by adopting the English practice, in which no questions are put, but where the prisoner is asked if he has any statement to make, with the usual caution that what he does say will be used against him?—The English practice is perhaps more favourable to the prisoner, inasmuch as I think it frequently permits him to escape, when a declaration in Scotland is found to be sometimes material evidence against him; but I would not be inclined to adopt the English practice.

8889. *Mr. Adam.*—You think the Scotch practice is more favourable to an innocent man?—Yes; and more unfavourable to a guilty man.

8890. *The Chairman.*—That is one of the ends of criminal law?—Undoubtedly.

MONDAY, 1st FEBRUARY 1869.

Members Present:—

Lord Colonsay.
E. S. Gordon, Esq., Q.C.
Dr. Hugh Barclay.
James Campbell, Esq.
George Harrison, Esq.
James Adam, Esq.
A. B. Shand, Esq.
T. G. Murray, Esq.
James Webster, Esq.
J. B. Baxter, Esq.

The Right Hon. LORD COLONSAY in the Chair.

Andrew Jameson, Esq., examined. *Andrew Jameson.*

8891. *The Chairman.*—You are Sheriff of Aberdeenshire?—Yes.

8892. When did you come to the bar?—In 1835.

8893. You were for some time Sheriff-substitute at Ayr?—Yes; I practised till about 1843, with some interruptions from bad health, and then I was appointed Sheriff-substitute at Ayr, for the whole county, in March 1843.

8894. How long did you continue there?—I continued there two years and a half.

8895. You were afterwards Sheriff-substitute at Edinburgh?—Yes,—from October 1845 till October 1865.

8896. You then became Sheriff of Aberdeenshire?—Yes.

8897. I believe there is a good deal of business transacted in the Sheriff Court of Aberdeen?—A great deal of civil business.

8898. You have two substitutes?—Yes, one at Aberdeen, and another at Peterhead; but the business at Aberdeen is much greater than at Peterhead.

8899. Have you considered the matter of the constitution of the Sheriff Courts, as consisting of a Sheriff and his substitutes?—Yes; I have had my attention very much called to that, both before the Act of 1853 was passed, when there was a great deal of agitation on the subject, and also within this year or two; and I entertain the same opinions now that I did in 1853.

8900. Would you have the goodness to inform the Commission what those opinions are?—I am very clearly of opinion that the constitution of the court, as consisting of the Sheriff and the Sheriff-substitutes, is of the greatest importance, and is highly beneficial to the community.

8901. Are there many cases appealed from the Sheriff-substitute to you?—There is a very large number,—I think very nearly all the cases that can be appealed.

Andrew Jameson.

8902. When you state your opinion as to the utility of the Sheriff Courts as at present constituted, do you derive that opinion from your experience as a Sheriff-substitute, as well as your experience as a Sheriff?—Yes; my opinion as a Sheriff-substitute was as strong as it is now as a Sheriff. I view the thing, as it were, from two sides; and the views that I held in 1853 have been confirmed by my subsequent experience.

8903. Would you state generally the advantages that attach to the present system?—There has been a considerable change in regard to the business, both criminal and civil, in the Sheriff Courts within the last 30 or 40 years. I mean that there have been changes in regard to criminal business in this respect, that now very few precognitions require to come to the Sheriff. I remember in my father's time the Sheriff-substitute took a great many of the precognitions, and they were very generally sent to the Sheriff in Edinburgh.

8904. Your father was Sheriff-substitute of Fifeshire?—Yes, for 45 years from the beginning of the century; and I had the benefit of a great deal of his experience, being brought up in family with him. From the improvement of the status and qualifications of the Sheriff-substitutes and of the Fiscals, there is much less of that business now coming to the Sheriffs of counties. That is one change.

8905. You mean before being transmitted to Crown counsel?—Yes. Of course, in very important cases, that duty still remains with the Sheriff-substitute.

8906. Do you mean that the communication now is more directly between the Procurator-fiscal and the Crown counsel than it used to be?—Much more directly; and the precognitions are almost never taken now, except in the most important cases, by the Sheriff-substitutes or by the Sheriff. They are generally taken by the Fiscals. That is one important change that has taken place in regard to criminal business. In regard to civil business, I think the number of appeals has been greatly diminished in consequence of the Small Debt Courts,—the £8, 6s. 8d. jurisdiction, which was raised in 1853 to £12. That has diminished greatly the number of appeals. But notwithstanding these changes, which point to the propriety of reducing the number of the Sheriffs, I think the present constitution of the court is of immense value, because it retains the intermediate appeal in civil cases above £12, which are very considerable in number and amount, and because it retains the advantage of a general superintendence and control by one responsible lawyer, apart from local influences, over the whole administration of his county, which I have reason to know is of very great importance; and at particular times, such as General Elections, and when the public tranquillity is either threatened or disturbed, I consider it quite essential.

8907. Are there many criminal trials before the Sheriff and a jury?—There are more cases that used to be tried at Circuit now sent to the Sheriff.

8908. You mean there are more cases sent by Crown counsel to be tried by the Sheriff and a jury than there used to be?—Yes; but I am not aware that there are more cases upon the whole, because I think that there has been in some districts a diminution of crime.

8909. Does it appear to you that the scheme that has been suggested, of dividing Scotland into five districts, and appointing two Sheriffs as Sheriffs of appeal, to perambulate these districts, would be a beneficial change on the present system?—No; I don't think it would.

8910. Do you see any objection to it?—I think, in the first place, it would diminish one benefit of the present appeal, namely, its small expense. I think it would likely increase the expense, and it would probably lead to delay. And I think it would be a very difficult thing to work. Probably it would not be so difficult if two appeal judges were resident in towns such as Edinburgh, or Glasgow, or Dundee, or Aberdeen; but I understand that is not the proposition. I have a strong idea that if they were to go on Circuit it would be very unworkable. I think that a single judge prepares a complicated case very much better for judgment, supposing it is going to another court of review, and that he sifts a complicated proof much better alone, and on his own individual responsibility, than two men sitting in an ambulatory court could possibly do. Indeed, I don't see how that could be worked at all; at least, I think it would be very difficult. Of course a number of simple cases might be disposed of at once; but I think, in the more complicated and important cases, it would be very difficult to manage. I consider that one of the great benefits just now is the feeling of individual responsibility. I recollect a very important case which has just come into my mind, which commenced by an interdict about a shooting in the Highlands of Aberdeenshire of some value, which was pending in the Sheriff Court of Aberdeenshire when I was appointed Sheriff, and had been pending for five or six years. A proof had been led which, I understand, took nearly six weeks. When it came before me, it was on a judgment of the Sheriff-substitute, who had found that after all this litigation it was a question of heritable right, and he therefore dismissed the case. I held, upon considering the proof very carefully, that it was a question of possession, and that there were materials for regulating the possession, and for giving one of the parties a right of shooting till the question of the right of property was decided. I am perfectly convinced that if any of my neighbour Sheriffs had sat with me in that case, it could not have been easily managed.

8911. *Mr. Baxter.*—Suppose it had gone to the Inner House, where there are four judges?—I believe it is there now; but the case is now prepared. I had to go over a six weeks' proof, and to take notes of it—to go back on different witnesses, and to compare passages in their evidence,—it is quite a different matter after all that has been already done.

8912. *Mr. Gordon.*—And printed?—And printed; and references to the proof. I think you must get one man to do that.

8913. *Mr. Baxter.*—Your Sheriff-substitute is a member of the bar?—Yes.

8914. Both your substitutes are?—No; Mr. Skelton is a Writer to the Signet.

8915. A record is prepared under the Sheriff-substitute's immediate direction?—Yes.

8916. The proof is led before him?—Yes.

8917. He takes notes of the evidence?—Yes.

8918. And afterwards gives his judgment?—Yes.

8919. And in cases where proof is led, you review his judgment, on his notes of the evidence?—Yes.

8920. And the appeal from him, with all these advantages, to you, as a single judge, commends itself to your judgment?—Yes.

8921. And you think that appeal should command the confidence of the public?—I am certain it does command their confidence at this moment. I know pretty well the feeling of the country from the various opportunities I have had, and I must say that the system generally has secured a wonderful degree of confidence on the part of the public.

8922. *The Chairman.*—Have you considered another suggestion, as to doing away entirely with the intermediate court of review, and allowing an appeal direct from the Sheriff-substitute to the Court of Session?—Yes.

8923. What do you think of that?—I think the operation of that proposal would be to deprive the public of the right of appeal in the great mass of cases. It would be tantamount to depriving the community of the right of appeal in Sheriff Court causes.

8924. *Mr. Baxter.*—Is that on account of the expense?—Yes.

8925. *The Chairman.*—In cases of small value, it would have that effect?—Yes. I understand there are upwards of 2000 appeals just now in all the Sheriff Courts, of which hitherto not above 40 or 50 are brought by appeal to the Court of Session. I am not aware of any system that has yet been proposed, of reducing the expenses in the Court of Session, so as to enable any large proportion of these 2000 cases to be brought under the review of that court; and I think it would be a great grievance to the subject, because I believe, both from my experience in Small Debt Courts, which has

been very considerable, and in other courts, that there is no country in the world where the right of appeal is more valued than in Scotland. I myself often found in the Small Debt Court of Edinburgh—where at one time my lamented colleague, Sheriff Arkley, and I decided cases to the extent of about £20,000 a year—that there was a very strong feeling of disappointment, on the part, of course, of the unsuccessful litigant, that there was no appeal; and in many of these cases I myself thought it was a great disadvantage. On the other hand, when I saw it was a case of that kind, I endeavoured to get the parties beforehand to agree to remit it to the ordinary roll, in order that they might have the benefit of an appeal; but it was generally very difficult to get them to accede to that. I think there has been another proof of the same thing; when the Act of 1853 was passed, I suggested to the Lord Advocate that a clause should be inserted in order to give the public the benefit of the summary trial of their cases without appeal, and section 23 was then, at my suggestion, inserted. By that section, in all civil cases above £12, the parties may, by minute, agree to have the case tried, proof led, and judgment given after discussion, but without appeal; and I have reason to know that that is almost never had recourse to. I don't think I had half-a-dozen cases during my whole experience.

8926. *Dr. Barclay.*—You say you are of opinion that in Scotland the right of appeal is a favourite?—Yes.

8927. And yet you tell us that, in the Small Debt Court, when you had an important case, and wished the parties to consent to get it sent to the ordinary roll, it was difficult to get them to agree to do so?—Yes.

8928. And you say that under the clause which you have mentioned in the Act of 1853, the power thereby given is very seldom had recourse to?—Yes. Clause 23 of that Act provides that parties in any case above £12 shall be at liberty to have a case decided out and out according to the small debt principle, but not in the Small Debt Court.

8929. Without appeal?—Yes. I have not had above half-a-dozen of these cases.

8930. I understand the last instance which you gave in support of your opinion, that the appeal was a favourite; but I cannot very well understand the first, namely, that you found the parties were not willing to go into the ordinary court and have the right of appeal. Did that not show rather a desire not to have an appeal?—But that was before the decision was given. If it had been competent after the decision was given, I have no doubt the unsuccessful party would have been very ready to appeal.

8931. But had they not made up their minds that one or other of them would lose the case?—They don't think of that. It is like a lottery,—every man expects to win.

8932. *The Chairman.*—And it would have required the consent of both?—Yes.

8933. *Mr. Gordon.*—And you have generally found, I suppose, that what requires the consent of both litigants is very seldom done?—Very seldom.

8934. *Dr. Barclay.*—You are aware that below £25 there is no appeal to the Supreme Court?—Yes.

8935. Where the Sheriff-principal has reversed the judgment of the resident Sheriff, do you think that there should be no appeal in that case?—I think that is unsatisfactory. I don't myself like to be a judge in cases where there is no appeal from me. I think it is a benefit to every judge to know that there is an appeal from his judgment.

8936. Then you would allow an appeal in that case?—I would allow an appeal beyond £12. Wherever there is an appeal to the Sheriff-principal, I think an appeal should be competent to the Court of Session.

8937. My question was applicable to cases where the Sheriff-principal differs from the Sheriff-substitute, and the case being below £25 there is no appeal; but you say you would allow an appeal in all cases above £12?—Yes.

8938. *The Chairman.*—But where the Sheriff-principal confirms the judgment of the Sheriff-substitute in cases of small amount, would you then allow an appeal, just as if he had reversed the judgment?—That requires some consideration. I am rather favourable to appeal in every case.

8939. *Mr. Adam.*—Would you be inclined in that case to qualify it by any condition, such as consent of the judge, or caution for expenses?—I think there should probably be caution for expenses.

8940. *Dr. Barclay.*—Do you approve of the late Act, by which parties may now appeal to the Court of Session without finding caution?—No, I do not; and I am told that it is not working very well.

8941. Is it increasing the number of appeals?—It is increasing the number of appeals taken; but I understand it does not increase the number of appeals discussed, because they are brought into court and then compromised. However, I cannot speak to that from experience.

8942. *Mr. Harrison.*—You have said that at present nearly all important cases are appealed. I observe, in a return which I have here, that about three-fourths of all defended causes are appealed. Now, is not the first appeal from the Sheriff-substitute to the Sheriff-depute almost a matter of course?—Yes, it is very much a matter of course.

8943. Is it not taken very much because from its cheapness to the loser it is worth risking the expense of that appeal?—Yes.

8944. Would it not therefore save time and expense if there was a direct appeal to the Court of Session? Would a final judgment not be got sooner than having this matter-of-course appeal?—I think in the end it would not be an improvement, because you cannot go to the Court of Session under an expense of about £25 a side, as compared with from £1 to £2, 10s., which is the expense of an appeal in the Sheriff Court.

8945. Do you think there would be many more appeals from the resident Sheriff, supposing there was only a resident Sheriff without a Sheriff-depute, than there is at present from the Sheriff-depute to the Court of Session?—I don't think the cases would be so well prepared. I don't think the judgments would be so carefully prepared if there was no appeal, because three-fourths of the cases could not bear the expense of being brought to the Court of Session, and practically the appeal would be taken away. The great mass of the cases would be practically unappealable.

8946. Would it not rather be the case that the resident Sheriff would give more attention to preparing his judgments carefully, if there was only an appeal direct from him to the Court of Session, than when he knows that there is a mere matter-of-course appeal in almost every case, without reference to his judgment being careful or careless?—I think that at present he knows it may be appealed to the Court of Session as well as to the principal Sheriff above £25, and I think it is an advantage for every judge to feel that his judgment may be appealed. In the case that you put, that is to say, the doing away with an intermediate appeal in the court itself, practically three-fourths of the cases would not go to the Court of Session at all, and it would have a very bad effect on the general conduct of the cases.

8947. *Mr. Baxter.*—When the Sheriff reverses his substitute's judgment under the present system, do you think it is calculated to give satisfaction to the clients?—When he gives good grounds for it, I think it is.

8948. *Dr. Barclay.*—From your long experience, do you think the number of appeals from the resident Sheriff to the principal Sheriff might not be advantageously diminished?—I think so. I think that appeals at various stages of the case are sometimes taken for purposes of delay, and I think it would be an advantage not to allow these appeals without leave of the Sheriff-substitute.

8949. *Mr. Baxter.*—You refer to preliminary appeals?—Preliminary appeals, such as on questions about sisting procedure, or in regard to the proof. There would be more difficulty in regard to the exclusion of any necessary witness; but there are not many of these cases now.

Andrew Jameson.

8950. *Dr. Barclay.*—Would you allow an appeal upon the dismissal of a process at a preliminary stage?—If there was a dismissal of the case, it should be appealable.

8951. If there was a case in which a preliminary plea was repelled, and a long proof took place in consequence, might it not be an advantage to have an appeal before the proof was taken?—Yes; that might be an advantage.

8952. *The Chairman.*—It has been suggested that there might be a saving of an appeal if a judgment repelling a preliminary defence, followed by a judgment allowing a proof, were both appealed together, instead of allowing an appeal first on the repelling of the preliminary defences, and then on the allowance of proof?—I don't see any objection to that.

8953. *Mr. Adam.*—Supposing the present system to be continued, of one Sheriff and a substitute, do you think that counties might be amalgamated with advantage, further than has been done?—With great advantage. Indeed I think that is absolutely necessary, in order to remove some of the objections that are at present very current, and in order to improve the system.

8954. *Mr. Baxter.*—Would you enlarge the territories so as to give the Sheriff constant work?—Yes; I would enlarge the territories.

8955. To give him work that would take up his whole time?—A great part of his time. For instance, taking the population of Lanarkshire, which is 631,000, and of Edinburgh, which is 273,000—altogether about a million of the population of Scotland—that would leave about two millions; and I think these two millions might, in a rough way, be divided among ten judges. At this moment the population of Aberdeenshire is 221,000; and that is not too much for one Sheriff.

8956. *Dr. Barclay.*—But is not territory a very important element?—The territory is very large in Aberdeenshire, and I believe the number of appeals is larger than in any other district except Lanarkshire; but I don't think it is too much for one Sheriff.

8957. *Mr. Adam.*—Do you think it an advantage that the Sheriff-principal should be a practising lawyer?—I think it is.

8958. Then you would not be disposed to give him so much work as a Sheriff as would interfere with a counsel of eminence taking the office?—I think it is of great importance to keep up the connection of the appeal Sheriff with the Court of Session and the bar. I think there are many advantages in that arrangement. I think that when Sheriffs are appointed, it should be absolutely necessary that they shall have been at the bar for a much longer period than three years; I would say that they should have at least ten years' practice; and, in fact, I believe that very few are appointed under that, but I think it should be made the law. By amalgamating the counties as I have proposed, and distributing the business, I think you would probably have, in the long run, a higher average of men of capacity, and talent, and experience, and at the same time you would have the benefit of the same appeal as now, and of the same supervision of the whole county or district. I think there are many advantages in the present system of the connection of the Sheriffs with the Court of Session and the bar.

8959. *Dr. Barclay.*—You have not turned your attention to drawing out a scheme of amalgamating the counties?—Not with any great pains; but it appears to me that, putting Edinburgh and Glasgow aside, about ten Sheriffs could easily manage the business without being separated from the bar.

8960. *Mr. Baxter.*—Ten additional Sheriffs?—Twelve altogether, instead of twenty-two as at present.

8961. *Dr. Barclay.*—Would you propose any amalgamation of resident Sheriffs, doing away with the Sheriff Court in any small place?—That would depend on what is to be done with the Justice of Peace Courts. If the judicial duties of the Justices of the Peace are to be preserved, I think that matter would require to be considered. Even if the Justice of Peace Courts remain as they are, I should think much fewer Sheriff-substitutes would be required. I know that several of them have told me that they have not enough to do, and it is very difficult to get their time employed; and I know others complain very much that they cannot get their salaries raised, because there are some men of the whole number who can hardly ask to have their salaries raised. I believe that, excluding the Highlands and Islands, which, I think, must be regarded as exceptional, there might be probably ten of the Sheriff-substitutes dispensed with.

8962. *Mr. Adam.*—Do you think one Sheriff-substitute could do the work of your whole county?—Mr. Comrie Thomson, in the height of strength and health, thinks that he could do it, and he is one of the most active men I know; but I don't think he would be always able to take the whole business of the county. But I think the business of Stonehaven and Peterhead, and also of Aberdeen, could be taken quite well by two, and that that would be a better arrangement than the present one, of three substitutes.

8963. *Dr. Barclay.*—I suppose the introduction of railways has changed these matters very much?—Entirely.

8964. *Mr. Baxter.*—You spoke of the Highlands and Islands. Do you think that Sheriff-substitutes are necessary there as police magistrates?—Yes; and I think it a great advantage to have a resident officer of the Crown, responsible to the Sheriff in Edinburgh, and to the Lord Advocate, even in districts where there is little crime.

8965. And little civil business?—Yes. For instance, take Lochmaddy; I think it is of great advantage to have a Sheriff-substitute there; so also it is an advantage to have one in the Isle of Skye, for it would be awkward to have these places without any magistrate.

8966. *Dr. Barclay.*—You don't think the Justices of the Peace would be sufficient in these places?—No; because I don't think the public have the same confidence in them as in a professional judge.

8967. *Mr. Adam.*—Would you think it desirable that the Sheriff-principal should be required to go more frequently to his county than he is now required by statute?—I think so.

8968. *Mr. Baxter.*—How often is he required to go?—Only four times a year. And I think a good deal of the outcry in the public prints just now about the office generally, arises from there being some counties where there is almost no business, and where it is said, with some reason, that these gentlemen have considerable salaries and have really no employment to show for them. I think that is an objection which would be better removed. The office generally would be strengthened in that way; and I think it is of great importance to improve and strengthen the office of such a functionary.

8969. And in counties where there is business, does the appeal business sometimes lie over longer than is desirable?—I think it does. And that is the difficulty of having a man in high practice. But I think a man in very good practice might very easily take large counties by going to them once a month or oftener.

8970. If the districts were enlarged as you propose, would the Sheriffs not require to go to them once a month?—I find I require to go to Aberdeenshire about twelve times in the year; and if Scotland were divided into twelve districts, that would just be about my proportion.

8971. *Dr. Barclay.*—You would not propose putting a Sheriff in large practice at the bar in a small county, and one with little practice in a large county. I suppose you would rather put the best men where there was the most work?—Certainly, if the counsel in high practice would take those large districts, it would be a great advantage. One objection just now is that some of the counsel of the very highest talent have very few appeals to dispose of.

8972. The distance of the counties from Edinburgh comes in there, does it not?—I think that ought to be considered. At the same time I think there is a good deal of delay in appeals, that could be remedied by proper regulation. A good deal of that delay is caused by the parties themselves or their agents.

8973. Don't you think the time for entering the appeals is rather long?—I think so; that might be shortened. There is no occasion for seventeen days.

8974. Is it seventeen days?—It is not quite that; but by taking seven days for minuting the appeals, the parties have so many days more to decide whether they will give in a reclaiming petition, so that they can extend the time more than is at all necessary.

8975. I suppose you see no difficulty when they minute an appeal in six days, and ask an oral debate; but that time would be too short to prepare a written petition?—Certainly.

8976. *Mr. Gordon.*—Do you approve of the system of written pleadings?—I think they are valuable in certain cases. I think they ought not to be abolished altogether; but I am not very sure that they should be paid according to their length. I think they should be paid according to the same fees as oral debates.

8977. Perhaps it might be left to the judge to say whether he thinks it is a case for an oral pleading, and not to the parties?—I think that would be an advantage. I am certain that there are some cases that could not be well discussed without them.

8978. *Dr. Barclay.*—But if the same fee were allowed, there would be no temptation to adopt the one more than the other?—No; I think that would be a decided improvement.

8979. Have you often ordered written pleadings, where you saw a case come up upon appeal, which required more despatch than would be got by your going down to the county?—Not often; but I have done it occasionally on the motion of one of the parties.

8980. *The Chairman.*—Have you any suggestions about the form of pleadings and procedure beyond what you have hinted at?—I think the Act of 1853 was an immense improvement, and has worked remarkably well in practice; and it would work still better if it were more thoroughly carried out. I believe there are still too many cases made up in the long form of condescendence and answers and revisals, where that is not necessary.

8981. *Mr. Baxter.*—Do you think the Sheriff has the power of determining whether it shall be made up by a short or a long record?—I think he has, to a certain extent.

8982. Is there not a difficulty about the parties signing?—When the parties will not consent, he can scarcely avoid granting a condescendence.

8983. But is there not a difficulty about parties being required to sign the short record?—There is a great difficulty.

8984. *Dr. Barclay.*—Have you seen the abuse prevented by an award of expenses?—No, I never saw that done; but I have seen many cases in which it ought to be done.

8985. *Mr. Baxter.*—Do you think many cases are made up by long records which ought to be made up by short records?—A great many. After the Act of 1853, I found in Edinburgh that almost every filiation case was made up in the long form. I immediately had a meeting with the procurators, and pointed out to them that that was one of the cases in which the form of summons and minute of defence would better suit the circumstances of the case, because there was no use of telling beforehand all that they were to give in as evidence about the intimacy of the parties, and all the outs and ins of it. All they required to tell in the summons was the places where, and the times when, the intercourse had taken place, and then a denial by the defender. And at last, after some little education, I got the procurators to adopt that, and it has worked admirably. When I went to Aberdeen, I found the old system still there; but with Mr. Comrie Thomson's assistance, I got the new plan introduced, and it has worked well there also.

8986. *The Chairman.*—In that case you introduced a condescendence into the summons by stating time and place?—Yes, in one line. The summons simply said, 'Being the result of intercourse on certain days and at certain places.'

8987. *Dr. Barclay.*—Supposing there were half a dozen of these, you could not do it in one line?—That occurs very seldom.

8988. *Mr. Baxter.*—If the procurators had not agreed, do you think you had the power of compelling that?—No, I don't think it; at least I never ventured to try.

8989. *Dr. Barclay.*—The minute must be subscribed under the Act of Parliament?—Yes.

8990. These paternity cases go over a long tract of time, and involve pecuniary consequences?—Yes.

8991. They also involve the status of the child?—Yes.

8992. Have you not frequently found that in defence, connexion with another man is alleged?—Sometimes.

8993. Have you not found difficulty in cases of that kind?—No. If there is a case of *alibi*, or a separate defence, the judge can then order a condescendence, and that is very proper; but in the great mass of cases it is a simple allegation, and a simple denial.

8994. Have you never found surprise?—No.

8995. I suppose you have a large number of these cases in Aberdeenshire?—A very large number.

8996. *The Chairman.*—Have you any other suggestions to make as to procedure?—I have sometimes seen a disadvantage from evidence not being taken down sufficiently full. I do not know if I could propose any different arrangement; but I think that sometimes there is a difficulty in deciding cases from the evidence not being fully taken down.

8997. *Mr. Baxter.*—Would you approve of having a shorthand writer?—I think in important places that would be an improvement; but it would increase the expense very much.

8998. There is a complaint made in some districts, that when the Sheriff is taking down the notes, he writes in silence, and the agents don't know what he is taking down. Do you think it would be an improvement that he should dictate the evidence to a clerk or to a shorthand writer?—I think in very important cases that is very necessary.

8999. It is objected that the reading of the deposition at the end is so rapidly done, that omissions are not noticed?—Well, that is sometimes a difficulty; but, on the whole, I think the system works well.

9000. *Mr. Gordon.*—The deposition is always read over to the witness before he leaves?—Yes; that is a check.

9001. *Mr. Baxter.*—Do you think that is a sufficient check?—Scarcely.

9002. *Dr. Barclay.*—Don't you think that the other system would lead to continual altercation at the bar, in presence of the witness, regarding the mode in which it was to be taken down?—I think if the Sheriff would take down the evidence more fully, and give himself more time to do it, any objections as to the working of the thing might be obviated; but the difficulty is that some of them are very hard-worked, and it becomes very severe labour. For instance, in Aberdeenshire, the work is very severe; and I remember even in Edinburgh I used to find it very severe in long proofs; but I always found it much better to take down the evidence rather full than otherwise, because that obviated a great deal of dissatisfaction.

9003. *The Chairman.*—That was the safe side to err on?—Yes. I also think it would be well that the Sheriff-substitute should have a power of allowing an amendment and opening up of the record, reserving to the Sheriff the same power.

9004. *Dr. Barclay.*—At present that can only be done by the Sheriff?—Yes; and I think that is a disadvantage.

9005. I think the words of the Act are, 'When before him by appeal.' I have once or twice made avizandum to the Sheriff to open it up, and that has been objected to. Has that ever occurred with you?—No.

9006. Do you see any objection to that?—Yes; the Act requires that it shall be on appeal.

9007. Under the present system, would it not lead to this: that the resident Sheriff must decide what he knows to be wrong, in order to give an appeal to put

Andrew Jameson.

him right?—I think the real remedy is what I have suggested.

9008. *Mr. Baxter.*—Have you anything to say about the Debts Recovery Act?—No; I have very little experience of that Act. I think it acts very unfairly in regard to the fees given to the solicitors, and I think that part of it would require amendment.

9009. Have you had any appeals under it?—Several.

9010. *Dr. Barclay.*—Has your bar complained about the fees?—I am not aware.

9011. Have no complaints come before you officially?—No; but I have seen cases appealed to me, where it was a grievous hardship that there was no power of proportioning the expense to the labour, according to all other kinds of professional remuneration.

9012. Then I suppose you would not recommend that the same principle should be carried into the ordinary court?—That would be most fatal; and if carried through all departments of the public service, it would be most unjust.

9013. Would you rather have a scale according to the amount of work done carried into the Debts Recovery Act?—Yes.

9014. *The Chairman.*—Do you think there are too many forms of procedure? There are the small debt, the debts recovery, and the ordinary action forms. Do you think the procedure might be more assimilated?—I think so. I think it would be an advantage to simplify the ordinary writ bringing the parties into court. At present there is a want of some provision in questions as to the delivery of a moveable, both under £12 and under £50. The only competent process seems to be the ordinary court process, which is expensive. I have had cases of delivery of a moveable, of the value of two or three guineas, or £4 or £5, where we had to go through the whole protracted procedure as if it had been a case of £25 or £50; and I devised a system in the Small Debt Court of Edinburgh, where such cases were very common, by which I recommended the parties to bring their action for the value of the article, and then, after hearing proof, and deciding that the pursuer was right, I gave the defender a week to deliver over the article, failing which he was to pay the amount craved; but there were some doubts as to whether that was altogether competent.

9015. Did the action contain a conclusion for money value failing delivery, or without saying 'failing delivery?'—It said, 'The defender is owing the sum of £2, being the value of a certain article which he has failed to deliver,' and that raised the question whether there was a failure to deliver. I heard proof on that; and if the pursuer was right, I gave the defender a week to deliver the article, certifying that if he did not deliver it, he must pay the amount shown to be the value.

9016. And the amount was always the amount which the pursuer was willing to take if he did not get the article?—Yes. I found that of great benefit to the poorer classes; but I had always a doubt as to its competency. It was an invention of my own.

9017. *Mr. Baxter.*—Have you a good deal of maritime practice in Aberdeen?—No; not a great deal. Though there is a good deal of trade, and navigation, and shipping, we have not many maritime cases.

9018. Have you ever desiderated a summary form for the settlement of freight? Have you had cases where a foreign vessel came into Aberdeen, and a merchant objected to settle the freight, and the captain was obliged to submit to the terms of the merchant, as his ship was to sail immediately?—I have had no experience of that.

9019. *The Chairman.*—Have you considered whether the jurisdiction of the Sheriff might with advantage be extended to classes of cases that it does not reach at present?—Yes. I think it ought to be very largely extended, under the check of an appeal to the Court of Session.

9020. In questions of heritage?—I think that is very necessary.

9021. Would you carry that to any extent, or would you have it only in cases of a limited value?—I don't think it is of very great importance which way that is decided, because I believe that all cases of magnitude and importance would come at once to the Court of Session, as is the case in important personal actions. I think that might, with safety, be left to the public, and it would have the advantage of getting quit of the preliminary discussion in regard to value. At the same time, I believe that the great mass of cases which at present come into no court whatever, and as to which there is a sort of denial of justice, greatly to the loss of the poorer classes, would in this way be adjudicated upon.

9022. Would you give to the parties, or to either of them, the power, at an early stage of the case, to remove the case to the Court of Session?—Yes; I think that might be proper in cases beyond a certain value.

9023. *Mr. Baxter.*—What value would you suggest?—Under the Act of 1853, the Legislature has fixed £25 as to feu-duties, and as to irritancy of feus; and I think that a safe amount.

9024. *Dr. Barclay.*—Above that, would you give either party a right to remove the case to the Supreme Court?—Yes.

9025. *Mr. Adam.*—You mean annual value?—Yes.

9026. *Dr. Barclay.*—Would you require caution in that case, for you seemed adverse to the abolition of it in regard to appeals to the Court of Session?—But it is different where there is a judgment. I don't see any reason in legal principle why there should be a distinction between the cases of heritage and moveables. I believe the original practice was, as we learn from Erskine, that the Sheriff had as ample jurisdiction in his territory as the Court of Session has throughout the whole of Scotland; but the later practice has been so different, that perhaps it would be satisfactory to have some limit at first.

9027. *The Chairman.*—Do you think that jurisdiction should be given to the Sheriff in cases of personal status, such as questions of divorce, declarator of marriage, declarator of bastardy, and declarator of legitimacy?—I think that admits of a good deal of doubt, and I cannot speak very decidedly upon it, but my inclination is to admit all these actions.

9028. *Dr. Barclay.*—Even divorce?—Yes; I understand, from gentlemen who have practised in the courts of the old commissaries of Edinburgh, that these old commissaries were not men of higher qualifications than the present Sheriffs of Scotland are; and it appears to me to be not a fair thing that people of the lower ranks should be denied the remedies which are given to the richer classes. I think that in some cases that is attended with great evil, and occasionally leads to crime. I have had such cases brought under my notice.

9029. *The Chairman.*—Is that remark applicable to divorce?—To divorce, and also to applications for protection of the property of wives. I think the latter is often more important than the former. I don't know anything, indeed, connected with the state of our lower classes in large towns which more urgently demands a remedy than this. During the long time that I was Sheriff-substitute at Edinburgh, I had constant applications from clergymen, and also from benevolent individuals throughout the city, sending to me poor women in a state of the greatest misery from being unfortunately coupled with bad husbands, who, after deserting them for a while and living in debauchery, occasionally came back and swept away the whole earnings of the poor women, who had been in the meantime maintaining themselves and their families by their own exertions.

9030. *Mr. Adam.*—In the cases of divorce, do you think there is more perjury than in the ordinary run of cases?—I think there is more temptation to it.

9031. *Mr. Baxter.*—Not more than in cases of paternity?—Well, it is a more serious sort of case.

9032. *The Chairman.*—Do you think that declarators of marriage should also be competent in the Sheriff Court?—My inclination is to hold that they should be competent there. There are not many cases of irregular marriage in this country, though there is great talk about them. I think it appears from the returns made, that out of 20,000 marriages there were only between 20 and 30 irregular marriages in a year; and I don't think

there would be many of these cases coming before the Sheriff, except at the outset of such a change, and these from places like Glasgow and Dundee. I think these cases might be safely trusted to the Sheriff Courts.

9033. Would you, in such cases, give the power of removal to the Court of Session at an early stage?—I am inclined to think so.

9034. *Mr. Baxter.*—Would you give that power in cases of divorce?—I think, if the husband was compelled to give the wife the additional expense of the higher court, there would be no great hardship.

9035. Don't you think that in an action of divorce by a husband against a wife, if she had the power of going to the Court of Session, she would be very apt to do so if her husband was obliged to pay her expenses; and would that not be debarring the husband from his remedy?—I don't think so.

9036. Would it not be the same thing as if he was bound to go to the Court of Session?—I don't think it would be entirely the same thing.

9037. But supposing a wife had a paramour who would assist her to go to the Court of Session, and drag the husband there, would that not be depriving the husband of his remedy?—That might occasionally occur.

9038. *The Chairman.*—Would you give the same power of removal in cases of declarator of legitimacy or declarator of bastardy?—I think so. It would be safer to do so.

9039. Do you think the Sheriff should have power to appoint judicial factors?—I believe it is found that, in regard to estates of small value, the necessity for coming to the Court of Session leads to a great deal of expense, and eats up a considerable part of the estate. I think it would be well to give that power under a certain limit.

9040. A limit as to value?—Yes.

9041. *Mr. Baxter.*—A limit with reference to the amount of the estate?—Yes. I think it is of great advantage to maintain the *nobile officium* of the Court of Session; but I think that, in the class of cases which could not afford much expense, it would be advisable that the local court should have a power to appoint a judicial factor.

9042. *Dr. Barclay.*—Would you place the factors so appointed under the Accountant of the Court of Session?—I think so. I think that is very valuable.

9043. In that way you would have unity of practice over the whole country?—Yes; I think it is very necessary to have that check.

9044. *The Chairman.*—Have you any suggestion to offer as to procedure *in criminalibus*?—None in regard to procedure; but I think it would be important to give the Sheriff more extensive power to punish in summary cases.

9045. *Dr. Barclay.*—Without a jury?—Without a jury. I have noticed, in the practical administration of the criminal law, that great evil arises from the frequency of short imprisonments. It is a bad thing to award short imprisonments in cases of a first, second, and even third conviction, as is frequently done. When there is a decided case of theft, I think it is an unfortunate thing to send a young lad to prison for thirty or forty, or even sixty days. It would be an immense advantage that he should then get a pretty long term of imprisonment, because very often he is without education, and he would get some education in prison. I am told by chaplains and teachers in jails that they can do nothing almost with prisoners who are sent to them on sixty days' sentences, but they can do a great deal with those who are sent for four or six months' imprisonment.

9046. Could they not be sent to reformatories?—But I mean prisoners above the age at which they can be sent to reformatories. I think great evils arise from the present system of punishing in first cases of crime. Probably a lesson might be given to a lad which might stop his career, if he were sentenced to a longer term of imprisonment at the outset, whereas at present they begin with a small sentence, which is repeated on a second conviction; then they go to the Sheriff with a jury, after two or three convictions; then they go up a second time to the Sheriff and a jury; and at last they land in the Circuit Court trained criminals.

9047. Does that not apply rather to magistrates of burghs than to the Sheriff?—A great deal more; but I think the Sheriff has not sufficient power, in the first instance, to deal with cases of crime.

9048. Are you aware that the resident Sheriffs very seldom, in the first instance, pronounce a sentence of sixty days' imprisonment?—I think that is a wrong system.

9049. Then that is an error of the judge, not of the law?—They don't like to go the whole length of their tether, and they proportion the sentence, the limit being sixty days. Very often there are two thieves, and in order to proportion the sentences they give the younger man thirty days and the other sixty days.

9050. What power would you give the Sheriff without a jury?—I think I would give him power to sentence to six months' imprisonment; but I think it would be wise, in the first instance at least, to give the criminal the option of being tried by a jury when the sentence may be above sixty days. I think it would be well to do that as a check, and also to require the Sheriff to take notes of the evidence.

9051. *Mr. Baxter.*—Are you aware that many of the magistrates of burghs have power to sentence to ninety days' imprisonment, while the Sheriff has only power to sentence to sixty days?—I was not aware of that.

9052. *Mr. Harrison.*—Is not the being sent to jail at all so destructive of a young man's prospects, that it is scarcely possible for him to reform afterwards?—That is one result of the short sentences, that you thereby neither deter a prisoner nor reform him.

9053. Could you suggest any other mode of punishment?—No; I don't know of any other mode of secondary punishment; but I think it ought to be more severe if really merited. In a great many police cases I think there ought to be no imprisonment at all.

9054. *The Chairman.*—You think the present system rather tends to contaminate than to reform?—Yes; they get the character of being 'jail birds,' and are not the least deterred. I know that at this moment, after a prisoner has been punished with sixty days' imprisonment, he goes out and commits an offence again, and goes back to prison. He speculates in this way: 'They cannot send me to a jury, and I will only get sixty days.' I know that is what they go upon; whereas, if they got six months at first, I think a more powerful impression would be made upon them, and there might be some advantage got in the way of education in the jail.

9055. You think that having the prospect of release in ten, twenty, or thirty days, they are not so ready to accept tuition as they would be if they knew that they were to be in prison for a lengthened period?—I think so, and chaplains and teachers have told me that they can make nothing, or very little, of those who receive short sentences.

9056. *Mr. Gordon.*—Are those prisoners who are sentenced to short periods of imprisonment put in a cell with other prisoners?—I don't know; that depends very much on the state of the prison. I don't think they are, in any well-regulated prison.

9057. *Dr. Barclay.*—Separation is the rule in Scotland?—Yes. I visit the Aberdeen prison occasionally, and I have seen nothing of that kind. And when I was in Edinburgh I don't think I ever saw anything of the sort. I think there is a great improvement in that respect in prison discipline; but I know that the most enlightened governors of prisons, Mr. Smith, for instance, the governor of Edinburgh prison, has told me that he has a very strong opinion of the bad effect of these short imprisonments.

9058. Have you known instances of these short imprisonments running up to the number of a hundred?—There are some old hands in Edinburgh who have had twenty and even sixty short sentences.

9059. Have you formed any opinion with reference to having a stipendiary magistrate in large towns?

Andrew Jameson.

You acted as a police magistrate, did you not?—Yes, for many years. When Mr. George Tait was senior Sheriff-substitute, I had the whole police duty; when I succeeded him, I had less of it.

9060. *Mr. Gordon.*—In Edinburgh the police duties are managed in this way, I understand, that the Sheriff-substitute takes one month and the magistrates take the next month?—Yes, it is so.

9061. *Dr. Barclay.*—Did you find any difference in regard to the terms of sentences pronounced by the Sheriff and the magistrates?—I cannot speak to that. It was more in operation after I became senior Sheriff-substitute, and had less to do with the police. Sheriff Hallard has acted more in the police court since that arrangement was made.

9062. *The Chairman.*—Do you think that there being three Sheriff-substitutes in Edinburgh, they would be able to overtake the whole of the Police Court duty?—Yes; I think that, if the civil business is in the same state as when I left Edinburgh, they might do so, so far as I am acquainted with it.

9063. *Mr. Gordon.*—How long does it occupy the police judge each day?—I think it generally took from one to three hours daily.

9064. *The Chairman.*—It was a daily court?—Yes; and it was a very disagreeable court.

9065. *Dr. Barclay.*—During the month that the Sheriff sat the magistrates exercised no police jurisdiction?—None in the court.

9066. Do you think that was a good arrangement?—I think a better arrangement would have been, with great deference to the magistrates, an arrangement which I proposed—namely, that the magistrates should be relieved of all judicial duties in matters of crime, but that they should have the whole cases of contravention of police regulations. I thought the Sheriff was the best judge in cases of crime and evidence, but that the magistrate was the best judge in questions about the police and about sanitary regulations, and so forth. I recommended that, at the time that the last Act was procured; but I believe the magistrates were very much opposed to it, because they had always had a strong opinion in favour of their criminal jurisdiction. And I must say that, so far as I know, they have administered that jurisdiction very well for many years, and in a much better way than many of their predecessors did. At the same time, I do not think it is the best system.

9067. *The Chairman.*—If the same judge sat always in these cases of crime, there would be greater uniformity of punishment probably?—Yes; there are often in the Police Court of Edinburgh as delicate cases of evidence in regard to theft and embezzlement as in the highest court.

9068. *Dr. Barclay.*—Have they not the benefit of an assessor there?—No, not further than the prosecutor.

9069. Mr. Linton?—Yes.

9070. Does the burgh clerk not sit?—No.

9071. In Glasgow I think they have an assessor?—Yes.

9072. *The Chairman.*—Mr. Linton is the superintendent of police?—Yes.

9073. Do you think it would be expedient to extend to the Sheriff the power of sentencing to penal servitude?—I cannot speak very decidedly upon that point. I believe there is a certain hardship sometimes in the case of prisoners who have committed offences immediately after one Circuit, being kept till the next half-yearly Circuit; and where there are cases of theft with aggravation, I think they might be very safely entrusted to the Sheriff.

9074. *Mr. Baxter.*—Would you keep up the distinction between theft and robbery?—No.

9075. *Dr. Barclay.*—The distinction is very slender?—Very slender.

9076. *Mr. Baxter.*—You think the Sheriff should have jurisdiction in those cases?—Yes.

9077. *Dr. Barclay.*—I think you said that police offences should not be punished by imprisonment?—I said there were many police offences that ought not to be punished by imprisonment.

9078. But suppose a person could not pay the fine?—I think a good deal might be done in the case of young offenders by caution, and in the case of older offenders by fine. Of course you can neither enforce caution nor a fine, except by imprisonment; but I think the alternative makes all the difference.

9079. That is leaving it a good deal to the discretion of the judge?—Yes, it must be so left.

9080. But you would still have imprisonment as the coercive power?—Yes.

9081. *Mr. Baxter.*—Do you think it is an advantage to have the criminal investigation in the first instance made privately?—I think, in the general case, it is of great importance that it should be in private, as at present.

9082. Have you known any innocent person sheltered from infamy, from the examination being in private?—Yes, I remember of one case which made a great impression on me, of a very highly respectable gentleman in Edinburgh, who was charged with indecently assaulting some young girls at a bathing-place on the coast; and when the Fiscal came to me with the information, I said it was very extraordinary, but of course we must do our duty, and I recommended the gentleman to be summoned in a quiet manner. He came, and being warned, gave his declaration, and told all the circumstances, denying the charge entirely. The precognition went on, and in consequence of the statements that he made, Mr. Lothian, the Procurator-fiscal, was enabled so to conduct the inquiry, and so to cross-examine the witnesses, that it turned out, in the course of two days, to be an entire misapprehension, if not a gross fabrication, leaving not the slightest stain on this very honourable gentleman, who was a man moving in good society, of most unblameable character.

9083. Supposing the inquiry had been conducted in public, don't you think the feelings of his friends would have been greatly lacerated?—I think it would have been very hurtful, and it would have served no good purpose whatever. There was no more of it, and I don't think anybody but the Fiscal and myself knew of it.

9084. *The Chairman.*—Has your experience in preparing criminal cases been such as to enable you to say that you have seen any undue pressure put upon criminals in taking their declarations, or any exclusion of evidence that they thought ought to be produced?—I never saw anything of that kind. On the contrary, I think our system is almost perfect. The whole system is carried on with great fairness to the criminal, and great benefit to the public, and without giving undue advantage either to the prosecutor or to the prisoner. I think further, that the prisoner should be entitled to call for his declaration when he thinks it necessary, and to have the benefit of it being read to the jury. I don't think it is just that it should be used against him and not used in his favour.

9085. You mean that it should not be capable of being used against him, and not capable of being used for him?—Yes; that is what I mean.

9086. To what effect do you think the declaration should be read in his favour?—To show that he made a certain statement when first brought before the magistrate.

9087. Would you have it read as part of his evidence?—Yes, it might be as part of his evidence.

9088. If the prosecutor's evidence was closed, and if he has not produced the declaration, you think the prisoner might begin his case with the declaration?—Yes; I think I have often seen prejudice to the prosecutor's side resulting from his denying the prisoner the benefit of the declaration. I think it had a bad effect on the jury.

9089. Have you frequently seen it withheld when the prisoner asked that it should be read?—Yes; but of course that was commented upon to the jury, to the disadvantage of the prosecutor.

9090. Sometimes the declaration contains certain statements implicating other parties, and these are frequently struck out before it is read?—I think there would need to be some discretion in regard to that.

9091. *Mr. Baxter.*—Do you think it would have a tendency to lead to a more strict examination of the prisoner, if he could insist on his declaration being read to the jury?—I don't know.

9092. I suppose you think it would not be desirable that that should be the case?—No; it would not be desirable to make them more lengthened documents than they are.

9093. *The Chairman.*—Or to subject the prisoner to the pressure of interrogation?—Certainly not.

9094. If the prisoner had a right to make any statement he pleases, and have it read to the jury, without any power of cross-examining, it would be, to a certain extent, enabling him to be a witness for himself, without the power of cross-examining him?—Yes.

9095. *Dr. Barclay.*—Are you aware that in England no questions are put to the prisoner, and that he is merely asked if he has any statement to make, while in Scotland questions are put, and if he declines to answer, it is written down that he declines to answer? Has that any prejudicial effect?—I don't see why it should not have a prejudicial effect in some cases.

9096. Then you think questions should be put?—I think so.

9097. *The Chairman.*—Suppose a man is found recently after a theft, in possession of the stolen goods, and he is asked how he came by them, and he says, 'I decline to answer,' should that not have any effect on the jury?—I think it ought to have an effect.

9098. Your opinion, as I understand it, on the question of the constitution of the Sheriff Court, is favourable to its existence at present, only you think the territory should be enlarged, some of the smaller counties being absorbed by the larger counties?—Yes.

9099. Did I understand you to say that the general superintendence of the ministerial and executive duties of the Sheriff, going occasionally to his county, he being free from the suspicion of local influence, is a wholesome thing?—Most certainly.

9100. And important to be preserved?—I think that is of great importance. I think I have noticed cases in which errors in administration have been quietly rectified in that way, which could not have well been put right without some very troublesome inquiry or procedure. And I think that, for instance, in the case of a contested election, or in cases of riot or public disturbance, it is of very great importance. I recollect feeling so when I was Sheriff-substitute in Ayrshire. The first year that I was there, there were some Orange disturbances, and I remember feeling the great benefit of having the assistance of Mr. Sheriff Bell, who corresponded with the Lord Advocate, and who gave me advice and counsel. Then again, in the case of the riots at the Fushiebridge Railway—serious riots which took place in 1846 or 1847—Sheriff Speirs was unfortunately absent, and I was obliged to go to the spot. The whole country was in a state of very serious riot; an immense number of railway labourers were burning cottages, and in a state of great excitement. I called out the dragoons from Jock's Lodge; but I recollect quite well the great value and advantage there was the moment that Sheriff Speirs came to my assistance, which he did before the riot was put down, or at least soon afterwards.

9101. *Dr. Barclay.*—In that last case both Sheriff Speirs and yourself were resident in the county?—Quite so.

9102. The only advantage there was having another to consult with?—There was the advantage of having a superior and responsible officer of experience, and of high legal capacity.

9103. But you were a responsible officer?—I was; but I did not feel that I had the same responsibility as he had, and I had not the same experience.

9104. In the other case which you mentioned in Ayrshire, there could be no local bias there. You were neither an Orangeman nor a Ribbonman?—No; but I was a young man.

9105. The Sheriff-principal might be a younger man in many cases than the Sheriff-substitute?—He might, but not generally.

9106. *Mr. Adam.*—Was there not a criminal trial arising out of the Fushiebridge riots?—Yes; there was a man murdered.

9107. *The Chairman.*—Have any other suggestions occurred to you which you would like to make to the Commission?—With reference to the matter of private precognitions, I forgot to mention that I think there are some cases in which an open precognition would be very valuable, and would give great satisfaction to the public without any detriment to the prosecution. I allude to cases of serious accident leading to destruction of life. I think 30 lives were lost one night in the High Street of Edinburgh by the tumbling down of a ruinous house, and I recollect quite well that there was a strong feeling of public dissatisfaction that the evidence was not taken in public; and it would have been of great advantage if the whole of the evidence, instead of being taken in the Council Chamber, I believe at great length for several days, had been taken in open court, before the Sheriff or before the Lord Provost. In cases of railway accidents I think that is absolutely necessary now-a-days when the public are so greedy for information, and will have it in some way; and if they do not get it in that form, they get it by bribing different people to give the information. In that class of cases, and perhaps in cases of sudden death, I think we might have the benefit of the coroner's inquest without its abuse. But I would put it within the discretion of the Lord Advocate, or of the court. I think the Sheriff might have the discretion of fixing what cases should be open, and what cases should be private. But in cases of murder and serious offences I think it is very important to have them conducted in private, and also cases of a private character, such as I have alluded to.

9108. *Mr. Baxter.*—Don't you think that in the case of sudden deaths arising from natural causes, it would be a great hardship to relatives to have the inquiries in public?—Yes; but in other cases I think it would be a great advantage to have the Sheriff going to the spot and making the inquiry. It would quiet a whole neighbourhood.

9109. *Dr. Barclay.*—You would not have a jury in these cases?—No; and what I am proposing would not interfere with future proceedings.

9110. Is there any law which prevents that at present?—I don't know; but it would be thought odd if the Sheriff ordered it. I remember, in the case of the 30 deaths in the High Street, there was a great demand for information in the public journals, the excitement was so great, but Mr. Dymock understood that it was not competent to make it public.

9111. *Mr. Baxter.*—Where there is any excitement or suspicion just now, you are aware that it is the duty and the practice of the Fiscal always to go to the spot?—Yes, that is of great advantage, and I would not interfere with that; but in certain cases I would have the power of making it an open precognition.

9112. *The Chairman.*—If it was a precognition pointing at the guilt of an individual, would you be disposed to have that in public?—No, certainly not; because I have seen cases in England where it resulted in the whole advantage of the inquiry being lost, the guilty parties getting a hint, from the proceedings being published from day to day, how the evidence stood against them.

9113. Or public feeling being unjustly directed against an individual before the investigation was completed?—Yes.

9114. In regard to cases of sudden deaths, you would also leave the discretion with the Sheriff?—Yes.

9115. There might be cases in which it would be harrowing to the feelings of relatives to have the inquiry made public?—Yes.

9116. *Mr. Adam.*—But you would not give the Sheriff power to have an inquiry in public in any case where a party was committed for trial?—I don't know. There was, for instance, the railway accident at Winchburgh some years ago, and in these cases you might arrest all the guards concerned, or the stokers or pointsmen; but I think it would be a great satisfaction to the public that such inquiries should go on in public.

9117. *Mr. Shand.*—And the conclusion might be that

Andrew Jameson.

the Sheriff might commit some party?—Yes. That might be necessary at the very outset.

9118. The provision you propose would be in very exceptional cases?—Yes.

9119. Cases in which there was great public excitement?—Yes; and it ought to be in the discretion of the Sheriff or the Lord Advocate.

9120. Would it serve your purpose that the power should be vested in the Lord Advocate for the time?—I think so; or the Sheriff might be safely entrusted with it. There is just one matter of detail which I wish to notice, and which I think very important to have regulated. I allude to the vacations in the Sheriff Courts. They were changed, I think unfortunately, by the Act of 1853. That Act was a great improvement on the previous procedure in other matters, but in regard to the matter of vacation it was positively the reverse. Formerly there was a proper spring vacation in the Sheriff Courts, as in other courts, but now it is limited to fifteen days, at the very worst season of the year—the last fifteen days of March—when nobody can get any recreation or any benefit. Then, instead of a short recess, they gave them a long vacation at Christmas, extending to about four or five weeks, which is a positive interruption to public business. The courts cease on 15th December, and don't require to meet till the first day after the 15th of January. In this way they have about five weeks of vacation, which is a great deal too long for any good purpose; and, in fact, it interrupts the business in the thick of the winter session for no end. I would therefore propose that that should be abolished, and that they should get a week for the Christmas holidays, like the Court of Session, and that the spring vacation should extend from the beginning of April to the beginning of May. The Sheriff-substitutes would feel that a considerable boon. I took charge of this matter about the time I was appointed Sheriff, and Mr. Patton had actually a clause framed to that effect which he intended to put into the £50 Debt Bill, but he thought it would be rather awkward to put it into that bill, and it was not done at all. There is also another matter which I may mention. I know that some of the Sheriff-substitutes complain of the difficulty which they have of getting leave of absence. I never myself found much difficulty in that, and I am sorry to say that I had several periods of bad health, and I always met with great consideration from the Sheriffs with whom I had to deal; but probably it might be of advantage to allow the Sheriff-substitutes of adjoining counties sometimes to act for others, so that a hard-working Sheriff-substitute might be able to go away for a month or six weeks to Switzerland or the Continent, if he thought proper, with the leave of the Sheriff of course. Just now they cannot do that without employing an advocate from the bar of considerable experience. Then several of the Sheriffs-principal think there is a greater hardship in regard to their case; for although the Sheriffs-substitute have great latitude in getting away for a considerable period by making an arrangement with the Sheriff, and having a gentleman from the bar, whom they remunerate out of their own pockets, the Sheriff himself cannot do this. The Sheriff has no power at this moment, however unavoidably he may be obliged to go to a distance, or however ill he may be, to appoint a person to do his peculiar work, which cannot be done by the Sheriff-substitute,—that is to say, his appeal duty; and there seems to be a want of some provision by which either the heads of court, or perhaps the Lord Advocate, upon an application of a Sheriff, might allow the Sheriff of an adjoining county, or some other qualified barrister, to take the appeal business when he is unavoidably absent. I know that in one case, where a Sheriff was obliged to live abroad for his health for four months, there was the greatest difficulty in making an arrangement. That is a matter which would require consideration, more especially if the number of Sheriffs is reduced.

9121. *Dr. Barclay.*—You say that your spring vacation is from 15th March to 3d April. Must you not have a court in that time?—Yes, one.

9122. Is there not an intermediate court, which makes the vacation only a week?—That makes it more obnoxious; so that, in point of fact, there is no vacation at all except the long Christmas recess.

9123. In regard to the Commissary Court, had you in Ayrshire a Sheriff-clerk and a Commissary-clerk?—I think not; but I am not sure.

9124. Are the offices held by two persons in Edinburgh?—They are.

9125. In Aberdeen?—They are held by different persons in Aberdeen.

9126. Is there an advantage in having the Commissary Court a separate court?—I don't see any; but in Edinburgh I think you must have them separate. It is the *commune forum*, and there is large business. The Commissary-clerk of Edinburgh gives in about £2000 yearly of fees to the Government.

9127. Do you think they should be separate in Aberdeen?—I don't see any advantage in it.

9128. If a question was to arise in Aberdeen regarding whether it was a Commissary case, would that not be a question as to who would get the fees?—Very much.

9129. *Mr. Baxter.*—Is the Commissary-clerk of Edinburgh paid by salary, or by fees?—I think he is paid by salary, and hands the fees to the Exchequer.

ROBERT BRUCE JOHNSTON, Esq., examined.

9130. *The Chairman.*—You are Procurator-fiscal for the county of the city of Edinburgh?—I am.

9131. How long have you been so?—Since September 1867.

9132. What is the area of the jurisdiction?—It is the municipality prior to the Act of 1856.

9133. Does it comprehend the ancient royalty, the extended royalty, and the Parliamentary boundary?—As these existed prior to 1856, but not the present police boundary.

9134. Does the jurisdiction of the Sheriff extend over all or any portion of that same territory?—I believe the Sheriffs maintain, and I believe, practically, the magistrates of the city have acquiesced in the contention, that they have a cumulative jurisdiction throughout the entire police bounds; although there was a question raised upon that point, and I believe never satisfactorily settled.

9135. The bounds of the jurisdiction of the magistrates are clearly defined; is there any difficulty about that?—I believe not.

9136. Have you any observations or suggestions to make with reference to the area of jurisdiction?—I should say that, at the least, it must appear to be an anomaly that the magistrates of Edinburgh should exercise jurisdiction within what is practically only a portion of the city, and even that portion not defined by any regular boundary, but, in fact, just consisting, as near as may be, of what forms the parish of the city, so that there are outlying scattered portions within their jurisdiction; while the Sheriff exercises jurisdiction in certain other portions lying, as it were, within what the magistrates' jurisdiction extends over.

9137. The magistrates exercise police jurisdiction over the whole police limits?—They do; but not as Sheriffs of the county of the city.

9138. What kind of jurisdiction do they exercise as Sheriffs of the county of the city?—Their duties as Sheriff-deputes of the county of the city are to preside in the Burgh Court, to which certain cases that cannot, under the Police Act, be dealt with by the police magistrates, are remitted; also, to be present at the examination of prisoners in all such remitted cases within their own jurisdiction of the county of the city. All cases that are beyond that jurisdiction, and falling necessarily within the limits of the jurisdiction of the Sheriff of the county, are remitted to the Procurator-fiscal for the county, Mr. Lothian.

9139. You say they sit in the Burgh Court. Do you mean that they sit there to try criminal causes?—Yes. There is a certain class of cases which, by sec-

tion 169 of the Edinburgh Police Act, cannot be tried in the Police Court, but must be remitted either to the Procurator-fiscal of the city, or to Mr. Lothian, the Procurator-fiscal of the county.

9140. What class of cases are these?—They are a pretty large class. They are such cases as those in which parties have been convicted of theft on two previous occasions; those who have been twice previously convicted of reset of theft; those who are charged with falsehood, fraud, and wilful imposition beyond the amount of £10, or breach of trust and embezzlement to an amount exceeding that sum; or with assault to the danger of life, assault whereby any limb has been fractured, assault with any knife or other lethal weapon, or assault aggravated by two previous convictions, and other serious crimes.

9141. *Mr. Baxter.*—That is a common clause in all Police Acts?—I believe it is; but in the Police Court of Edinburgh you have what does not exist in other places, viz. that the same men are held competent to decide a class of cases which, practically, they are considered incompetent to decide sitting in another court.

9142. Do they try cases of that other class?—Yes.

9143. Cases that they cannot try in the Police Court?—Yes. I may mention that we only do so in such cases as we consider may equally well be disposed of in the Police Court.

9144. You don't try by jury?—We have not done so for many years. The magistrates consider that they are entitled to do so *qua* Sheriffs; but in practice I believe it has not been done since 1830.

9145. You always send such cases to the Sheriff?—They are reported by me to the Crown, and the Crown sends them to the Sheriffs or to the High Court. Cases in which we take precognitions are tried before the Sheriff and a jury, or before the High Court.

9146. *The Chairman.*—What kind of cases do you try in that court which the police do not reach?—For example, we have cases of this kind of almost daily occurrence. We have parties remitted to us on a charge of assault, who have been twice previously convicted of that crime. The assault is very frequently trifling, and we never think of taking a precognition in such a case, because the punishment which we believe would be awarded would not come up to 60 days, or would not exceed that which the magistrates have power to award; and accordingly I prepare a summary complaint, and they are brought up that day or next before the magistrate in the Burgh Court. Other cases of a like trifling character—such as petty theft, or even a case of breaking open a lockfast place, where the offender may be a child—we never think of reporting; because the punishment awarded is usually a sentence to a reformatory which is administered by the magistrates in the Burgh Court, and which could only be done by a Sheriff.

9147. You take up these in the first instance, without their coming before the police and being remitted to you?—The offender is always brought before the police magistrate in the morning, and the case is remitted by him.

9148. *Dr. Barclay.*—To himself?—It may be so.

9149. *The Chairman.*—Is there a large number of these cases?—A considerable number.

9150. How often do the magistrates hold that court?—Daily.

9151. *Mr. Baxter.*—Would it not be better to dispose of these cases in the Police Court?—I see nothing to prevent it.

9152. *Dr. Barclay.*—What is the limit of punishment?—The same as by the magistrates in the Police Court—60 days' imprisonment.

9153. *The Chairman.*—Upon what does their jurisdiction rest to impose 60 days' imprisonment?—These cases are all brought by me under the Summary Procedure Act.

9154. *Dr. Barclay.*—But their power of punishment rests upon common law?—Yes. Before the Summary Procedure Act passed it was the same.

9155. *The Chairman.*—Then, when you said you saw no reason why they should not be disposed of in the Police Court, you mean that you see no reason why that court should not have power to dispose of them?—Precisely. *Robert Bruce Johnston.*

9156. It has not the power now?—I don't say that I would give the Police Court power to dispose of all the cases which are at present remitted to us, by any means; but I would give them a larger power with reference to such as those I have adverted to, viz. petty assaults and petty thefts; and all the more that there is a clause in the section which gives the judge of police power to remit any case where he thinks the offence merits a higher or greater punishment than he can award.

9157. *Dr. Barclay.*—To remit to the magistrate or to a higher court?—To a higher court. The notice of remit is given to the Procurator-fiscal of the city or county within whose jurisdiction the offence has been committed.

9158. *The Chairman.*—Does any inconvenience arise from the present state of the jurisdiction in the two courts?—Not perhaps beyond the fact that in many cases the public are not aware what Procurator-fiscal they should apply to, if they are going to give information. I am very frequently called upon by a party who will go so far with his story, when I ask him where the offence of which he is complaining was committed, and that very often results in an answer which obliges me to send him to Mr. Lothian. Very often one side of a street is Mr. Lothian's, and the other side mine.

9159. That is an inconvenience arising from the clashing of the jurisdiction of the Sheriffs of the county and the magistrates of the city?—Exactly.

9160. What is the remedy which you would propose? Is it that the one should absorb the other?—The only ways in which I can imagine that the thing might be arranged would be, either to extend the jurisdiction of the magistrates throughout the entire police bounds of the city, or to abolish their jurisdiction in criminal matters as exercised in the Burgh Court, the effect of which would be that they would have no summary cases to dispose of remitted from the Police Court, and no examination of prisoners whose cases are afterwards reported to the Crown.

9161. *Mr. Baxter.*—How do you conduct the taking of prisoners' declarations?—In presence of a magistrate.

9162. Who dictates the declarations?—I do; and I believe that is sometimes the case even in counties where there are professional Sheriffs.

9163. *Dr. Barclay.*—You put the questions and dictate the answers?—I do.

9164. *Mr. Adam.*—You said that the Sheriff of the county claimed and exercised a cumulative jurisdiction over the whole territory?—Exactly.

9165. Does his Fiscal ever interfere in the investigation of crime in your admitted territory?—He does, and so do I in certain cases under his jurisdiction. Under the Municipal Act of 1856, the magistrates have a cumulative jurisdiction in the entire police business, though they don't exercise it except in those cases where the crime is committed partly in my boundary and partly in Mr. Lothian's. In these cases he generally acts, because he held his jurisdiction before the magistrates' jurisdiction was extended in 1856, so as to cover the entire police boundary. That, I believe, is the reason of it. In other words, he is paid for it.

9166. *The Chairman.*—Might not the case you give of a person coming to complain to you, and after he has proceeded a certain way in his statement you find that the locality is beyond your jurisdiction, occur also if your jurisdiction was pushed out to the police limits?—I think not; at all events not to anything like the same extent. While my jurisdiction embraces a very populous portion of the city, so does Mr. Lothian's. Leith Street, for instance, is partly within his district and partly within mine; and of course the public are not supposed to know that one Procurator-fiscal acts within a certain area, and another within another area. To some extent it might also be said to apply, if the suggestions of your Lordship were given effect to—that the magistrates' jurisdiction should be extended to the limit of the police bounds, though, of course, not to

Robert Bruce Johnston.

anything like the same extent, because the boundary there is well defined all round.

9167. It is a better defined boundary?—And in a very much less populous district.

9168. The other suggestion was, that the magistrates should abandon their jurisdiction in criminal matters altogether, except in the Police Court?—Yes.

9169. *Mr. Shand.*—Do you think it a good practice that the prosecutor should dictate the prisoner's declarations?—I see nothing against it if the prosecutor be assumed to be a judicious prosecutor. I would be strongly in favour of it.

9170. Do you think that would be a desirable thing to occur all over Scotland?—Supposing the assumption that I put, I see nothing against it all over Scotland.

9171. As matters now exist?—I don't say so. I don't say that a professional Sheriff being there, he should not examine the prisoner. I think probably that is the best course. At the same time, my experience shows me that unless a Sheriff has made himself acquainted with the general bearings of the case, so far as he has opportunity, when it comes that length, he is not in so good a position to examine a prisoner so as to get at the truth—for that, I submit, ought to be the object in all examinations—as the Procurator-fiscal would be.

9172. *The Chairman.*—I understood your former answer to be in reference to dictating the answers of the party to the questions put. It is one thing that the Procurator-fiscal should put the questions, and it is another thing that he should dictate the answers?—I did not understand that to be Mr. Shand's question. I see no reason why the Sheriff should not dictate the answer. On the contrary, I think it is matter of indifference, supposing the Procurator-fiscal is dictating it in the presence of the Sheriff, or the Sheriff doing it in presence of the Procurator-fiscal, if the Sheriff is undoubtedly the judge of what ought to be put down as the answer.

9173. *Mr. Webster.*—But take the case of an unprofessional magistrate?—That is another matter. I am certainly quite prepared to say that it would never do for an unprofessional magistrate to dictate the declarations of prisoners.

9174. *Mr. Baxter.*—Don't you think it a little dangerous to allow the prosecutor to put the questions and to dictate the answers?—Assuming that the prosecutor is one-sided, it is most dangerous.

9175. *Mr. Shand.*—Is not the magistrate there, in a great measure, for the protection of the prisoner?—I consider that the public prosecutor is also there for the protection of the prisoner. I don't consider myself against any prisoner who is brought up for examination.

9176. *The Chairman.*—You think you are there to investigate the truth?—Precisely; and the result may be that there is no committal.

9177. *Dr. Barclay.*—Have you ever heard the magistrates find fault with anything you dictated?—Never.

9178. *Mr. Shand.*—Is there any limit to the class of cases in which you take declarations?—None.

9179. Even in cases of murder are declarations taken by you before a magistrate?—Always.

9180. And in such cases is the declaration dictated by the public prosecutor?—It is.

9181. Do you think that is a practice which can be upheld as reasonable?—If I were asked whether such a practice should be followed throughout Scotland, I should say no, because, as already said, where there is a professional Sheriff, there can be no objection to his dictating the declaration.

9182. Then you think it depends on the accident of the character of the individual holding the office of public prosecutor?—To some extent it must; but that also applies in the case of all individuals.

9183. As a rule, I suppose you would say that it is a bad practice?—Judging from my own experience, and that is all I have to go upon, I cannot say that it is. If you ask my opinion very much as you might have done before I had any experience at all, I would have said that I was not in a position to give an opinion.

9184. Don't you think it would be better, if it can be done, that such declarations should be taken before the Sheriff rather than before a magistrate in the way you have described, and that the Sheriff should dictate the declarations?—I am not prepared to say that it would, because there are cases in which, if the Sheriff came there without knowing anything whatever beforehand, he might not be so well fitted to understand and give effect to the statement of the prisoner, even in his own interest.

9185. *Mr. Baxter.*—The charge is always read over?—Yes.

9186. *Mr. Shand.*—The Sheriff in every case is assisted by the Procurator-fiscal with all the knowledge he has?—That is just what I am not in a position to say. With us he is not, and that is why I am not able to give so satisfactory an answer to your question as to what might be done elsewhere.

9187. But assume the Sheriff has the assistance of the complaint being read, and of a Procurator-fiscal acquainted with the case, in taking the declaration, don't you think it would be much better that such declarations should be taken by him rather than by a magistrate, who merely looks on while the Procurator-fiscal dictates it?—I don't understand exactly what you mean by assisted by the Procurator-fiscal.

9188. In bringing out the case?—Certainly; I think that is quite enough.

9189. Then, on that assumption, you would be disposed to supersede the present system of taking declarations in Edinburgh, and to have them taken before the Sheriff?—Not having found the present system work anything but well in Edinburgh, I don't know that I can go that length.

9190. *Mr. Baxter.*—Has the objection ever been taken in court, that the declaration is not dictated by the magistrates?—In no case of mine has that been done. In the Greenock stowaway case I heard the Solicitor-General take it. I happened to be in court, and I heard the cross-examination of the Procurator-fiscal, and the Solicitor-General brought out from him, or from some other witnesses, that the Procurator-fiscal and the Sheriff had each partially dictated the declaration of the prisoner. I don't think that is a good plan.

9191. *Mr. Adam.*—When you have taken the precognitions in a case which is remitted to the Sheriff, do you prosecute before the Sheriff?—Never.

9192. Then you don't see your own case to the end?—Never.

9193. Mr. Lothian does that?—Yes.

9194. Is that a good system?—I can conceive very strong objections being stated to one prosecutor getting up the case, and another prosecutor conducting the trial; but that may be equally said in all High Court cases.

9195. Then Mr. Lothian acts as counsel would do in High Court cases?—Yes.

9196. *Dr. Barclay.*—You send your precognitions to the Fiscal in the Sheriff Court?—No. I send them to the Crown Office.

9197. *Mr. Baxter.*—And they are returned to you?—No. If the case is to be tried before the Sheriff, it is sent to Mr. Lothian. The only intimation I get of its going to the High Court is the indictment in proof to revise.

9198. *Dr. Barclay.*—I suppose you are called as a witness to the declaration in the High Court?—In the High Court I am.

9199. After the case has gone to the Sheriff Court, are you aware if a second declaration is ever taken?—I have never had such a case.

9200. Are you aware of supplemental precognitions having ever been taken in your cases?—Never to my knowledge.

9201. Are these cases sometimes tried in the High Court?—Very frequently.

9202. And in the Sheriff Court?—Yes.

9203. Are they never sent back to the magistrates to be tried in the Burgh Court?—Never. But certain of our cases are sent by Crown counsel to the Sheriff to be disposed of summarily; and in that case the magis-

trates of the city may be supposed to have been equally competent to dispose of them, because the sentence is the same.

9204. Could you not have done that without reporting it?—I do it in many cases; but there must be a difficulty somewhere; and there are many cases in which I don't take the responsibility. I don't consider that I am the proper party to judge in all cases.

9205. *Mr. Baxter.*—Do you say that all cases remitted by the Crown counsel for trial, whether summarily or by jury, are sent to the Sheriff?—Or to the High Court.

9206. They are never sent back to you?—Never.

9207. *Dr. Barclay.*—Are you paid by salary from the town?—I am paid by the Exchequer.

9208. A fixed salary?—A fixed salary.

9209. Do you attend the Police Court?—No.

9210. Who is prosecutor there?—Mr. Linton.

9211. Does he not call for your assistance?—Whenever there is a case falling under my jurisdiction, which cannot be disposed of in his court, we have communications together.

9212. Do you never appear in the Police Court?—Never. I may explain that besides the criminal jurisdiction which the magistrates exercise in the Burgh Court, there is a sort of *quasi* criminal class of cases which they also dispose of daily there, viz. cases under the Weights and Measures Acts, where a statutory penalty is exigible, hackney coach regulations, etc.

9213. Is that in the Police Court or in the Burgh Court?—In the Burgh Court.

9214. And contraventions of publicans' licences?—No; that is dealt with in the Police Court. There are various other Acts under which penalties are exigible.

9215. So far as the criminal jurisdiction is concerned, do you think the cases might be tried at once in the Police Court but for the restriction in the Act?—Trifling cases; but not important cases, such as forgery and murder.

9216. But in cases of double convictions, I suppose the same sentence is given in both courts?—Yes, in some. There are many parties brought before the court for the tenth or twentieth time, charged with a trifling assault; but in these cases, under the Police Act, it is necessary to remit to the Procurator-fiscal. In such cases he does not take a precognition, but he disposes of the cases summarily, either in my court, if it happens to be a case of mine, or in the Sheriff's Summary Court, if it happens to be a case of Mr. Lothian's.

9217. Do you see any advantage to the criminal or the public in trying them in that way rather than before the Police Court?—None in these cases.

9218. *Mr. Adam.*—In investigating serious cases of crime, where, for example, there are several charges of theft, some within your boundary, and some within Mr. Lothian's, do you complete the case, or does each of you complete that part of the case falling within his own jurisdiction?—If I have begun the case, and it afterwards transpired that the offence was partly committed within Mr. Lothian's boundary, I would exhaust it. On the other hand, if he had begun the case, and found that any part of it was in mine, he would exhaust it. In neither case is there a division of labour. The one Procurator-fiscal who begins the case conducts it to the end, as far as the taking of the precognition is concerned.

9219. I am supposing distinct acts of theft committed by the same man?—Precisely.

9220. *Mr. Baxter.*—Do you commit the prisoner for acts of theft beyond the jurisdiction of the magistrates?—The 3d section gives them a jurisdiction over the police bounds.

9221. *Mr. Adam.*—But I was speaking of the police bounds and the rest of the county?—I could not do anything in a case which occurred beyond the police bounds.

9222. You don't investigate anything beyond the police bounds?—Nothing; and if I were investigating a case within the police bounds, and it turned out that an offence had also been committed by the same party beyond the police bounds, I would probably hand it all over to Mr. Lothian. I never had such a case; but I would probably hand over to him all that I had done, and he would be responsible for the whole case.

9223. *Dr. Barclay.*—Is there some difficulty in discovering the exact limits of the boundary?—There is.

9224. Supposing that you were to take up an individual within your jurisdiction, and it turned out that the offence was not committed within your jurisdiction?—There is no difficulty at the outermost limits of the police bounds. If there is any difficulty within that, it is overcome by either Procurator-fiscal conducting the case, because each has a cumulative jurisdiction throughout the police bounds.

9225. But have the magistrates a cumulative jurisdiction?—Yes. Section 3 of the Municipality Extension Act gives them that jurisdiction.

9226. Then the difficulty apparently is about which Procurator-fiscal can take it up. There is no difficulty as to the tribunal?—The Procurator-fiscal has the same power as the magistrate has, within the same jurisdiction. The difficulty, if difficulty there is, consists in this, that in point of practice the Sheriff exercises jurisdiction beyond what were the limits of the Royalty in 1856, and within the limits as then extended, while the magistrates of the city only exercise jurisdiction within the limits as these existed prior to 1856, in practice; but as regards the power, each has power to exercise it throughout the entire police bounds.

9227. I thought you said there was a difficulty arising between you and the Procurator-fiscal of the county as to knowing whose duty it was to take up a particular case?—Yes.

9228. Can you suggest any remedy for that, or do you think it works quite well just now?—It works pretty well. There is this objection, that the police themselves have often a difficulty in deciding to which Procurator-fiscal the case falls to be remitted. It goes sometimes to Mr. Lothian, and he sends it to me, saying it is not within his jurisdiction. I believe that occasionally the same thing is done in our office; but, in point of practical result, there is no difficulty.

9229. *The Chairman.*—I understand you to say that the criminal jurisdiction of the magistrates extends over the whole police bounds?—Yes.

9230. But the Procurator-fiscal does not act to that full extent?—Neither do the magistrates of the city.

9231. What is the reason of that?—Simply this, as far as I understand it, that the Sheriff of the county and his deputes were officers appointed and paid for performing the whole duties within the county of Edinburgh beyond the boundaries as they existed prior to 1856, and that state of things has since continued; while, on the other hand, the Procurator-fiscal of the city was only appointed and paid for doing duty within the old city boundary.

9232. Then the magistrates think the matter is sufficiently provided for by the jurisdiction of the Sheriff, and that it is unnecessary for them or their Procurator-fiscal to do anything there?—I do not know what they think.

9233. But they so act?—Yes.

9234. You said the reason was that the Sheriff had the jurisdiction before?—Yes. I don't know that the magistrates would have time to take all cases falling within the police bounds, because they are not stipendiary magistrates.

9235. Do you think it a bad thing that they should have jurisdiction beyond the former police bounds, and within the extended bounds?—I see no reason against their exercising that jurisdiction, if they were competent to exercise it within the Royalty prior to 1856.

9236. The magistrates have a jurisdiction there which they don't exercise, because somebody else has a jurisdiction there. Is there any advantage in their having that jurisdiction which they don't exercise?—I do not say that there is.

9237. Do you think it is better that they should not have that extended jurisdiction, if it causes any confusion?—If I am asked my individual opinion, I don't see how they could undertake it.

Robert Bruce Johnston.

9238. Is it a bad thing that they should have a jurisdiction which they cannot exercise?—Which they have not time to exercise.

9239. As to cases that occur within the city boundaries, exclusive of the extension of the police boundaries, who regulates the distribution of business between you and the Fiscal of the county of Edinburgh?—I believe Mr. Linton, in cases remitted from the Police Court. He judges by the limits. I have the limits laid down on a plan here.

9240. He sends to you all the cases that he thinks are within your limits?—Yes.

9241. And he sends to Mr. Lothian those that, in his opinion, are not within your limits?—Yes.

9242. Sometimes it turns out that he is mistaken?—Yes.

9243. Does any practical disadvantage arise from that?—I don't think so.

9244. When you get a case remitted to you, you consider whether it is one worthy of precognition?—I do.

9245. If it is not worthy of precognition you proceed immediately, if it is within the jurisdiction of the magistrates, to have it tried summarily before them?—I do.

9246. If you think it merits precognition from its serious character, you take a precognition?—Yes.

9247. Having taken the precognition, do you sometimes proceed to try the case before the magistrate, or do you remit all such cases to Crown counsel?—Occasionally, but very rarely. I have had cases where I have begun the precognition and been satisfied that the case was not one which merited a complete precognition and report, and perhaps I have even gone the length of taking a declaration before a magistrate, and then disposed of the case summarily; but I think in all such cases I have deserted the diet. I have merely disposed of it summarily in that way. I have called it before the magistrate, but have deserted the diet, being satisfied that there was no case at all.

9248. Have you brought cases to trial upon precognition; or is it your practice, when you consider them so important as to merit a precognition, to send the precognition to Crown counsel?—Always.

9249. Then it comes to this, that practically there is a certain class of small cases that the Police Court has no power to deal with, that are sent to you to be dealt with by the magistrates, but you think the Police Court might perfectly well be empowered to deal with these cases?—I do.

9250. If they were so, do you see any use of the criminal jurisdiction of the magistrates in regard to trials?—That raises a very important question. I can conceive that if there were a proposal to abolish the magistrates' jurisdiction entirely *qua* criminal matters—

9251. I speak of trials?—No; I see no use in the case of trials in the Burgh Court. In the cases in which precognitions are taken, it might be objected that this was taking away a great deal of what constitutes the dignity, and character, and status of the office of the magistrate.

9252. They would cease to be terrors to evil-doers?—Precisely; and I would regard their jurisdiction—if I might so put it—as much more social than criminal, because it is for the social order and welfare of the community that they dispense justice in that class of cases.

9253. *Mr. Baxter.*—But they never do try any cases in which you report precognitions?—They do not; but nevertheless they are there as the magistrates before whom the declaration of the prisoner is taken, and who have the power of committing the prisoner for trial, or not, as they shall think fit.

9254. *The Chairman.*—My question was as to whether there was any advantage in their having the power of trying people?—Personally, I don't see that it would do much, if anything, to derogate from the power and authority of the magistrates to take away that limited class of cases from them in Edinburgh; but I can understand that different views may be held upon that subject with some reason.

9255. Some magistrates might wish to retain it, and some might not?—Precisely.

9256. *Dr. Barclay.*—After taking a precognition or declaration you commit the prisoner, I presume?—If we are satisfied that it is a case to be reported, the prisoner is committed.

9257. Do they apply to the magistrate for bail?—They do. In all cases they apply to the magistrate in the first instance. If, under the instructions from Crown counsel, the case is not bailable by the magistrate, the petition is refused. It is then reported with the case to the Crown Office, and the magistrate receives instructions from the Crown as to whether or not bail shall be accepted; and if so, the amount is left to the magistrate.

9258. *Mr. Baxter.*—Do you report all applications for bail to Crown counsel?—No; only in cases of a certain character which may be bailed on the instructions of Crown counsel, but which cannot be bailed by the magistrate otherwise.

9259. *Dr. Barclay.*—As to the declarations, have you ever made use of them in a trial before the Burgh Court?—Never.

9260. If you were to throw those cases which are mentioned in the Edinburgh Police Act into the police jurisdiction, do you think Mr. Linton would be able to manage them, or would he not require the assistance of a professional Procurator-fiscal?—I think he is quite competent as regards capacity to overtake these cases also; but I am not in a position to say whether he has time to overtake them.

9261. Does he assist you in the Burgh Court?—In no way.

9262. In that court do professional gentlemen sometimes appear in defence?—Occasionally; counsel occasionally.

9263. Has the magistrate an assessor?—He has. The Solicitor-General and Mr. M'Laren are assessors at this moment.

9264. Is that not in civil matters only?—In both civil and criminal matters.

9265. Have you known these assessors to sit in criminal matters?—I never saw that. I may state that any remark which I have made as to the class of cases which might be dealt with by the police judge in future, but which he cannot now deal with, equally applies to the cases within Mr. Lothian's jurisdiction as to those within my own; so that a greater number would fall upon the police judge than those from my court.

9266. *Mr. Campbell.*—Do you think it a desirable thing that the Superintendent of Police of Edinburgh should act as public prosecutor in the Police Court?—My own opinion is, that he ought to have duties as Superintendent of Police to occupy his whole time fully, without adding that one to the number.

9267. From your knowledge of the work that passes through the Police Court, in so far as it refers to crime in Edinburgh itself, are you aware that a very large portion of his time must be taken up in his preparations as Procurator-fiscal in the Police Court?—I should think it must necessarily be.

9268. And that a large portion of his time, therefore, is abstracted from his direct control over the police force?—I should think it is.

9269. *Dr. Barclay.*—He never calls for your assistance in the Police Court?—Never.

9270. *The Chairman.*—The judge in the Police Court in Edinburgh is the Sheriff and one of the magistrates of the city month about?—Yes.

9271. Does that system operate well?—I believe it does; at least I know nothing against it.

9272. Do you think that the continuous presence of the same judge, without being changed in that way, would be calculated to promote uniformity of punishment in dealing with cases. Would it not be better than the system of changing the police magistrate?—I believe it might.

9273. Do you see any reason why one of the Sheriff-substitutes might not do the duty of the Police Court?—If that arrangement were to be made, I would suggest that he did no other duty; I mean that he should

not be accustomed to dispense justice in more important cases.

9274. What is your reason for that suggestion?—Because I think that a judge who is accustomed to sit in a court trying important cases, is not so apt to give the same amount of consideration to trivial and unimportant cases as a judge who is entirely occupied with such a class of cases.

9275. Do you think that cases that are tried in the Police Court receive more attention from the Bailie who sits there than they do from the Sheriff who sits there?—I cannot say so, for I never was there. My view may be said to be a theory more than anything else.

9276. *Dr. Barclay.*—Would you not draw a different conclusion, viz. that the man whose time and attention were taken up with important cases would honestly attend to the trivial cases?—The argument may be said to cut two ways; but I think the man of practical common sense, without any law at all, and nothing more than a brief experience of the duties, is as well fitted as any man can be to deal with police cases.

9277. But you are of opinion that if one Sheriff-substitute had his attention and time wholly devoted to the Police Court, that would be an improvement?—I would not like to say so; but I don't think I am a judge on that point. I would require to have some experience of the way in which police cases are disposed of in the Police Court, which I have not. I have no doubt that if you took away from the magistrates the whole criminal jurisdiction of the city, and prevented their sitting even in the police cases, you would strike at the root of municipal institutions. You would not get people in the city to take an interest in municipal affairs, to the extent that I would submit is necessary for their proper conduct.

9278. *The Chairman.*—Their authority would not be so great?—It would not. The name and the dignity attached to the office is a thing which people like.

9279. People like to see their own bailie in the court?—Yes.

9280. They had a share in placing him there, they look on him as one of themselves, and they are pleased to see him exercising the jurisdiction?—Yes.

9281. *Mr. Murray.*—And the bailie is pleased?—I should think so.

9282. *Dr. Barclay.*—Would not the best men take the civic position without the annoyance of the Police Court?—My opinion is, you cannot get the dignity without the annoyance.

9283. Are you aware that judges of the Court of Session have sometimes declined to take the Justiciary business?—I believe the judges of the Court of Session have a position independent of any Justiciary business, which the giving of that class of business can never affect.

9284. *The Chairman.*—Have you any experience of the Dean of Guild Court?—I am Procurator-fiscal in that court.

9285. Have you any suggestions to make about it? Do a good many cases come before you?—Not very many. The only class of cases in which I am called on to interfere are those in which parties have begun to build or to alter buildings in an important manner without a warrant of the court, or cases in which danger is apprehended from the existing state of any building.

9286. Is it a rule of the court, that no person can make any considerable alteration on his premises without the authority of the Dean of Guild?—That is the custom.

9287. And when such authority is applied for, how does the Dean of Guild proceed?—The party employs a solicitor before the Guild Court, which, by the terms of my appointment, I am expressly prevented from being, so that the public interest may in no way clash with the interest of the private party. The party proceeds by way of petition, the form of which is regulated, I believe, by Act of Sederunt of the Court of Session. With that petition he produces the plan to which he refers, and he asks warrant to erect or to alter the building, as shown upon the plan. The court invariably, I believe, appoints a visit, and being composed of practical men, experts, they are considered to be good judges as to the way in which the building or the alterations for which leave is craved should be carried out.

9288. Who selects them?—They are appointed, I believe, by the Dean of Guild himself.

9289. Are they his council?—Yes; but he alone is the judge.

9290. They report whether the operations should be permitted or not?—Exactly.

9291. And the Dean of Guild decides?—Yes.

9292. *Mr. Baxter.*—Suppose any one should attempt to build without a warrant, would you interfere as Fiscal?—I do; and if he has begun and not finished, I apply for an interdict.

9293. To the Dean of Guild Court?—Yes.

9294. On the ground that he has not obtained a warrant?—Yes.

9295. *Dr. Barclay.*—Without any encroachment on public or private property?—Yes; and I further ask him to be amerced in a fine for contempt of court.

9296. *Mr. Baxter.*—And that whether he is merely exercising his legal rights within his own property or not?—Certainly.

9297. *Dr. Barclay.*—Have you a separate salary for acting in the Dean of Guild Court?—I have no salary for that.

9298. *The Chairman.*—When a petition is presented for authority, is it appointed to be served upon the neighbours?—I believe in some cases no one is called except, perhaps, the City Chamberlain for the city's interest. Parties do not always call the adjoining proprietors; in fact, I understand that unless it is anticipated that they may have a possible interest, they don't call them.

9299. They may sometimes get their consent, and present that along with the petition?—Yes. There are cases in which, though the adjoining proprietors are not called, the court has thought fit to order intimation to them.

9300. There are cases where tenements become dangerous. How do you get knowledge of these?—Sometimes through reports of my own officers, and occasionally from hearsay, of course leading to my giving directions for a report being made to me.

9301. By your own officers do you mean officers of police?—Officers of the Guild Court; but my notice is chiefly got from the burgh engineer, in terms of the Provisional Order passed a few years ago.

9302. *Mr. Campbell.*—Mr. Macpherson?—Yes; he is obliged to give me notice; and if, within three days after he has given notice, the party does not proceed to remove the danger, I take the case up.

9303. *The Chairman.*—Is he always on the alert to see whether there is danger?—There are many cases in which he cannot possibly be aware of the fact. For example, we had a case only a few weeks ago, where we heard quite incidentally that a certain very trifling alteration as regards extent was being carried on, in an old tenement in High Street. I then applied to the Guild Court; and on the place being visited, they were quite satisfied that it was very dangerous. The party engaged in making the alteration was a mere joiner, and he was breaking through the main bearing-wall of the tenement inside the house, to make a doorway.

9304. *Dr. Barclay.*—In that case did you call the proprietor or the joiner?—Both.

9305. *The Chairman.*—Do you think it would be any advantage to have a surveyor who should look after these matters?—I think so. I think the system which is adopted in England, moulded into conformity with our own, would be a very great advantage.

9306. *Dr. Barclay.*—Does the town engineer not look after that?—He has so many other statutory duties to perform, that he could not possibly overtake the duty which I think should be imposed on the surveyor whose appointment his Lordship has suggested.

9307. *The Chairman.*—When the police observe or hear of any building that is dangerous, are they in use to give information of it?—I never obtained information through the police.

Robert Bruce Johnston.

9308. Do you think there is a want of some person of that kind?—I think so; and I think there is a want of an officer to see that the warrants granted by the Dean of Guild Court are carried out.

9309. *Mr. Murray.*—Does the town engineer receive a salary?—I believe he does.

9310. Is his whole time given to the duties of his office?—So far as I know, it is.

9311. There are a number of duties imposed upon him, such as seeing that water is brought into tenements?—I did not know that the burgh engineer was responsible for that; but I can easily conceive that there is no public office in Edinburgh more inundated with complaints than that of the burgh engineer.

9312. Is he controlled by the Town Council or the magistrates?—Yes, he is. He is their officer.

9313. *The Chairman.*—You think the Dean of Guild jurisdiction is a useful one?—I do.

9314. You think that it could not be beneficially transferred to the Sheriff?—I would not be very particular as to the court. I think the office of surveyor is the more important part of it. At the same time, I think the present court works well, and that if the Sheriff were the judge, he would in many cases require to be advised by such men as the present Dean of Guild assessors.

9315. These assessors receive no remuneration?—They receive no remuneration whatever, and I believe they willingly give their time to the duties of the office.

9316. Are they just professional men selected from the community?—They are always builders, and in my experience they are builders of the best class in Edinburgh.

9317. Have they any official position in consequence of being members of the Dean of Guild's Council?—None.

9318. They give their services gratuitously to support the Dean of Guild?—They do.

9319. *Dr. Barclay.*—I suppose these persons are elected annually?—I think so.

9320. And the Dean of Guild every three years?—Yes.

9321. *The Chairman.*—Are there fees exacted in the Dean of Guild Court?—There are.

9322. Is there a table of these fees?—I believe so.

9323. Can you furnish us with the table?—I shall send a copy of it.

9324. *Dr. Barclay.*—When you gain a case, do you get your costs?—Yes.

9325. According to what table of fees?—I really do not know. But while I would not in the slightest degree abolish or even limit the jurisdiction of the Dean of Guild Court, I think some arrangement might be made by which parties could, at smaller expense than at present, apply to the court for warrants to make trifling alterations; I think it is in many cases a hardship that when a party wishes to make a very trifling alteration on his property, he should have to be at the expense even of a few pounds.

9326. *The Chairman.*—Are there any fees paid to the Dean's councillors?—There are not.

9327. *Mr. Baxter.*—What would you suggest in the case of these minor improvements?—If the office of surveyor were established, I can conceive of an arrangement by which his sanction and authority might be got, without a formal application to the Dean of Guild Court.

9328. *Dr. Barclay.*—These councillors are builders?—Yes; but I believe they are not always all builders.

9329. If they are builders in actual practice, have they no motive to condemn old tenements?—I never saw that. On the contrary, I think the leaning of the builders would naturally be rather to favour a member of their own trade.

9330. But I mean the proprietor?—A builder ought not to touch a stone until he has got from the proprietor a warrant put into his hands. The builder is therefore the responsible party for failure to obtain the warrant before commencing operations; and if I bring no other respondent into court than the builder, I am entitled to decree if I prove that the work has been done without a warrant.

9331. I was referring to ruinous tenements?—There have been very few of these in my experience.

9332. My question was, whether these men had an interest to condemn a house which might perhaps stand for another century?—I never heard of complaints of that kind in Edinburgh.

9333. *Mr. Webster.*—What is your opinion as to having Dean of Guild Courts in small burghs?—I do not think they are of the same importance, or perhaps even at all necessary.

9334. In small burghs a suitable staff of practical assistants cannot be got?—Possibly not.

9335. *Dr. Barclay.*—I suppose you are aware that the small burghs on the coast of Fife have Dean of Guild Courts?—Yes.

9336. Would you make exceptions of Edinburgh, Glasgow, Aberdeen, and Dundee?—Yes.

9337. *The Chairman.*—Are all new streets laid out for feuing sanctioned by the Dean of Guild?—Yes. Within the Dean of Guild's jurisdiction, which is almost synonymous with that of the magistrates in criminal matters, and does not extend beyond the limits prior to the Act of 1856, parties building ought to apply to the Dean of Guild Court for a warrant; and I never knew of a case in which the warrant was refused, where there was not a successful opposing party except one, a very recent case, where a party applied for a warrant to erect a storm window in a house in Charlotte Square, and I believe *ex proprio motu* the Dean of Guild refused the warrant.

9338. *Dr. Barclay.*—In the public interest?—Yes.

9339. *The Chairman.*—On account of departure from the plan?—Yes.

9340. *Dr. Barclay.*—Was there opposition from any one?—No. I would not make the Dean of Guild Court a court of taste, although, I believe, there are many architectural monstrosities that every one would condemn; it would be impossible to get a court to act consistently on such grounds.

9341. *The Chairman.*—Tastes vary?—Yes.

9342. *Mr. Webster.*—Where a warrant has been obtained for a building, is there any course followed for ascertaining whether the warrant has been properly carried out?—No.

9343. Is the party left to the freedom of his own will?—Yes; there is no security for ascertaining that what is authorized to be done, is done.

9344. *The Chairman.*—Have you any other suggestion to make as to the Dean of Guild Court, except as to the expediency of having a surveyor or inspector?—I would extend the jurisdiction to the police bounds, or to include within it all the largely inhabited part of the city.

9345. *Mr. Murray.*—Would you leave the Court in the same relative position to its assessors as at present?—I think it works well; but I don't think that is a matter of so much importance.

9346. Supposing a legal question arises?—That is another question; and I can conceive its being objected to the Dean of Guild exercising jurisdiction in any case where a question of right arises.

9347. *Dr. Barclay.*—What would you do there?—They might sist procedure, giving parties a certain time to bring a declarator before the Court of Session. At the same time, though they have no legal assessors, I believe, in point of fact, the present system has been found to work well; so that there have been no complaints of ill-advised judgments having been given even in questions of right.

9348. *The Chairman.*—They take the advice of the city assessors, Mr. M'Laren or Mr. Young?—Yes.

9349. *Dr. Barclay.*—And they only decide in possessory questions?—No; in questions of legal right.

9350. *Mr. Murray.*—Do you see any mode by which that class of cases might either originate with the Sheriff, or be sent to the Sheriff?—I think it is frequently only after the proceedings are in the Guild Court that the question of conflict of interest arises.

9351. *The Chairman.*—If the Dean of Guild cases were tried before the Sheriff, there would be an expense in getting persons to report, which is avoided by the

Council of the Dean of Guild?—Entirely. I believe it would be a very costly procedure to the country, because I should think you would require an additional Sheriff for nothing else, and also to the inhabitants, in making applications for warrants. I may observe, that if the utility of the Guild Court is recognised, I see very great difficulty in distinguishing between such a case as I mentioned a little ago as having occurred recently in High Street, and a case where the same sort of thing often happens in the New Town, and where no danger can be apprehended, because the law must be uniform. If a person in High Street is obliged to come to the Court for a warrant to break a hole in a wall, a person living in Heriot Row ought to be obliged to do so, though in the one case there may be danger, and in the other there is not.

9352. But in a case of that kind, if there was a surveyor, it would be enough for the party in Heriot Row to get the surveyor's authority?—Exactly, and possibly enough for the party in High Street; but I would always give the surveyor power to bring the matter before the court.

9353. *Mr. Webster.*—Are not owners sometimes delayed in their building operations by the necessity of obtaining warrants?—I do not see how they can be. If a man is going to build, it is a thing he thinks about for some time before he does it, and he has ample time to go to the court for a warrant. It is a very summary court in its forms of procedure. It meets every week. I never knew any delay.

9354. *Mr. Baxter.*—Supposing there is opposition?—That is a case which arises whether there is a Dean of Guild Court or not.

9355. But the other parties there would have the responsibility?—Yes; but if there is a question of right involved, it does not matter who takes the initiative. *Robert Bruce Johnston.*

9356. *Mr. Webster.*—It gives the opponents the benefit of an interdict?—Yes, without showing cause.

9357. *The Chairman.*—When a party does appear to oppose, do you make him the practical pursuer, and require him to make out his case, or do you require that the applicant shall make out his case?—I think the court holds that the original petitioner for the warrant has to make out his case.

9358. *Dr. Barclay.*—Would not the conflict between the Fiscals' jurisdictions be removed by making you sole Fiscal over the extended boundary?—That is hardly a question for me to answer. I may mention that in Glasgow there are two joint Fiscals, who have the jurisdiction throughout the entire Middle Ward of Lanarkshire, which includes all Glasgow.

9359. *Mr. Murray.*—And there is no Burgh Fiscal?—There is not; and there the magistrates, who, I presume, attach as much importance to the dignity and weight of the office of magistrate as is done here, only exercise jurisdiction in the Police Court.

9360. The Superintendent of Police there does not act as Fiscal?—I believe not. But the Fiscal in the Police Court in Glasgow is not one of the joint Fiscals who are Sheriff-fiscals.

9361. *Mr. Campbell.*—Do you know whether it is the case that in each of the Police District Courts in Glasgow, the magistrate is provided with a paid professional assessor?—I do not know whether that is so or not.

FRIDAY, 5th FEBRUARY 1869.

Members Present:—

Lord Colonsay.
The Lord Justice-General.
The Lord Justice-Clerk.
A. R. Clark, Esq.
James Campbell, Esq.
George Harrison, Esq.
James Adam, Esq.
T. Graham Murray, Esq.
James Webster, Esq.
John B. Baxter, Esq.

The Right Hon. LORD COLONSAY in the Chair.

W. F. Ogg, Esq., examined. *W. F. Ogg.*

9362. *The Chairman.*—I understand you are a practitioner before the Sheriff Court at Aberdeen?—I am.

9363. Have you been long a practitioner?—Since 1841.

9364. Do you hold any official position there?—No; I hold no public office.

9365. Have you considered the matter of the constitution of the Sheriff Courts, as consisting of a Sheriff and Sheriff-substitute?—I have. I was a member of a small committee appointed by the Society of Advocates to consider that question. We reported, and our report was adopted, and I was asked by the society to come here and state their views, and the grounds on which they arrived at the conclusions in their report.

9366. Have you the report?—Yes. I produce it.

9367. What is the substance of it with reference to the constitution of the courts?—We think that there ought to be, as now, an appeal within the Sheriff Court. Probably it would be an improvement if there were two Sheriffs in place of one in the appeal court. The grounds upon which we arrived at that opinion are, that the great majority of cases in the Sheriff Court are regarding matters of so small an amount, that they cannot afford an appeal to the Supreme Court. I myself was originally of opinion that we ought to have one resident Sheriff, and an appeal direct to the Inner House; but fuller consideration, and an inquiry specially on the matter of expense, has convinced me that such an appeal is impracticable. I have excerpted from three cases, which seem to me to be illustrative cases selected for that purpose, the expense of appeal to the Inner House. They show that the expense of the appeal—the mere discussion in the Inner House—is so much beyond the whole expense of preparing the record in the court below, and also of the appeal, as to be practically inoperative in the great majority of cases. I shall mention the cases to which I refer, as showing the amount of expense in the court below in the preparation of the record, and the cost of the appeal in the Inner House. The first is *Barclay* v. *Thomson*, in 1865. It was a right of way; a good many witnesses were examined, some of them professional witnesses, and the costs were taxed in the Sheriff Court at £37, 19s. 5d.

9368. *Mr. Baxter.*—Are these the pursuer's expenses?—Yes; and the pursuer ultimately prevailed. The Sheriff recalled the substitute's judgment, but the Inner House reverted to that judgment. The expense of the appeal was £57, 15s. 7d. on one side. That is the amount of the taxed expenses, but of course there would be a considerable sum to add for extrajudicial expenses. The second case was not a case of my own.

9369. The first was a case of your own?—Yes. The second is the case of *Pirie* v. *Warden*, in 1867.

W. F. Ogg.

9370. *Mr. Webster.*—That was a difficult maritime question?—Yes; a question of law. The expenses in the court below were £30, 10s. 2d., and in the Court of Session £65, 18s. 1d., on one side, besides extrajudicial expenses. The other case is not a case of my own, and I give it because it was decided in the Supreme Court in about three weeks; having been advocated for jury trial, it was put to the Summar Roll. It is the case of Roy, decided the other day. The whole costs were £52, 16s. 7d., and of that sum the costs in the court below were under £20, leaving upwards of £30 as the costs of hearing the appeal in the Court of Session.

9371. *Mr. Baxter.*—Was that a case under the Debts Recovery Act?—It was not. A merchant in Glasgow pursued a merchant named Roy, in Aberdeen, for an account about £50; it was the simplest of all cases. We think that, in the great majority of cases in the Sheriff Court, the judgment by such a court as I have mentioned, which would be got, according to the amount of the matter in dispute, either for £1, 30s., or £2, would be satisfactory to the litigants. We also think that the emoluments of the Sheriff-substitute should be increased, in order that the best men, or very good men, might be got; we think they ought to be equal to those of the judges of the County Courts in England, because their duties are more important.

9372. *The Chairman.*—You mean that the emoluments of the Sheriff-substitute should be at least equal to those of the English County Court judges?—Yes, at least equal; and we are of opinion that, in order to get good men from the bar to be Sheriffs in the appeal court, there should be two or three counties united together, and two Sheriffs appointed to be judges in appeals in these united counties, that they should have probably £2000 a-year, or some such salary as would ensure the obtaining of first-rate men for the office.

9373. *Mr. Baxter.*—Would you restrict their duties to those of the appellate court, leaving the resident Sheriff to do the executive and magisterial duties?—Yes; and I would propose that they should give their whole time to these appeals. They could have such a number of counties as would ensure them full employment.

9374. *Mr. Campbell.*—Then I understand you to mean that there should no longer be such an officer as a Sheriff-substitute, but that each county should have a resident Sheriff, and that his judgment should be subject to review by the Sheriffs on appeal?—Yes. It does not matter by what name you call him—resident judge or Sheriff-substitute, but that he shall be judge in the first instance, and that his decision shall be subject to review by two Sheriffs.

9375. *Mr. Webster.*—Taking, for example, the counties of Aberdeen and Kincardine or Banff, would you propose that there shall be a separate Sheriff for each of these counties as heretofore, and that these, or two of them, shall in combination form the appeal court for that district; or do you point at a set of appeal judges merely?—It does not appear to me that that makes much difference. We did not consider whether they should be called Sheriffs. If there were two, and they had only two counties, there would be no objection to each being Sheriff of a particular county, nor do I think there would be any advantage even if they were not called Sheriffs of the particular counties. I have not considered that particular point, and I don't see that it would make any difference, so far as the public are concerned, whether they were nominally Sheriffs of counties.

9376. That is, that as regards the mere appeal business it would be immaterial what name they went under?—Yes.

9377. *The Chairman.*—Have you anything more to say as to the constitution of the court?—I don't think I have anything further to say on that subject, except that the small proportion of cases that are advocated to the Court of Session shows either that the litigants are satisfied with the judgment of the Sheriff, or that they believe the cost of an appeal to be so great that they don't venture upon it. I believe that they are generally satisfied; that is, as far as a judgment against a man can be satisfactory. Upon the whole, I think that the Sheriff Court is a satisfactory tribunal to the public.

9378. *Mr. Murray.*—If so, why would you change the present system?—I think that, although one Sheriff is satisfactory, perhaps two Sheriffs would be more so. With such an appeal court there would probably be no advocations in causes of trifling value. Occasionally there are now advocations where parties get excited about sums that cannot well afford such advocations, and they repent when it is too late.

9379. *The Chairman.*—Would you allow an appeal from these two gentlemen to the Court of Session?—Yes, we propose to allow an appeal.

9380. *Mr. Murray.*—Are you aware how many advocations there have been from the Sheriff of Aberdeenshire within the last few years?—There have been a number of bonds of caution lodged, but very few advocations have been insisted in. In 1868 there were two bonds lodged, and in 1867 there were two bonds lodged, but none of them were insisted in. In 1866 there were four bonds lodged, and only one of these cases was discussed in court; and I think the result of the other three is very illustrative of what usually takes place. It so happens that I was in these three cases, all of which went off. One of them was an action of accounting for a large sum. The Sheriffs gave effect to the report of the accountant in all points, and we would have taken it to the Court of Session if we had not got an additional £100 from the defender; but we got that, and the case was settled. Another was an action of damages against the Caledonian Railway Company with reference to sheep. I was agent for the railway company, and the Edinburgh agents for the company advised that though the case involved a principle, the cost of the appeal would be too great for the sum at issue, and it was not insisted in.

9381. *The Chairman.*—Too great for the Caledonian Railway Company?—No. Too great for the sum at stake. The amount that they would have got cut off from the damage found due would probably have been less than the expense of the appeal. The other was a case in which the party opposed to me appealed to the Court of Session. I never thought he had any ground for an appeal except merely delay, and he did not go on with it. That kind of thing is perpetually going on; the litigant is dissatisfied in the first instance with the Sheriff's decision, and is very anxious to rush into the Court of Session; but when he comes to reflect and is advised upon the matter, he finds that the judgment is well founded, or that the expense of an appeal would be too great for the sum at issue.

9382. One of the cases you have mentioned was a case of an extensive accounting?—Yes; and it was settled by the defender paying an additional £100 to the sum found due by the Sheriff.

9383. Found due against the defender?—Yes.

9384. What was the cost of that case in the court below?—I have not got the cost here, but I can send it. Speaking from memory, I think it was about £30, which was exclusive of the fee of the accountant. It was a very intricate question of marine accounting, involving a good deal of money; and there were voluminous reports by the accountant.

9385. Have you any recollection what the fee of the accountant was?—I think it was £80, or about that sum.

9386. *Mr. Murray.*—Do you know how many appeals the Sheriff decided in 1867 and 1868?—In 1868 he decided 127; in 1867, 143; and in 1866, 127.

9387. And of the cases decided in 1867 and 1868 not one appears to have been followed out to the Court of Session?—Not one. Two bonds were lodged, but none were followed out.

9388. *Mr. Webster.*—Can you state what was the course of procedure in the right of way case of Thomson, which led to the heavy cost of the appeal there?—There was nothing special in the case. It was a question of fact on the proof, and went directly to the Inner House.

9389. The case of *Pirie* v. *Warden* gave rise to new

and difficult questions of maritime law and jurisdiction?—Yes; it was a pure question of law.

9390. *The Chairman.*—Would you leave the parties the free choice, as now, of raising their action in the Sheriff Court or in the Court of Session, where it was above a certain sum?—Certainly. I think the litigant ought always to have the right of choosing the tribunal; but, at the same time, I think that, to prevent oppression, there ought to be some restriction. If, for example, a comparatively small sum was found due, the pursuer ought to be allowed only Sheriff Court expenses; because I can conceive cases where a wealthy litigant might try to concuss a poor man by threats of expensive proceedings; and we know very well that that is too frequently done.

9391. But if he were successful, would you deprive him of the proper expenses in the court?—No. If, for example, he recovered a sum over, say £50, I would limit it in that way. We considered that matter, and we thought that there ought to be some restriction to the bringing of cases in the Court of Session for trifling sums. There is no doubt that the body of practitioners before the Supreme Court are highly respectable men, but it is equally well known that there are one or two who do foment frivolous litigations; and what I suggest would be a check to that.

9392. There is a certain restriction at present?—Yes. £25 is the limit.

9393. Would you alter that?—I would extend it to at least £50.

9394. Then you would exclude cases not exceeding £50?—Above £25 we proposed that the litigant should have the choice of the tribunal; and if he came to the Court of Session, and was successful to the extent of over £50, he should get Court of Session costs.

9395. But if his demand was between £25 and £50?—Then he should be obliged to go to the Sheriff Court; and we propose, in order that the expenses of the Sheriff Court under that limit should be as low as possible, that cases not exceeding £50 should be tried summarily, and that there should be no appeal on questions of fact; but that in all cases there should be an appeal to the Sheriffs, and from them to the Court of Session, on cases stated on points of law under £50.

9396. *Mr. Baxter.*—Are you aware that in England, where decree is pronounced in an action brought in the Supreme Court below the sum at which it could be introduced into the County Courts, the successful party is only allowed County Court expenses, unless the court shall certify that there was something peculiar in the case which made it proper to bring it before the Supreme Court?—We considered that rule at the time we came to the resolution, and we thought it was an excellent one. I omitted to say that we were also of opinion that the same privilege should be given to the litigant, of being able to get a certification from the judge; and, in that case, to get his costs.

9397. *The Chairman.*—Would you limit the application of that rule to cases not exceeding £50?—Yes.

9398. *Mr. Adam.*—On what principle do you propose to exclude review on matters of fact, when you don't do so on matters of law? Is it not all one to the litigant whether he loses his case on matters of law or of fact?—In a summary trial, if it is to be cheap, you cannot have a review of the facts; the witnesses come before the judge and tell their story, and he decides the case; in fact, it is something like an extension of the Small Debt Court. Probably there ought to be some kind of fees allowed to procurators for attending. All the judges that ever I have talked with on the subject, say that they never would get through their work with satisfaction to themselves if they were not assisted by procurators, because a party comes into court with no notion of where the point of his case is; and when he goes to a procurator he tells a long story, and the procurator has to find out where the gist of the case lies. In the Small Debt Court the judges would never get through their work in large counties if they had not assistance.

9399. It is simply on the ground of the difficulty of review?—And the expense. We are of opinion that these small sums ought to be recovered in the most expeditious way, and at the least possible cost.

9400. *The Chairman.*—Have you any observations to make on the jurisdiction of the Sheriff?—We are of opinion that the Sheriff's jurisdiction ought to be extended, so as to be co-ordinate with that of the Court of Session. The grounds of that opinion are, that every country procurator knows that many cases occur which never can be tried, because the value is so much under what would afford the expense of a decision in the Supreme Court. The consequence is that the matters remain undetermined, a festering sore between neighbours and friends. I think that would be pretty obvious if one just takes the matter of heritage as an example, and considers that the average values of heritable properties in Scotland is, say £500. Of course the great majority of properties are house properties, and in Aberdeen £500 would probably be over the average of the value of the houses, taking them all together. In Edinburgh and Glasgow the average would probably be higher; but assume the average to be £500, if a question arises in regard to a heritable property of £500, you cannot get that discussed and decided in the Court of Session except at a cost, judicial and extrajudicial expenses included, of about £500—the whole value of the property, or not much less; and if it were a jury case the expense would probably be double, so that it is an absolute denial of justice at present that the Sheriff should have no jurisdiction in these small matters of heritage. It has been suggested that the Sheriff's jurisdiction in that matter should be limited; but we think there is no necessity for that, because every important case would come direct to the Court of Session, just as important cases in moveables do, where the Sheriff has jurisdiction to try cases of any amount. One never sees in the Sheriff Court a case for thousands of pounds; and so, in the matter of heritage, whenever the case was an important one, it would come direct to the Court of Session. Another reason for our opinion that there should be no limit, is that there is a difficulty in deciding the value. The Sheriff must either appoint somebody to inspect the property, or he must take some kind of proof, and that would be unnecessarily expensive. And so in other matters, where the Sheriff's jurisdiction is at present excluded—cases of lapsed trusts, where the trust is of small amount—cases of curators and of factors, where the sum is small.

9401. In questions of heritage, would you think it proper that either party should be entitled, at an early stage, to remove the case to the Court of Session?—Yes, I would give that power, the Sheriff hearing the parties, and certifying that in his opinion it is a case for removal; because a rich litigant might, in regard to a sum of small amount, try to get the case removed just in order that he might concuss the other party, who might be poorer. I would give the Sheriff the cognizance of the question of removal.

9402. The rich litigant would probably concuss the other party more effectually by making him run the gauntlet of two courts?—I don't know. If the decision of the Sheriff was in favour of the poorer man, he would probably get support to go to the Court of Session, whereas nobody would assist him to go to the Court of Session in an untried case, because before the case is tried you cannot know the whole strength of the other party's case. You may have a notion of it, but you cannot judge with accuracy what the case against you may be till it has been discussed.

9403. *Mr. Murray.*—But you don't propose finality in any question with reference to heritage?—No, unless the value was under £50,—in very small cases.

9404. How would you determine the value?—Probably the better way would be to allow an appeal in all cases of heritage—in all cases of extended jurisdiction, to get rid of the cost of determining value.

9405. *The Chairman.*—What would you say as to questions of status?—That is a vexed question. Our society at first, by a small majority, were of opinion that these cases should be excluded from the jurisdiction of the Sheriff; but, on reconsideration, and on hearing that their brethren in other places had come to the

W. F. Ogg.

conclusion that it would be better to make no exception, they acquiesced in that. But there is very great difference of opinion upon that point.

9406. There is still difference of opinion?—I think there is, among professional men throughout the country.

9407. Do they draw any distinction in that respect between questions of divorce and questions of declarator of marriage?—Some people are of opinion that if cheap divorce were allowed, very many men would rush into that court, and would probably form conspiracies against co-respondents. That is the fear of many people. Others think that it is a very great hardship that a poor man should be compelled to live with a woman with whom he cannot agree, and that it would be better for both of them that they were separated. There is a great diversity of opinion as to that.

9408. I observe that you put the case as it has been put to and by several witnesses here—the case of the man's right to divorce. Do you think that the woman should not be entitled to divorce if her husband commits adultery?—I think the woman should be entitled to divorce as much as the man.

9409. These are the conflicting views which you say exist as to whether it would be expedient, on the whole, to give the Sheriff the power of dissolving marriage?—Yes; there is very conflicting opinion on the expediency of it.

9410. What is your opinion as to the Sheriff's jurisdiction in declarators of marriage?—We put that in the same category as the other. We have agreed to report in favour of the Sheriff having jurisdiction in all these questions.

9411. What were the grounds of that decision as regards declarator of marriage?—I, for one, am in favour of the Sheriff's jurisdiction being extended to these; but some objected to that. I really don't remember at this moment the grounds of their objection.

9412. What is your reason for giving that power to the Sheriff?—I see no grounds of expediency, but many on the other side, for holding that, if a man has really been married, and if it appears that there are interests of importance which may follow his obtaining a decree of marriage, he should be excluded from it merely because he is poor.

9413. Would you give a power in such cases to transfer the cause to the Court of Session at an early stage?—Yes; I would give the same power as in heritage.

9414. Only it would not be measured by value in any way?—No; in that case you must give the power without any limit.

9415. *Mr. Baxter.*—Here is a sentence which is embodied in the report of the Commissioners on the Marriage Law: 'That, in cases of disputed marriages, the present law, which renders actions of declarator of marriage competent only before the Supreme Court, involves a process so expensive as in many cases to render its benefits beyond the reach of the humbler classes, to the deepest injury of the wife and children; and that to remedy this great evil, jurisdiction should be extended to the Sheriffs to dispose of such cases, subject to appeal to the Supreme Court.' Does that express your opinion?—That is exactly what I have thought upon that point all along.

9416. *Mr. Adam.*—Do you think that, if you allowed declarators of marriage in the Sheriff Court, many of the actions now brought as actions of affiliation would take the form of declarators of marriage?—Probably they would; but if there was really a promise of marriage, I don't see why it should not be implemented.

9417. *The Chairman.*—Have you any other observations to make as to the question of jurisdiction?—No.

9418. *Mr. Baxter.*—Are you aware that, under the Conjugal Rights Act, petitions for the protection of a wife's earnings, and for provision to her in case of desertion by her husband, are only competent in the Court of Session?—Yes.

9419. Should that be so?—The power ought certainly to be given to the Sheriff. In the great majority of cases it is a denial of justice, because women who enter into business and earn a little money are, in the majority of cases, of the lowest class, and they cannot afford to go to the Court of Session. I think it ought to be as in England, where the County Courts have the jurisdiction.

9420. *The Chairman.*—Have you any observations to make upon the procedure and writs in the Sheriff Court?—With the view of reducing the expense in the Sheriff Court as far as possible, we propose that, in all cases, a writ or citation should be issued, having endorsed upon it the particular claim or demand made; and if the defender does not, within a certain number of days, say that he means to resist that claim, then decree should pass. If, within a certain number of days, he states that he means to object to it, then the pursuer would lodge his grounds of action; the defender would then answer these grounds by a minute of defence, and we think the short form in the Procedure Act would answer very well. In the case where the defence consisted, besides denial, or besides other defences, of a counter-claim, there ought to be a replication, or answer to the counter-claim, written upon the minute of the grounds of action, and then the record should be closed. We think that the least expensive form of procedure.

9421. You mean that, at the first calling of the cause, the defender should state whether he meant to oppose decree?—We mean that, before the calling of the cause, he should state that; and at the calling of the cause, or before it, the pursuer would lodge his grounds of action. The defender would then see these grounds, and minute his defence.

9422. *Mr. Webster.*—To whom would he communicate that he means to oppose the action?—He would just lodge it in the Sheriff Court, as a minute of appearance is lodged now. He would lodge a minute of compearance.

9423. *Mr. Baxter.*—The writ would be merely calling the defender into court?—Yes; summoning him.

9424. *Mr. Webster.*—With a note indorsed, specifying the amount of the claim?—Yes.

9425. Would it specify what it was for?—Yes; it would specify that shortly, so that it might be extractable.

9426. *Mr. Baxter.*—And so as to form *res judicata*?—Yes; sufficiently specific for that purpose, and sufficiently specific to form a warrant for extract.

9427. Would that be your form in all cases?—Yes; that would apply to all cases.

9428. *Mr. Campbell.*—Would you take from the Sheriff the power of ordering condescendence and defences, which he has at present?—No. Some of my brethren would have it taken away altogether; but I would allow the Sheriff to order condescendence and defences in cases where he thought these necessary. Their reason for wishing it taken away altogether is, that they suppose the Sheriff-substitute would grant it in every case where it was demanded. I don't see that that follows. I think he would do his duty, and would only allow it where he thought the case was suitable for it.

9429. *Mr. Baxter.*—Has he the power now of determining whether the record is to be made up in the short form?—Yes. I believe the practice is rather loose. Our present Sheriff-substitute, Mr. Thomson, does inquire, but formerly a condescendence and defences was always granted when asked.

9430. That is not done now?—No.

9431. Supposing the party refused to sign the minute of defence?—I suppose he would oblige him to sign it. I have never known a case in which a procurator before the Sheriff Court of Aberdeenshire refused to sign a minute. I presume he would be bound to execute an order of court.

9432. *Mr. Clark.*—In practice, are most records made up in the short form, or by condescendence and defences?—With us now, in the short form; formerly it was different.

9433. Do you find in taking proof, when the record is made up in the short form, that a necessity arises for an adjournment, in consequence of surprise being pleaded?

—Very seldom. It does occasionally, and in these cases our Sheriff-substitute allows the adjournment.

9434. But do you find that, when the record is made up in the short form, the probation may be taken, generally speaking, without any necessity for adjournment?—Generally it is so. I believe the intention of the Act of 1853 was, that at the first calling of the cause the pursuer should state his grounds of action, and the defender his grounds of defence. If that is properly done, each should be aware of the case of the other. At one time that was not done at all, but it is done now, at least with us. The Sheriff-substitute insists on the pursuer stating fully his grounds, and the defender his defence, and from that discussion they have an idea of what is to be proved.

9435. From the recollection of what took place at the oral discussion, they are informed of the particulars of the defence?—Yes.

9436. *The Chairman.*—Does the Sheriff make a note of that for his own guidance?—I do not know that he does. I think the object of it was more to inform the parties what was the case against them. No doubt the Sheriff considers it at the time in reference to the question of whether or not he will grant condescendence and defences, or insist upon a minute of defence being lodged.

9437. When you come to the court, does he keep it in his mind with reference to the question whether there is surprise or not?—The Sheriff cannot keep it in his mind, but the parties ought to keep it in their minds. If the Sheriff were to keep a note of it, it would furnish him with a record of what took place, and he would be able to say whether there was any ground for asking additional proof in consequence of surprise.

9438. *Mr. Clark.*—But you find that the short form of record in the majority of cases works well?—Yes.

9439. Would you say the great majority of cases?—Yes, I would say the great majority of cases. I think that the cases are exceptional where condescendence and defences are necessary. There is one matter in regard to the taking of proof upon which I personally have a very strong opinion, and so have some of my brethren. I mean the system of taking proof by short notes. I think that very objectionable. The reason for it is said to be that the Sheriff-substitute has an opportunity of observing the demeanour of the witness when he is giving his evidence. Now, if he is writing, he cannot see properly the demeanour of the witness. My impression from experience is, that the proofs so taken down are not sufficiently full, and that they are not very satisfactory. I don't mean in reference to any one Sheriff-substitute, but in reference to all the Sheriff-substitutes whom I have ever seen take down evidence.

9440. What would you suggest? Shorthand writing?—Yes, a shorthand writer; the Sheriff having the opportunity of seeing the witnesses while he dictates to the shorthand writer. I think that by shorthand writing a proof would be taken much more quickly than it is now, and much more satisfactorily; and if there were attached to the Sheriff-clerk's office a young man who could be taught shorthand writing, the expense would be a trifle.

9441. *Mr. Baxter.*—In that way the Sheriff-substitute would have a better opportunity of observing the demeanour of the witnesses, and the agents would be aware of what was taken down?—Certainly. You refer to one great fault of the short way of taking the notes. An agent is examining a witness, and he does not know what the Sheriff-substitute is taking down. It is read over, but I have never seen a case, where I have been leading evidence, in which I have not observed that something has been omitted which in my opinion was important; but it is all read over at once from beginning to end, and you cannot go back upon everything. Besides, the present system does not give to the judges on appeal the same opportunity that the Sheriff-substitute has of judging of the case, because the Sheriff-substitute supplements his notes by his memory of the evidence, and of the demeanour of the witnesses.

W. F. Ogg.

9442. How does the Debts Recovery Act work with you? Have you had any cases under it?—Oh yes.

9443. Have you had any case appealed under it?—No. I know that the older members of the profession are of opinion that it is the beginning of a system which they think is intended to degrade the Sheriff Court practitioners; they think that it will probably ultimately drive the best men from the Sheriff Court practice, and that it will fall into the hands of inferior practitioners. In all large bodies of procurators there are two or three who fall out of the ranks, and we know very well that it is from them that all or most of the objectionable litigation springs,—actions of damages, and so on, that ought never to be brought. Were all practitioners of that class, the result would be serious.

9444. *The Chairman.*—What is the feature of that Act which they apprehend as likely to lead to that result?—It is that the fees are less, in proportion to the work done, than those allowed to the Sheriff-officer who executes the writ. Looking at what the officer has to do, and at what the procurator has to do, and measuring it by time, the payment awarded to the Sheriff-officer is higher than to the procurator. A little straw sometimes shows how the wind blows. In the Act of Parliament with reference to the taking of the University votes, a Vice-Chancellor or Sheriff who takes the votes is allowed by that Act the same fee as his clerk, viz. a guinea a day. He is always taken from the county procurators. We see also that it has been proposed the other day, by a gentleman very highly respected in the profession, as an improvement, that the Sheriff Courts should be made more inferior than they are now. The whole tendency hitherto of the policy in this country, as far as I can understand it, has been to raise the character of the practitioners in the country, and to raise the Sheriff-substitutes and the Sheriffs, in order that the tribunal, as it is increasing in importance and increasing in business, should be up to its work. If by legislation you do anything to lower the character of the procurators, I think there cannot be a greater injury done to the public.

9445. *Mr. Baxter.*—Do you think the fees under the Debts Recovery Act are not such as to induce respectable men to practise under it?—I believe that respectable men would not practise under it. They may be doing so just now as a matter of probation; but if a similar table of fees were extended to the Sheriff Court, they would not remain in it, because they would feel themselves degraded by accepting such fees. We are of opinion that the expense of litigation in the Sheriff Court ought to be reduced, and the steps of procedure reduced as far as possible, consistently with efficiency; but if you give fees that are less than tradesmen get, it is out of the question, I think, to expect that educated men will do the work.

9446. *The Chairman.*—Do you object to the principle of slump payment, which is introduced into that Act?—I don't object to that peculiarity; but many do. I think it not very fair, because in one case there may be little trouble, and in another case there may be a great deal of trouble; and, applying that principle, you may get too much for one case and too little for another. I don't think it is a just rule. It is said that the fees under that Act are similar to those in the County Courts Act; but it is not so. The County Court practitioners are well enough paid; their fees are very different from those in the Scotch Courts.

9447. *Mr. Adam.*—Supposing that proofs were to be paid for separately, by time, under that Act, would you consider the fees allowed sufficient?—I don't remember what the scale is.

9448. £4 is the maximum?—Well, for £4 the highest, or 30s. the lowest fee, you have in the first place to receive from your client a statement of his case; then you have to precognosce the witnesses, more or fewer; you have to prepare the record; you have to attend the proof; debate the case twice, once before the Sheriff-substitute, and once before the Sheriff, necessitating double preparation; besides meetings, correspondence, etc.,—the work extending over months.

9449. I was putting the case that the proofs were

W. F. Ogg.

paid for separately, and over and above the present fees. Do you think that if that were done, those fees would still be insufficient?—I think the amount of responsibility and of actual labour in preparing satisfactorily a case for trial, and attending the discussions, cannot be paid for by the fees under the Act. I think that any respectable journeyman's labour would come to much more for the same time.

9450. *The Chairman.*—Have you any other remarks on the procedure?—I think not.

9451. *Mr. Webster.*—What is your opinion as to having written argument in appeals?—We are of opinion that all appeals should be discussed in open court, as being the more satisfactory mode of proceeding. Something may escape the writer of a reclaiming petition, or answers, which in the Sheriff's view is important, and he can explain it if the argument is oral. Besides, written argument gives an opportunity of increasing the expense unduly.

9452. *The Chairman.*—Might not that evil be checked by allowing the same fees for a reclaiming petition as for an oral hearing, and that whether the petition was long or short? The fee for the speech does not depend on the length of it?—If there is to be a fee for a reclaiming petition and answers, it ought to be a rule that the fee should not be larger than the fee for the speech. But I think there is an advantage in an oral hearing over a written paper.

9453. *Mr. Campbell.*—Are you aware that in Edinburgh and Glasgow, where the appeal Sheriffs are resident, reclaiming petitions and answers are all but unknown?—I don't know that it is so, but I think it is a very good practice. They are all but unknown now with us. There is an oral hearing in almost every case.

9454. *Mr. Clark.*—I suppose in all the Sheriff Courts the oral pleading is very much in excess of the written pleading?—I should think so.

9455. *The Chairman.*—Have you any observations to make on the privileges of agents?—Our president has sent a statement to the Commission of the privileges that we claim. We have always been an educated bar. We insist upon our students attending the university for three or four years, and also attending the law classes of the university, two sessions for conveyancing and two for common law, and in most cases they come to Edinburgh as well, before they pass; so that there is full provision with us for their being properly educated in their profession.

9456. Do you deduce from that, that no one should be admitted to the profession who has not had the advantage of these studies?—No; we would not go as far as that, but we think it would be a great advantage if the educational test were raised in other places.

9457. *Mr. Baxter.*—Are you aware that under the Procurators' Act there exists a system of examination that did not exist before?—Yes, that is a great improvement, and probably that will answer the purpose. At the same time, if you can get men to enter, I don't think you can make the test too high.

9458. *The Chairman.*—Looking to that recent enactment, do you think it would be expedient that gentlemen who were admitted as Procurators in one Sheriff Court should be allowed to go and practise in another Sheriff Court,—I don't mean that they should be admitted to the benefits, whatever these may be, of the Society of Procurators, such as library and widows' fund, but that they should be entitled to practise before the court?—We are of opinion that they ought, and we are quite willing that procurators from other counties should be admitted to practise before our courts. We are of opinion that the privileges of agents should be extended to all courts, as they are in England, where the agent of the litigant is the agent in the cause. It is rather anomalous that an agent employed in the country by the litigant, and being responsible to him for the conduct of the cause, and being responsible also to the agents in Edinburgh for the costs of the cause, should not have the power of directing it.

9459. Are you aware in what court these gentlemen in England are admitted?—I understand they are admitted in London to be solicitors for any part of England.

9460. But they are admitted by the Supreme Court?—Yes.

9461. Not by any local bodies?—No.

9462. You are talking of the privileges you would give to gentlemen admitted by local bodies?—Well, if what we think the fair rule were carried out, we would have no objection to those that were qualified being admitted now.

9463. Do you think there is any advantage in the Sheriff retaining a control over those admitted to practise in his court?—I should think if any one came to any particular court from another court, he would have to be admitted as a procurator; it might be only a formal admission, but it should be such an admission as would give the Sheriff jurisdiction over him.

9464. *Mr. Baxter.*—But you don't think there should be any re-examination?—No.

9465. *The Chairman.*—Do you think that a country practitioner, even under the present system, should be allowed to follow his case into the Supreme Court?—I think he should. I don't think he would do it, probably; he would very likely employ an agent in Edinburgh, as he does now; but the advantage of the agent employed by the litigant being the agent in the cause is this, that he is then paid for the work he does. At present his account is not passed by the Auditor of the Court of Session, while he is responsible for the whole costs incurred in Edinburgh.

9466. Do you mean that he and the Edinburgh agent should both be paid?—We think that what are called extrajudicial costs should be allowed as costs in the cause; that whenever a person is completely successful in a litigation, all the proper and necessary expense incurred in that litigation should be awarded to him. It is very hard that a man should be dragged into court, to go through a long litigation, to be found in the end completely right, and yet have a large sum of money to pay.

9467. Does that imply that the country agent is to conduct the cause in the Court of Session?—No, it does not imply that he is to do it. He would only have the power of doing it. I don't think he would do it.

9468. How would he practically carry it out, if he had the power?—If he were agent in the cause, he would examine the witnesses, prepare the case, and send the precognitions to his Edinburgh agent, instructing him to do what was necessary in Edinburgh. The agent in Edinburgh would do that, and he would be paid for what he did in the cause, as would also the agent in the country, but only one account would be given in, viz. that of the agent whom the litigant employed, and that account would include the items for the work done by the agent in Edinburgh, who would be paid by the country agent.

9469. But if the country agent were himself to conduct the cause in Edinburgh, how would he go to work?—I don't see that he could conduct the cause in Edinburgh unless he were to go there.

9470. Supposing he were to go there, would he remain there while the cause lasted?—It could only be done by his going to Edinburgh altogether.

9471. By becoming an Edinburgh practitioner?—Yes; and that is a thing which, of course, he would not do.

9472. *Mr. Webster.*—Except that the accounts are not amalgamated, is not the present system exactly what you describe as the right system?—Well, it professes to be that; but in point of fact it is just this, that the country agent's account is disallowed, except for a letter or two.

9473. *Mr. Baxter.*—I suppose you find few clients in the country who would be able to conduct their own defence?—Even intelligent merchants frequently don't know the points of their case. They will tell you the whole story, but they would be quite incapable of conducting the defence.

9474. *The Chairman.*—I suppose you don't profess to be able to give us any information about criminal

matters?—No; except that we reported that the Sheriff should have power in his ordinary jurisdiction to sentence to penal servitude, and that in his summary jurisdiction he should be allowed to impose sentences of six months' imprisonment. The reason of that suggestion is, that a vast proportion of the prisoners brought up in the Criminal Court are professional thieves. They live by plunder; they are well known to the police; and they come up time after time for conviction, and are sent to prison. It is a great expense to the country to have them confined in prison waiting the assize, and then there are all the expenses connected with their conviction. Perhaps nine-tenths of the criminal cases are cases which come from what are called the criminal population.

9475. *Mr. Baxter.*—And the cases are very simple in their nature?—Yes; thefts.

9476. *The Chairman.*—Have you a Bailie Court in Aberdeen?—Yes; and it has an assessor; but there are no civil cases now brought before it.

9477. *Mr. Webster.*—There is a Dean of Guild in Aberdeen?—Yes.

9478. Is there a Dean of Guild Court?—It does not hold sittings, but the Dean exercises his jurisdiction. I think it would probably be an improvement if the jurisdiction of the Dean of Guild were extended to the Sheriff. I had a practical exemplification lately of the inconvenience of the present system. A man proceeded to take down a house, half of which belonged to him, and the other half to another person; by his operations the house was likely to fall, and I had to apply to the Sheriff for an interdict. He then applied to the Dean of Guild for an inspection under his authority. So there was a process going on before the Sheriff, and another process going on before the Dean of Guild, which was awkward. *W. F. Ogg.*

9479. *The Chairman.*—You used the expression that the jurisdiction should be extended to the Sheriff. Did you mean transferred to the Sheriff?—Yes.

9480. *Mr. Baxter.*—Do people who intend to build houses in Aberdeen apply to the Dean of Guild for warrant to build?—No; not to the Dean of Guild. By a Police statute they are bound to get the authority of the Commissioners of Police, and to submit their plans to them.

9481. *The Chairman.*—Would you abolish that?—No. That is a statutory power, and it is useful; and the commissioners have power, wherever there is an encroachment on the street, or wherever they require part of the ground for public purposes, to take it at a valuation, as under the Lands Clauses Act.

9482. Do you think the Commissioners of Police are good judges as to regulations for building?—I think they are good enough judges of what is useful for the community. They only interfere in cases where it is for the public advantage to widen a street, and where they deem it expedient to take part of the property of a person proposing to build; but they are not allowed to interfere till he does propose to build. I think it is a useful power.

SATURDAY, 6TH FEBRUARY 1869.

Members Present:—

LORD COLONSAY.
THE LORD JUSTICE-GENERAL.
THE LORD JUSTICE-CLERK.
LORD BARCAPLE.
E. S. GORDON, Esq., Q.C.
A. R. CLARK, Esq.
JAMES CAMPBELL, Esq.
W. SMYTHE, Esq.
GEORGE HARRISON, Esq.
JAMES ADAM, Esq.
A. B. SHAND, Esq.
T. G. MURRAY, Esq.
JAMES WEBSTER, Esq.
J. B. BAXTER, Esq.
ADAM PATERSON, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

JAMES WHITE, Esq., examined.

9483. *The Chairman.*—You carry on business in Glasgow?—Yes; I am a manufacturing chemist in Glasgow, a partner of the firm of John & James White. *James White.*

9484. You are a member of the Merchants' House?—Yes; and I am a director of the Chamber of Commerce. I may explain that I practised professionally in Glasgow as a partner of the firm of Couper & White, writers, for about seventeen years.

9485. As a practitioner before the Sheriff Court?—Yes.

9486. When did you cease to be so?—In 1851. I was so from 1834 to 1851.

9487. You have had an opportunity of observing the working of the Sheriff Court in Glasgow?—Yes, to a considerable extent, and also from communication with mercantile men, having a knowledge of the general opinion that prevails in regard to the efficiency of the court.

9488. Have you any observations to submit as to the constitution of the court, as consisting of the Sheriff and his substitutes? The Sheriff has three substitutes in Glasgow?—Yes. I don't see that any improvement almost could be made upon the system of the Sheriff-substitutes, with an appeal to the Sheriff-deputes in civil cases; but I think that the number of Sheriff-substitutes throughout the country might with advantage be reduced, and possibly also the number of Sheriff-deputes, throwing different counties together.

9489. Do you think that could be done in regard to Lanarkshire?—I don't think it could in Lanarkshire, because, with the amount of work which the Sheriffs have to do there, it would be hardly practicable to throw more work upon them, or to reduce the number of substitutes. In fact, if the work of some of the other courts were thrown on the Sheriff-substitutes, they would probably have more to do than they could overtake, and it would be necessary to have an increased number of them.

9490. That is in the city of Glasgow?—Yes.

9491. As to Hamilton, Lanark, and Airdrie, do you think that it is expedient to have a Sheriff-substitute at each of these places?—I think so. In these districts there is a large mining population, and a considerable amount of commercial wealth.

9492. *Mr. Paterson.*—Does that hold equally in regard to Lanark?—I am not quite prepared to go into details as to the districts from which the substitutes should be taken away. But I know, for instance, that in Bute the Sheriff-substitute has comparatively little to do. I would therefore be disposed to throw more

James White.

work upon an efficient Sheriff-substitute in one district, and to amalgamate various counties or districts. I see no difficulty, for instance, in the Sheriff-substitute of Renfrewshire undertaking the work at Bute.

9493. *The Chairman.*—Do you mean the Sheriff-substitute at Greenock?—Yes.

9494. Do you think he could undertake the work of Paisley also?—I hardly think so, as Paisley is a large place, and in Greenock a good many maritime questions arise; but I am not prepared to give an opinion in detail as to these matters.

9495. You merely give a general opinion that there might be a reduction of the number of Sheriff-substitutes?—Yes.

9496. You think the system otherwise is a good system?—I think so. I think it is an immense advantage to have a simple and expeditious appeal from the Sheriff-substitute to the Sheriff-depute.

9497. Do you form that opinion entirely from your own observation, or is it partly founded on what you understand to be the feeling of mercantile men in Glasgow?—Both from my own experience, and also from communication with other mercantile men in Glasgow. As to the Sheriff-deputes, I would be very much disposed to reduce their number. Of course, necessarily, their salaries must be increased, because if you give a man more work to do, you cannot ask him to do it for the same remuneration; and in regard to Sheriff-deputes I am very much disposed to have men in that position who have had large experience and practice in the courts before their appointment as Sheriff-deputes.

9498. *Mr. Adam.*—Would you think it an advantage that they should still continue to practise?—No; what I propose would preclude them from practising altogether.

9499. *Mr. Baxter.*—Would you give them larger districts than they have just now?—Yes.

9500. *Mr. Webster.*—So as to be fair occupation for their whole time?—I would look very much to the extent, population, and valuation of the districts where they were, because in many cases I am satisfied that Sheriff-deputes have not that amount of work that they could undertake; from their professional occupation otherwise in Edinburgh, they are very often unable to overtake the work that falls on their shoulders, and a good deal of delay is necessarily caused by their making their judicial position subordinate to what they feel to be their personal position as advocates practising at the bar.

9501. *The Chairman.*—That is the ground on which you form your opinion?—Yes.

9502. *Mr. Baxter.*—You propose that their whole time should be devoted to their appellate duties?—Yes.

9503. And you would pay them accordingly?—Yes.

9504. Have you considered where you would place them, or do you think they should reside in Edinburgh?—I don't see any advantage in fixing their place of residence. Edinburgh is perhaps as central a point as any; and from associations, as well as local interest, they would probably mostly centre there. There would be this advantage, that in cases of difficulty they might be able to consult with one another, if they had doubt or hesitation in their own minds as to the course they should take in any particular case.

9505. *Mr. Adam.*—Supposing you were to diminish the number of Sheriff-substitutes, have you considered how the summary criminal jurisdiction would be provided for in such a case as taking away the Sheriff-substitute from Bute?—I think the facility of getting from Greenock to Bute is now so great that there would be no difficulty about that.

9506. You think the Sheriff-substitute at Greenock might go to Bute to try the summary cases there?—Quite well; and the facility of travelling all over the country by railways is now so easy and cheap, that I don't think there would be any difficulty about it.

9507. You would not take the prisoners to Greenock to him?—If it were thought better to do so, I think the one would be as easily done as the other. It depends very much on the amount of business.

9508. *Mr. Webster.*—If you took the prisoners to Greenock, you would require to take the witnesses there also?—Clearly.

9509. *Mr. Adam.*—That would be a great expense?—I suppose you get from Rothesay to Greenock for sixpence or a shilling, so that it is not a very serious matter.

9510. Might it not be serious for a prisoner to take all his witnesses that distance?—A prisoner has not generally very many witnesses to take. The witnesses are generally on the other side.

9511. But if the prisoner had witnesses to take, it might become a serious difficulty?—It might; but the same question arises in that district just now with regard to Arran. There is no resident Sheriff-substitute there; and throughout the whole of the country you might just as well have a Sheriff-substitute at every little village for the facility which would arise of trying all questions which might come up. It is only on the general principle that I would be disposed to speak, rather than with reference to the details of each individual case.

9512. *Mr. Baxter.*—In the appellate courts would you have the Sheriffs to sit singly or cumulatively?—I don't see much benefit to be got by having two Sheriffs sitting in the appeal court.

9513. Then you think they should sit singly?—Yes.

9514. *The Chairman.*—The alteration that you would make would be to reduce the number of Sheriff-substitutes, and to reduce the number of Sheriffs, by enlarging the area over which they would exercise jurisdiction; and you would prohibit the Sheriffs from practising at the bar?—Yes.

9515. You would allow them to reside in Edinburgh, and you think there would be an advantage in their doing so, because they would have an opportunity of consulting with each other?—Yes; and Edinburgh is so central that they could go to any part of the country with facility.

9516. Do you think it is also a reason for their residing in Edinburgh, that they would have an opportunity of seeing the practice of the courts of law, and of keeping their minds up with the progress of cases there?—I think that would be an advantage, although I would consider it such an advantage as to compel them to reside in Edinburgh. I would leave that very much to the individual Sheriff.

9517. Have you considered the question of extending the jurisdiction of the Sheriff?—My feeling is, that the jurisdiction of the Sheriff should be very materially extended.

9518. In what respect?—In regard to questions of heritable right that arise, which are practically precluded from his consideration at present. Whether that should be to an unlimited amount or not, it is perhaps very difficult to determine; and the change might possibly be too great from having no heritable jurisdiction at all, to a jurisdiction of an unlimited extent; so that possibly, in the meantime, it might be advisable to limit it to some extent, making it somewhat of a tentative measure, rather than a completed or fixed rule.

9519. Have you formed any notion as to the extent to which it should be limited in the meantime?—My own feeling is to make it unlimited, because if a Sheriff-substitute or a Sheriff-depute is allowed to have an unlimited range in regard to moveables, I don't think there is any peculiar reason applicable to heritage why they should not have the same unlimited jurisdiction in disposing of questions of a heritable nature.

9520. When you said that perhaps it might be as well in the meantime, as a tentative measure, to limit it in some degree, had you any idea as to the extent of the limit?—It occurred to me that questions of £500 or £1000 of value, and an equivalent of say 5 per cent of rental, might be a safe measure to commence with.

9521. *Mr. Campbell.*—Don't you think the difficulty would be very much obviated by giving either party to the litigation a right to transfer the case, without any reason assigned, at once to the Court of Session, if he was dissatisfied with the tribunal to which he was called?—Do you mean that, if a pursuer had raised an

action in the Sheriff Court, it should be transferred to the Court of Session of consent of parties?

9522. No; that the defender might, by putting in a minute, have a right to get the case transferred to the Court of Session?—I don't see why a defender more than a pursuer should have that in his power.

9523. As a tentative measure it would give a defender a right to take the case to another court; and if defenders generally did not do so, would that not show that the litigants were satisfied with the Sheriff Court as a tribunal for disposing of these questions?—I cannot see any reason why the public should be dissatisfied with the judgment of the Sheriff on a question of heritable right, any more than in a question regarding moveables.

9524. *The Chairman.*—You are aware that in cases above £40 in the Sheriff Court, when a proof is ordered, it is in the power of the party to remove the cause to the Court of Session?—That is by advocation.

9525. Would you give the same kind of power in reference to questions of heritable right?—Does that mean before the merits of the question have been disposed of?

9526. Yes?—The practical working of that had not occurred to me; but I do not see any difficulty in acceding to it. I don't see any reason against it.

9527. *Mr. Campbell.*—If you were informed that that power was scarcely ever exercised of late years by the litigants, don't you think that the question I asked before, as to a similar power being conferred with regard to questions of heritable right, might be a good mode of trying, as a tentative measure, whether the Sheriff Court was a satisfactory tribunal for disposing of questions of heritable right?—My feeling is so strong in favour of the Sheriff Court, and I have such a dread of the Court of Session, that I would rather be disposed to let the case remain within the jurisdiction of the Sheriff, than even give the defender power to take it to the Court of Session. I would give it a fair trial, making it a compulsitor on the parties to take the decision of the Sheriff.

9528. *The Chairman.*—And then have a second run in the Court of Session?—To a certain extent I would preclude that too. I would be very much disposed to extend the power of the Sheriff, and to preclude appeals or advocations on questions involving questions not exceeding £100 or £200 in value. I would rather have these final in the Sheriff Court, with the decision of the Sheriff-depute, and preclude the parties from carrying such cases any further.

9529. You would limit the finality to questions of that value?—Yes.

9530. Would you apply the same rule to heritage?—I would.

9531. *Mr. Webster.*—Your view would be, to have all the facts investigated in the Sheriff Court?—Precisely so.

9532. *Mr. Shand.*—Would you make the Sheriff's decision final, both in fact and law, in regard to such cases?—Both in the one and the other.

9533. Do you think it would be satisfactory to the mercantile community, that there should be no power of appeal in cases of that value?—That subject was considered at a meeting of the directors of the Chamber of Commerce the day before yesterday, and the members had a considerable variety of opinion as to amount; but they had no difference in opinion that the power of appeal should be fixed at a higher limit than it is just now.

9534. What do you understand the limit to be just now?—£25.

9535. What was the range of sums that was suggested?—I think the general feeling seemed to be something like £100; but my own feeling is, that it might be extended with perfect safety to £200.

9536. Do you not think that if an action for £200 was raised, which was of much importance to the defender, and the defender was anxious to have a decision of the Supreme Court upon it, he should have a power of removing it from the Sheriff Court?—I would say not. In my experience, questions of that kind often arise from feeling, and the litigation is carried on, not so much for the real value of the question, as ultimately for the expenses that have been incurred.

9537. In many cases, may not such a sum as £200 involve a party's whole means almost?—So it may; but supposing he loses it in the Inner House, the expenses are by that time so enormous that he may be a loser in the end; and if he is to be ruined, it may as well be done early as in the end.

9538. The case you put involves his going through two courts, whereas the case I am putting is, that he should be enabled to remove the action at once from the Sheriff Court to the Supreme Court?—And then to the House of Lords. You would leave that open too?

9539. That may be another question?—Well, my feeling is, that great benefit would accrue from prohibiting appeals in questions that do not exceed in value from £100 to £200.

9540. And you would not couple with that, a privilege to the defender, if he thought the case of vital importance to him, of removing it from the Sheriff Court before it had gone through all its stages in that court?—No, I would not.

9541. *Mr. Gordon.*—Why would you give the pursuer the privilege, and not the defender?—They are both in *pari casu*.

9542. The pursuer selects his tribunal; why should not a similar privilege be given to the defender?—That would undo the whole matter; because, if the defender is to be allowed to take the case to the Court of Session in the outset, the finality of the Sheriff's judgment is at an end.

9543. Where a party did not wish the cause to be concluded by the Sheriff's judgment, but wished the opinion of a higher tribunal, would you not give him a power of transferring it to that higher tribunal?—I don't look to the position of the pursuer or the defender individually, but to the general advantage that would accrue to the community, whether a party is pursuer or defender; and I think it would be of great benefit, if the finality of the judgment of the Sheriff were recognised by both parties before they engaged in the lawsuit.

9544. *Mr. Webster.*—You would have all such cases brought before the Sheriff?—Yes.

9545. *The Chairman.*—Would you preclude any case beyond £200 from being brought into the Court of Session?—No; I don't think I would do that either.

9546. Then you give the pursuer a choice of his tribunal?—Yes.

9547. But no choice to the defender?—No.

9548. *Mr. Baxter.*—If the defender had a power of removing a case in its first stage, would that not be giving the power of selecting the tribunal to the defender?—Yes, clearly it would.

9549. *Mr. Paterson.*—Supposing a defender to be convened before the Sheriff in an action which ostensibly involved £50 or £100, but really a question of heritable right, might it not be that the decision of that question would settle the validity of his title to a large estate? The rent of one farm might be selected to try the whole question?—You mean, holding it as *res judicata* in any other like question that might arise?

9550. Holding the decision for what it might be worth?—I don't see that you can preclude such cases as that from arising.

9551. Would you not, in that case, give the defender a right to remove the case at a preliminary stage to the Supreme Court?—It would be very difficult, I think, to provide for all such questions.

9552. The question as to the validity of a proprietor's right to a large property, might be brought by a multiplepoinding raised as to the rent of one tenant. Would that not be practically giving the Sheriff jurisdiction to an unlimited extent, unless you give the defender power to remove the case to the Court of Session?—I don't think any drawback would arise from that. My feeling would be, on principle, to extend it unlimitedly; but as a prudential and tentative measure, I would be inclined to fix the value at £500 or so.

9553. *The Chairman.*—There might be some difficulty as to fixing the value of the subject; because, supposing it were part of an estate only that was in issue, and

James White.

that the result of the loss of that portion might be material as regards the rest of the estate not in issue, would you preclude the party from removing it to the Court of Session?—That is one of the drawbacks in limiting the amount, certainly; but I think that might be got over. We have the valuation roll and other means at hand to ascertain the value of the subject at issue.

9554. *Mr. Harrison.*—If means could be found to cheapen and shorten procedure in the Supreme Court, would that modify your opinion as to making the decision of the Sheriff Court final?—No, it would not. I don't think it is possible to cheapen it, and to accelerate the procedure to such an extent as ever to make the Court of Session a desirable court for questions of such an amount.

9555. You think that the majority of mercantile men, whether as pursuers or defenders, would rather submit to the risk of an occasional wrong decision, for the sake of a speedy final judgment?—Most assuredly.

9556. *Lord Barcaple.*—Do you confine that to mercantile men?—No.

9557. Is there any difference in that respect between mercantile men and other men?—Sometimes a landed proprietor may have nothing else to do but a good-going law plea, and having nothing else to do he can afford it; but a mercantile man has other things to look after, and he has a dislike to get into litigation. In an immense number of cases in Glasgow, the parties, instead of getting involved in a law-suit, the end of which they don't foresee, enter into a submission, or compromise the case. In my professional experience, I always invariably recommended the parties to make a considerable sacrifice rather than go into the Court of Session.

9558. Are there many submissions in Glasgow?—A great many questions of a commercial character are submitted to commercial men.

9559. *Mr. Campbell.*—Are there many submissions to lawyers?—There are a good many.

9560. *Lord Barcaple.*—To lawyers in Glasgow?—To lawyers practising in Glasgow.

9561. Submissions of commercial questions?—Yes.

9562. Questions between merchant and merchant?—Yes.

9563. Or between merchant and customer?—No; they are more between merchant and merchant, and merchant and tradesmen.

9564. Merchants and tradesmen whom they are supplying?—Yes; or contracting with.

9565. Has that kind of reference to lawyers been increasing or diminishing?—Submissions generally, I would say, have been increasing. I cannot say whether the number to lawyers has been increasing or diminishing. I would say there are more submissions, but probably there are more questions arising.

9566. Are there many submissions from mercantile men in Glasgow and the west of Scotland to members of the bar?—I don't think it.

9567. Have there been more in your recollection than there are now?—I don't think it. I think matters are very much as they were.

9568. And you think they are few in number?—I would say they are few.

9569. Very few?—Very few in my experience. There are a number of cases where mercantile men agree upon a statement of the case, without pleadings or anything of that kind, similar almost to taking the opinion of counsel, and they send the case to counsel in Edinburgh as a joint case for opinion; and they are guided by that. One of the great advantages which I think a commercial community feel they derive from that mode of settling their cases is that the decision of the referees, or of the oversman, as the case may be, is final, and the case cannot go beyond that.

9570. *The Chairman.*—You have spoken of extending the jurisdiction of the Sheriff in heritable matters. Are there any other cases to which you would extend his jurisdiction?—Yes; I would likewise extend it to cases of divorce and legitimacy.

9571. And declarator of marriage?—Yes.

9572. To questions of status?—Yes.

9573. *Mr. Webster.*—Would you extend it to protection of a wife's earnings?—Yes; and to separations.

9574. *The Chairman.*—Is there any class of cases to which you would not extend it?—I am not aware that there is any class of cases that I would exclude from the Sheriff's consideration.

9575. *Mr. Paterson.*—In your recollection of your professional experience, would you say that cases were as carefully and exhaustively prepared for judgment in the local courts as they are in the Court of Session?—I would not say that they were so in my day; but great improvements have been made since that time both in the procedure in the Sheriff Court, and also in the status of the procurators practising before the Sheriff Court.

9576. But is the present system in the Sheriff Court, with one individual agent on each side, equal to that in the Supreme Court, where you have counsel, one or more, and an agent on each side?—I would not say that it is quite equal to it. With a Glasgow agent, and an Edinburgh agent, and an Edinburgh counsel, you should have more wisdom than you would have in the head of one Glasgow procurator alone.

9577. Might not an important case, involving large interests, suffer in its preparation, and the ends of justice suffer by its being final in the Sheriff Court?—I don't think it would.

9578. *The Chairman.*—Would you have the discussion before the Sheriff on appeal from the Sheriff-substitute to be oral or written, or either the one or the other according to circumstances?—There are advantages in both ways. There are some agents who are not good hands at speaking; and there are some other agents who are not good writers. I would leave it very much to the consideration of the Sheriff which he might find most beneficial. As a rule, I think the oral method is better. You have the advantage, in the oral discussion, that if any point of doubt or difficulty occurs to the Sheriff's mind, he has it in his power to set it at rest on the instant, whereas with written pleadings he must just read the paper through, and has no opportunity of asking any question, or correcting any matter of fact on which he has had difficulty.

9579. Would you suggest any change on the system of pleading,—writs or appeals?—I cannot say that my knowledge of Sheriff Court practice now is such as would warrant me in making any suggestions as to the internal management of the procedure in the court, excepting this, that I would do everything possible to prevent delay and save expense to the parties, because that is the great source of complaint in all judicial proceedings on the part of the commercial community.

9580. They want cheap and speedy decisions?—Yes; and it seems to me, from my knowledge of some cases that have occurred, that that can be got, and has been got elsewhere, and I don't see that it should be impossible for Scotchmen to obtain the same rapidity and the same economy in their judicial procedure.

9581. *Mr. Campbell.*—Are you acquainted with the provisions of the recent statute for the recovery of certain debts?—I have had no personal experience of it; but as far as my knowledge goes, the community don't seem to be satisfied with it.

9582. *Mr. Smythe.*—To what do you refer when you speak of speedy and cheap justice elsewhere?—Well, there is a case that gave me a very strong impression of the advantage of the English system over the Scotch, —a case that we ourselves had some years ago, when we raised an action in the Court of Queen's Bench for a sum of £1500. The action was raised on the 14th of March 1857; the whole proceedings were completed, and the case put down for trial on the 30th of June of the same year; but the trial was adjourned on that day, and the case was tried on 8th July, before Lord Campbell. It was one of six cases tried by jury before him on the same day. Three or four of them were disposed of after full investigation, and ours came on at a quarter past two o'clock; and I think we got our verdict by a quarter to four, or thereabouts.

9583. *Mr. Baxter.*—Were you present?—Yes.

9584. Did it satisfy you?—Perfectly.

9585. *Lord Barcaple.*—What was the nature of the case?—It was an action of damages for breach of contract.

9586. What was the nature of the contract?—It was a written contract to deliver a certain quantity of goods within a certain time.

9587. What was the real dispute between the parties?—In the first place, the defender disputed that we had sustained any loss by non-implement of the contract; and the question came to be, whether he was bound to deliver within a specified time, and to deliver a specific article.

9588. *The Chairman.*—That would appear in the writing?—That appeared in the writing. It was not a formal contract; it was in correspondence.

9589. *Lord Barcaple.*—And the jury, under the direction of the judge, determined that point?—Yes.

3590. *Mr. Shand.*—How many witnesses were examined?—Four witnesses were examined. The examination of the witnesses, the opening speech of the defender's counsel, the charge of the judge, and the verdict of the jury, all took place within something like a couple of hours.

9591. *The Chairman.*—Had the defender no witnesses?—There were two witnesses for the pursuer, and two for the defender.

9592. Was that as to the amount of damage?—It was.

9593. *Lord Barcaple.*—Were you for the pursuer, or for the defender?—We were ourselves the pursuers.

9594. Did you gain or lose the case?—We gained the case.

9595. Do you remember when you got your costs taxed?—The verdict was given on 8th July, and we got our costs taxed, and the sum due us was paid on the 24th July.

9596. Before the long vacation?—Yes.

9597. *Mr. Webster.*—Can you give us any description of the other trials which preceded this?—They were very much questions of a similar kind,—commercial questions as to the validity or non-implement of contracts, some of them for smaller sums, £60 to £100. I don't think any of them were for such large sums as ours.

9598. Were any of them for goods sold and delivered?—I cannot charge my memory with the particulars.

9599. *Mr. Shand.*—Were there witnesses examined in them all?—In some there were no witnesses.

9600. And in those in which witnesses were examined, there were very few witnesses?—Yes.

9601. *Lord Barcaple.*—Where was the trial?—In London.

9602. At Westminister?—No, it was in the city.

9603. Was it in term time?—It was in July.

9604. *Mr. Paterson.*—What were the total costs on both sides?—I cannot tell you that; but the costs we recovered amounted to £26, 9s.

9605. The pursuer's costs, as got from the defender, were £26, 9s.?—Yes.

9606. *Mr. Baxter.*—Had you to pay any extra costs?—Yes, we had; but I don't recollect the amount. There was an account that we paid; but it involved a number of other questions in which our London solicitor was employed.

9607. *The Chairman.*—Was the £26, 9s. the expense of the whole case, or the expense of the day?—It was the expense of the whole cause that we recovered from the defender. The expenses otherwise that we paid came to £83, 3s. 9d.; but that included fees of professional witnesses who had not been examined, and of other witnesses who came up to attend; but our solicitor in London said it was quite unnecessary to examine them.

9608. *Lord Barcaple.*—Do you mean that, in consequence of their not being examined, you could not put them in your bill of costs?—Yes.

9609. Do you understand that to be a fixed rule in England?—I don't know; but it was so in our case.

9610. Did you put them in, and were they struck out?—I don't think it.

9611. *Mr. Adam.*—What was the amount at issue in that case?—The sum claimed was £1500, and we recovered £869, 14s.

9612. *Mr. Shand.*—Does the £83 represent the whole costs you had to pay?—Everything.

9613. *Mr. Gordon.*—You said it was put down for the 30th of June?—Yes, it was put down first for the 30th of June.

9614. Were you kept in attendance from that time forward?—No, I came home that night. I went up by the evening train two days before, and when I heard that from some cause or other the case was not to come on, I returned home the next night.

9615. When was it next put down?—A week afterwards.

9616. *Mr. Murray.*—How did you do with your witnesses?—The witnesses were not called up to London on the first occasion. We were to telegraph for them.

9617. *Mr. Gordon.*—What was the commodity?—Chromate of iron,—an article which we dealt in.

9618. *Mr. Adam.*—Have you any experience in any case which you lost in England?—That is the only case I have had in England.

9619. *Mr. Baxter.*—Had you ever a jury trial in Scotland?—I never had a jury trial in Scotland myself; but I know sufficient about them to deter me from entering on any jury trial in Scotland.

9620. *Mr. Paterson.*—Is the case you mention a reported one?—Yes.

9621. What was the defender's name?—Guistiniani, a Greek.

9622. *The Chairman.*—Was there any concession in the course of trial?—No. The reason why the sum we got was less than the sum claimed was this, that independent of the breach of contract, we had supplied ourselves with the article from another source, and paid an increased price for it, which entitled us to compensation for that from the defender. In addition, we maintained that the value of the article we got was greatly inferior to the article which we should have got, and that the defender was bound to indemnify us for that difference. But unfortunately—I don't know from what cause—the two samples of chromate of iron sent up to the chemists had got displaced, and we found it our interest, as we had not evidence at hand, and could not repeat the analysis in time for the trial, to forego asking that, and rest satisfied with the reduced sum.

9623. *Mr. Murray.*—Does your experience entitle you to say that that is a fair sample of jury trial in England, in regard to expense?—No. I am not prepared to say that. I only give it as an illustration of the difference in point of rapidity and economy as contrasted with Scotland.

9624. *The Chairman.*—From the nature of your business, you probably took some interest in the question of Mr. Young's patent?—Yes.

9625. Are you aware that there was a trial as to that patent in the Court of Chancery?—Yes.

9626. Are you aware how long that question lasted?—I don't recollect at this moment.

9627. Are you aware that it lasted upwards of thirty days?—I know it was a very protracted trial.

9628. Are you aware that there was a trial as to that patent in Scotland?—Yes.

9629. Are you aware how long it lasted?—It was not so long.

9630. It was six or seven days?—Yes; but all that I mean is, that if in one court expedition and economy can be practised, it is surely possible to practise them in another.

9631. Is it your opinion that if there could be expedition and economy in one case, it necessarily follows that there can be the same in other cases?—It is not of universal application, certainly; but in my experience of jury trials in Scotland, the cases are terribly overloaded.

9632. *Lord Barcaple.*—In what way?—In the first place, as a rule, there are three witnesses cited for one that is examined, and the whole matter made of far more importance than a commercial man would be disposed to attribute to the disposal of a case of that amount.

James White.

9633. Who do you think does that?—It is a great deal attributable, I daresay, to the agents.

9634. Which agents?—The agents in Edinburgh.

9635. Do you think the agents in the country are not so apt to wish that a large number of witnesses should be sent up?—They have not the same control or say in the management of the case as the Edinburgh agent. They are very much subordinated to him in the conducting of a jury trial.

9636. They have the original patronage of it, have they not?—They may have the patronage, but they have not the carrying of it out.

9637. You think it is the Edinburgh agents that urge the bringing up unnecessary witnesses?—The conduct of the case is very much in their hands, and I daresay, from an over-zeal to gain the case, they perhaps advise the country agent rather to have too many witnesses than too few.

9638. Are you aware that there is a rule in Scotland about the costs and expenses of witnesses not being allowed unless they have been examined?—I understand that to be the case.

9639. Do you know whether that ever induces the parties to examine witnesses when it is plain that there is no use of examining them?—I have no doubt of that.

9640. I suppose you have no doubt that very greatly lengthens many jury trials?—Quite so.

9641. And increases the expenses in that way?—Clearly.

9642. *Mr. Paterson.*—Does it come within your knowledge that the client of the provincial agent often presses a superabundance of witnesses upon him in his zeal for his case?—I don't think it. In my experience I don't think the client has very much to say.

9643. *Mr. Gordon.*—In the case you mention, did you not say that there were several witnesses who were brought, but were not examined?—That was in consequence of our inability to examine them as to the quality of the ore, from the samples having got confused.

9644. And not for any other reason?—No.

9645. How many witnesses had you in attendance in that case?—I think we had three scientific witnesses, who were not examined, and other two.

9646. Were these not examined?—They were examined. There were none but the scientific witnesses on our side who were not examined. The other two were the mercantile witnesses, who spoke to the value of the commodity.

9647. *Mr. Baxter.*—And these professional witnesses would have been examined but for the miscarriage of which you have spoken?—Yes; and we expected that they would have got us £500 additional.

9648. *The Lord Justice-Clerk.*—Had you a special or a common jury in that case?—A common jury.

9649. Do you think the constitution of the juries in England and Scotland may affect the question of the length of trials to a considerable extent?—It should not do so.

9650. Do you think that juries in England make up their minds more rapidly under the direction of the judge than juries in Scotland do?—If you have a common jury, I should expect that, whether in England or Scotland.

9651. *Lord Barcaple.*—Do you think it is impossible in the Court of Session to have a simple case, such as you have been telling us about, brought to an end in the same time as that case was in England?—All I can say is, that I never knew of one.

9652. But do you think it is impossible, if the parties wish speed?—I think it is impossible under the present system.

9653. Why?—There are so many parties engaged.

9654. How are there more parties engaged in Scotland than in England?—In Scotland you have a country agent and the Edinburgh agent and counsel.

9655. Have you not in England practically exactly the same number?—Yes, you have. Therefore there must be something in the mode of procedure. I know that the papers in our case were few and little in bulk, whereas here they would probably have been voluminous and very bulky.

9656. Are you sure that, in a simple case like that, the papers would have been more than six or seven pages?—Yes; I would say so.

9657. And you are sure that it would occupy a longer time to obtain a judgment in such a case in Scotland?—Yes.

9658. Would you be surprised if you were told of cases of that class, in which judgments are got in the same time in Scotland?—I would be surprised to find that in any litigated case.

9659. You are judging from one case in England that you were personally acquainted with?—And several others that I have heard of from commercial men, who had had similar experience.

9660. Have you a large acquaintance as to the progress of causes in Scotland?—I have.

9661. And you are satisfied that parties desirous of an early judgment could not get a judgment in a simple case like that in the same time?—I hardly think so.

9662. *Mr. Murray.*—Would you be surprised if you were told that the Court of Session decided yesterday an important case relating to the means of a gentleman who died on 18th October last?—I certainly would, unless the decision was given in a case where the parties were at one as to the facts.

9663. *The Lord Justice-Clerk.*—I suppose your attention has been called to the power given under a recent Act to state a special case for the decision of the Court of Session?—I think that is a vast improvement, but I would not call that a litigated case.

9664. Why not?—Because the parties don't go through the formal steps which are gone through in the ordinary procedure before the Court of Session. The getting up of the record and adjustment of an issue for a jury trial, I have known to take a year and a half.

9665. But if parties are disposed to have a case decided by the Court of Session, and agree in presenting a case, a judgment may be obtained in a short time?—Yes; but I don't regard that as coming under the ordinary Court of Session procedure.

9666. Supposing that power exists in the Court of Session, would you say that the Court of Session procedure was necessarily dilatory and expensive?—I look upon that as an exceptional case, and I regard it more as a reference by parties to the court to decide upon an admitted statement of facts. Now, I would say that the great majority of cases that come before the court involve questions where the facts are disputed, and the difficulty is to get the parties to be at one on the facts, so as to enable the court to form a judgment on the merits and apply the law.

9667. *Lord Barcaple.*—You are speaking of the general class of cases in the Court of Session when you say that the great majority of them are cases where the facts are disputed?—Yes.

9668. Has that been the case in your experience in the Court of Session?—It has.

9669. Do you think that has been the general impression on that subject?—I really cannot speak to that.

9670. Are you aware that there is a very large number of cases in the Court of Session in which there is no dispute about the facts, involving the merits of the case?—There may be no dispute as to the facts; but it may take a very long time before the parties come to be at one as to the facts under the procedure you have just now, with condescendence and answers; and the difficulty of arriving at what the facts are, necessarily causes delay.

9671. What difficulty do you allude to?—In the outset of a case, it would often seem to turn on a very different point from what it is ultimately decided upon.

9672. Seem to whom? To the parties, do you mean?—To the parties.

9673. Then they must not understand their own pleadings?—I would not exactly say that either.

9674. Then how do they not see the point?—I have seen very often, in my experience, a condescendence in the Court of Session completely altered from what it was at first.

9675. You mean upon revisal?—Yes.

9676. Are you aware that that revisal very seldom takes place?—I believe so. I think there has been a great improvement in the Court of Session since I had experience of it.

9677. *Mr. Shand.*—You are satisfied that the recent Act contains a great many improvements?—Yes.

9678. Are you favourable to jury trial for the settlement of questions of fact?—I cannot say that I have any partiality to jury trials at all.

9679. Can you tell us what is the feeling of the commercial community whom you represent as to jury trial as a mode of investigating questions of fact?—The opinion is that it is very unsatisfactory as a rule.

9680. You mean they don't like it?—No, they don't.

9681. Have you any suggestion to make on that subject? Would you desire to see jury trial abolished, or do you look forward to see it improved and made useful?—I would be rather disposed to abolish it altogether, except in a few cases involving character, the press, insanity, or crime, and to take another mode of establishing the facts.

9682. Why?—From its very great uncertainty and its unsatisfactory character. In fact, as a rule, people have a feeling that in jury trials it is a toss-up whether they gain or lose.

9683. *Mr. Baxter.*—And there is a feeling that it is very expensive?—Yes; and very tedious.

9684. *Mr. Shand.*—But apart from the question about expense?—I think it is unsatisfactory in itself.

9685. Have you considered what you would propose to substitute for it?—No, I have not. I cannot speak as to that.

9686. *Mr. Murray.*—Did you ever hear mercantile men in England express their opinion of their own courts?—No, I have had very little experience of them.

9687. *Mr. Campbell.*—As an abstract question, is it your view that professional lawyers are better judges of evidence than juries selected at random, and put in the box?—I would say so.

9688. *Mr. Paterson.*—Would you be more content with the opinion of one judge—a professional man—than with the opinions of twelve jurymen upon matter of fact?—Do you mean a Sheriff-depute or a judge in the Court of Session?

9689. Either?—I would be much more satisfied with the verdict of the one than the verdict of the majority of the twelve.

9690. *Mr. Shand.*—Do you think it would be satisfactory, that where a judge tries a question of fact arising in a case, his decision on the evidence should be final on the matter of fact?—I think so. Do you speak of the Sheriff Court?

9691. Either of the Sheriff Court or of the Court of Session?—I don't understand that the judgment of the Court of Session is final either upon fact or law just now.

9692. Suppose you substitute for a jury a judge sitting alone, either in the Sheriff Court or in the Court of Session, do you think it would be satisfactory to the litigants that his judgment should be final on the question of fact, without review upon the question of fact, leaving a review on questions of law?—I would rather be disposed to allow an appeal on the whole case, not limiting it either to the one or the other, in the same way as you have an appeal from the Sheriff Court to the court here on the evidence adduced; the court judge of the value of the evidence, and decide the principle of law as applicable to the evidence which, in their opinion, establishes a particular fact.

9693. Are you aware that a very large part of the expense of litigation at present arises from the necessity for recording evidence at length, and printing it, and making it matter of discussion at different stages of the review of the case?—It does, no doubt.

9694. Is that not a very great evil?—Yes; but I don't see how you can very well avoid it.

9695. Would you prefer that that evil and that great expense should exist, rather than be shut up to the decision of a single judge as conclusive upon the evidence as to matter of fact?—My predilection is rather to prevent appeals, and I would forego something to attain that end. *James White.*

9696. But you cannot say that you think it would be satisfactory to hold the decision of a single judge as final?—I don't see why there should be any greater objection to holding a decision final on matter of fact than on questions of law. The one hinges on the other so completely, that unless the fact is ascertained, the law applicable to it cannot be properly decided.

9697. Would you be favourable to holding it final upon the fact?—I would be very much disposed to do so.

9698. And to let the facts raise the law for consideration?—Yes.

9699. Do you think that would be satisfactory to the mercantile community?—I think so.

9700. *Mr. Webster.*—Supposing a tribunal, consisting of three judges, to sit in very complicated cases and hear all the evidence, would you be satisfied with a finding of a majority of these three, finally fixing the facts, without power of review?—I don't think there is any very great advantage to be got by the three, because ultimately it comes to the decision possibly of one of them. There may be a difference between two, and the third gives the ruling decision.

9701. *Mr. Shand.*—Would there not be so great benefit arising from a discussion among three trained minds in regard to the effect of the evidence, as to render it perfectly satisfactory that the decision of such a tribunal in fact should be final?—That might be a mode of making it more satisfactory than leaving it solely to one; but in my opinion that would not be necessary.

9702. *Mr. Paterson.*—Did it ever occur to you in your experience of jury trial in Scotland, that the verdict was, in some cases, in some degree due more to management at the bar than to what you considered the real merits of the case?—I would say that almost in every case. I think the decision of every case is attributable very much to the management of it by the counsel at the bar.

9703. Do you think that it is equally so in the Jury Court and in the Court of Session?—I would say so; and, in my experience, our first object, if we foresaw a jury trial in a case, was to secure the counsel most eminent in conducting jury cases.

9704. But do you think the court as likely to be influenced by what they hear from the bar as a jury would be?—No, I don't think so; and for that reason I would look to the judge as being safer.

9705. *Mr. Webster.*—At present, where the court is dissatisfied with the verdict of a jury, what happens when a verdict is upset is merely to land the parties in another costly trial?—Quite so; and the result of that is probably as unsatisfactory as of the first trial.

9706. *The Chairman.*—If the evidence is taken before a judge in the first instance, being a Sheriff-substitute, and he pronounces findings upon fact, you would have him do so, I suppose, separately from the law, and then to apply the law to the facts; but supposing that he has made a mistake as to the true bearing of the evidence, would you shut out all power of having that inquired into or reviewed?—I understand that the decision of the Sheriff-substitute is subject to the review of the Sheriff-depute.

9707. I rather understood, from an answer which you made to Mr. Shand, that you would hold the evidence of the first judge who heard the evidence as conclusive, without any review. Now, do you think that would be satisfactory?—I understood the case put was, if jury trial was abolished, and a case was remitted to be tried by one of the judges of the Court of Session, sitting and taking the evidence, his decision should be final upon the questions both of fact and of law, subject to review by the Inner House, both on the fact and upon law.

9708. Do you apply that to the Sheriff Court also? Do you think that the Sheriff-substitute's judgment

James White.

upon matter of fact should be final?—No; I would make it subject to the review of the Sheriff-depute as well on fact as law.

9709. You think there should be some mode of correcting anything that goes wrong?—I think it is advisable that there should. I have known a Sheriff-substitute make a mistake in point of fact, which has been corrected by the Sheriff-depute.

9710. Then the evidence in these cases must be taken down in some form or other?—Certainly; the evidence must be preserved.

9711. Are you satisfied with the manner in which the evidence is now taken down in the Sheriff Court?—I think it devolves on the Sheriff an immense amount of manual labour; and I think it might, with great advantage, be taken down by a shorthand writer, where one can be got.

9712. *Lord Barcaple.*—Have you had any experience of the use of a shorthand writer for that purpose?—None, beyond having a shorthand writer in taking down other evidence.

9713. You have no experience of it in judicial proceedings?—The only experience I have had of it was in taking down the evidence before the committee of investigation of the North British Railway, of which I was chairman, where the evidence was taken by the same shorthand writer as is now present; and it was exceedingly accurate and satisfactory.

9714. But that was not a proper judicial proceeding?—No.

9715. There was no judge conducting the case?—No.

9716. And no counsel disputing about points of competency?—No.

9717. *Mr. Shand.*—The same objection in regard to the expense of review does not apply to the Sheriff Court as it does to the Court of Session?—No; the evidence having been once recorded is laid before one judge only, and in the Court of Session it is necessary that it should be printed and laid before a number of judges?—Yes.

9718. Does that in your opinion make a difference?—It does.

9719. *The Chairman.*—Suppose the judgment of the Sheriff-substitute on fact be reviewed by the Sheriff-depute both on fact and law, and the case be appealed, would you approve of the Court of Session having the same power of reviewing on fact and on law?—Do you mean in cases where the evidence is printed and laid before them?

9720. In cases dependent on fact and law, in which a judgment has been pronounced on fact and on law by the Sheriff-substitute, and that has been reviewed by the Sheriff, and the case is appealed to the Court of Session, would you leave it open to the Court of Session to deal both with the judgment on fact and the judgment in law?—I think so.

9721. And to apply the law to the facts as they regarded them?—I think so. If you are to have a court of review at all, I don't see that you can prevent that.

9722. *Mr. Webster.*—There is such a court of review in the House of Lords, where decisions upon the law are reviewed, but not upon the facts?—Yes.

9723. *Mr. Shand.*—Do you think it would be satisfactory, that where cases have originated in the Sheriff Court, the Sheriff's judgment should be final upon the fact, and that his findings in law only should be reviewed by the Court of Session?—I don't see any advantage to be derived from that. If you are to appeal the case at all, you may as well have the appeal on the facts and on the law.

9724. If it would save the printing of the evidence and the discussion on the evidence, would that not be a great advantage?—As a general rule, I think it might be.

9725. *Mr. Gordon.*—What is your opinion as to the Debts Recovery Act?—I have no experience of it myself, but I have heard parties express dissatisfaction about it.

9726. What parties do you refer to?—Commercial men.

9727. What was the objection to it?—I can hardly go into the merits of the question.

9728. Were they practitioners who objected to it?—No, they were not practitioners.

9729. *Lord Barcaple.*—Are commercial men much in the Debts Recovery Court?—I don't think it.

9730. The cases there are about very small matters?—As a rule, I would say so.

9731. *The Chairman.*—Have you any other suggestions to offer to the Commissioners?—I think it would be a great improvement to have a stipendiary magistrate in some of the other courts.

9732. What other courts do you refer to?—The Justice of Peace Court, for instance, the Dean of Guild Court, the Burgh Court, and I think also the Police Court.

9733. Would you have a stipendiary magistrate for each of them?—That depends very much on the amount of the duty.

9734. It might be differently arranged in different towns?—For instance in Glasgow, I don't think one stipendiary magistrate could undertake the duties of the Justice of Peace Court, the Dean of Guild Court, the Burgh Court, and the Police Court. No one man could undertake the whole of these.

9735. Is there any disadvantage in having them quite separate, as they are now?—I don't think there is any disadvantage in having them separate. I understand the question to be whether they could not be combined.

9736. I understood you to say that in some places they could not be combined?—That is owing to the number of cases. No single judge could undertake the number of cases which come before these courts in Glasgow.

9737. In some places do you think the Dean of Guild Court could be dispensed with altogether?—I think so.

9738. But not in Glasgow?—I think that instead of the Dean of Guild in Glasgow, there might be a stipendiary magistrate, because practically just now in the Justice of Peace Court, and the Burgh Court, and the Dean of Guild Court, you have an assessor sitting who is in the great bulk of cases practically the judge, but without the responsibility attaching to his decisions. I think the constitution of the Justice of Peace Courts at present, at least in Glasgow, and the large towns, so far as I am cognisant of it, is of a very unsatisfactory character.

9739. In what respect?—For instance, in regard to the licensing question in Glasgow, I know that it has become a question of trial of strength between the two parties of the Justices,—one for licensing everybody and the other for licensing nobody; and at the sitting of each court there is a competition who will have the largest number of persons present of their own particular views, to dispose of the cases that come before them according to the principles they hold.

9740. Are the Justices the parties who deal with the licences in the first instance in Glasgow?—The magistrates dispose of the licences first, and there is a court of review in the Justices.

9741. Does your observation apply to the magistrates also?—No.

9742. You think they exercise their jurisdiction properly?—I think so.

9743. *Mr. Smythe.*—When you speak of Justice of Peace Courts, do you mean the Justice of Peace Courts for the city of Glasgow, or the Justice of Peace Courts for the whole county?—I am speaking of the Justice of Peace Courts for the city.

9744. You confine your remarks exclusively to them?—Yes; I speak of large towns generally.

9745. *The Chairman.*—If you think it is well done by the magistrates, and ill done by the Justices, would not the simple course be to have no appeal from the magistrates?—That is my feeling,—that in large towns the decisions of the magistrates on questions of licensing would be much better to be final than subject to the review of the Quarter Sessions.

9746. Do you think the magistrates are not open, or supposed to be open, to influences in regard to licences to parties who are the electors to civic honours?—

In my experience they are not; but if the constituencies were dissatisfied with the magistrates' conduct, they have it in their power not to return them another year to sit in council, and by that means they would have an opportunity of correcting an abuse if it did exist. In the Justice of Peace Court there is no such power.

9747. If it is by the influence of certain parties that the magistrates have been returned to office, the same influence would return them again?—In my experience I never found the magistrates subject to the same influence, or that there has been so much exertion made on the part of magistrates to get others of the same views with themselves to dispose of questions that come before them.

9748. *Mr. Harrison.*—You think the magistrates feel a greater sense of responsibility?—I think so. That is one of the great drawbacks in the constitution of these courts, that there is no responsibility in the person who pronounces the judgment, because the assessor is not responsible.

9749. *The Chairman.*—Do you mean in the Justice of Peace Courts?—And also the Burgh Court and the Dean of Guild Court in civil cases.

9750. *Mr. Baxter.*—There was formerly a great deal of civil business in the Burgh Court?—In Mr. Reddie's time there was more business in the Burgh Court of Glasgow than in the Sheriff Court.

9751. *The Chairman.*—There is little or no business now in the court of the Bailies in Glasgow?—Almost none.

9752. *The Lord Justice-Clerk.*—To what do you attribute that circumstance?—I think it is attributable to two reasons: Firstly, in the Burgh Court, at the time the business was so large, Mr. Reddie—who was an advocate at the bar—was sitting as assessor, and he stood so high in the opinion of the mercantile men in Glasgow, and the public generally, and his judgments were so much respected, that a great many parties took their cases to the Burgh Court in preference to the Sheriff Court. Now the case is altered; the assessors are not so highly qualified, the Sheriffs are regarded as more efficient than they were in those days, and their judgments carry more weight.

9753. *The Chairman.*—Is there not an advantage in going to the Sheriff Court, by reason of the facility of giving effect to the judgments?—No doubt there is.

9754. That facility does not exist in the Magistrates' Court?—It does not; but that is no reason why there should be a difference from what there was in Mr. Reddie's days as to the amount of the business conducted in the Burgh Court.

9755. Might it not make a difference in this way, that people prefer to go to the court in which they get the most speedy and effective remedy?—That may be.

9756. *Mr. Campbell.*—Is there not something in the fact, that the form of process in the Burgh Court has not been altered for many years, and that a new and improved form of process has been introduced into the Sheriff Court?—That may apply in Scotland generally; but in regard to Glasgow, I think the simple reason was, that on Mr. Reddie's death, or retirement from the judicial position he held, litigants preferred going to the Sheriff Court instead of to the Burgh Court.

9757. *The Chairman.*—Perhaps there were about the same time improvements upon the Sheriff Court?—I am not aware that there was at that time.

9758. Was there not an increased number of Sheriff-substitutes?—I think that was long after. I don't recollect the particular year that Mr. Reddie died, or that these improvements were introduced, but I think it was some time afterwards.

9759. *Mr. Baxter.*—Are you aware that the same change has taken place all over Scotland with regard to the Burgh Courts?—I believe so.

9760. *Mr. Clark.*—Is there any civil business in the River Bailie Court?—I don't think it.

9761. They don't deal with the arrestment of ships, or anything of that kind?—I don't think it.

9762. It is merely offences against the Clyde Act that they deal with?—Yes.

9763. *Mr. Paterson.*—Mr. Reddie was a member of the Edinburgh bar?—Yes.

9764. The present assessors are not so?—No.

9765. *Mr. Shand.*—You don't think there is any good reason now for endeavouring to resuscitate the Burgh Court in any way?—I don't see any benefit to be got by that.

9766. Do you think the Sheriff Court is quite efficient, and capable of doing the work satisfactorily?—Yes; and if it is not efficient it could easily be made efficient.

9767. *The Lord Justice-Clerk.*—Does your observation extend generally over Scotland, or is it limited to the case of Glasgow?—I think that over Scotland the Sheriff Court is infinitely preferable to the Burgh Court.

9768. *The Chairman.*—There is a good deal of business in the Dean of Guild Court in Glasgow?—A very considerable amount of business. It is of a kind that requires professional skill sometimes, in order that the cases may be properly disposed of.

9769. That is obtained by the constitution of the court, without the expense of remits to professional men, who would have to be paid?—Yes; but the only benefit you have by the constitution of the court is, that there are men of experience in those matters who advise with the Dean of Guild.

9770. His council?—Yes.

9771. Would you think it would be beneficial to extinguish that court, and appoint a stipendiary magistrate to do the work?—I think it would, if you could combine with that two men of skill and experience in these matters, sitting with him and consulting with him.

9772. Would you give them salaries also?—I suspect you must pay a man if you expect work from him.

9773. At present they have no salary?—No, nothing.

9774. The assessor is paid?—Yes. But in speaking of these alterations, I do not pay so much regard to economy as to the satisfactory way in which, as regards the public, the business would be disposed of, and particularly the more speedy and expeditious conducting of the cases before the court.

9775. Is the business of the Dean of Guild Court not conducted satisfactorily now?—I think it is; only there is a want of that responsibility which I think a judge should have in deciding cases which come under the cognisance of the court, because the assessor is practically the person who, as a rule, disposes not only of the questions of law, but of fact.

9776. *Mr. Shand.*—As at present constituted, is it not often a great advantage that the parties have meetings in the Dean of Guild Court with professional builders and persons occupying the position of liners?—They sit in the court with the Dean of Guild, and he has the advantage of their experience and knowledge to guide him in deciding the cases that come before him.

9777. And they also attend inspections?—Yes.

9778. Is not that a very useful thing in Glasgow, and does it not lead to the arrangement of a great many cases?—It is very beneficial.

9779. If that administration were in the hands of the Sheriff, would you not lose that advantage?—But I would be disposed to combine with that some men of experience to sit and advise with him on these questions, as there are in the Dean of Guild Court as at present constituted.

9780. But if it is working well, would it not be rash to make that change?—I don't see any pressing necessity for the change; but my feeling was to have stipendiary magistrates rather than assessors in all the different courts.

9781. But speaking of this particular institution, you have no objection to the Dean of Guild Court as at present existing, so far as its working is concerned?—None whatever. I think it is very efficient, and its judgments are much respected.

9782. *Mr. Murray.*—Would your objection not be obviated if, in the event of any question of law arising, the judgment of the Sheriff were got upon that question?—You mean, allowing the assessor to the Dean of Guild to decide the case in the first instance, and appeal to the Sheriff on the question of law.

9783. Either that, or letting any question of law go

James White.

at once to the Sheriff, leaving the Dean of Guild and his council to deal with practical matters not involving questions of law?—I have not considered the propriety of having the Sheriff Court as a court of appeal from the Dean of Guild Court.

9784. *Mr. Paterson.*—Allowing that the Dean of Guild Court in Glasgow performs its functions satisfactorily, does it occur to you that there is anything anomalous in the constitution of that court? In the first place, the Dean of Guild is elected by the Merchants' House?—Yes.

9785. And he holds office for three years?—Yes.

9786. And the liners are taken partly from the Merchants' House and partly from the Trades' House?—Yes; it is an anomalous constitution altogether.

9787. May it not happen that one or more of these liners may be contractors for the work which is sought to be authorized, in cases brought before the court?—It is quite possible.

9788. Do you understand that the jurisdiction is incompetent where a member of the court happens to be a party?—Do you mean that he should not sit, or that he does not sit?

9789. Do you understand that the constitution of the court excludes him?—Yes.

9790. Is that so in practice?—I don't think it.

9791. He may sit there though he may be contractor for the work?—Yes. And in the same way you might have a man elected by the Merchants' House perfectly incompetent to sit on questions of importance coming before the Dean of Guild Court. He is not elected chairman of the Merchants' House because of his peculiar aptitude for disposing of these questions.

9792. The Merchants' House is a large charitable institution?—Yes.

9793. Are not the Merchants' House and the Trades' House, who send liners into the Dean of Guild Court, large proprietors of property in Glasgow?—I believe they are.

9794. Supposing they require a lining, is there anything that prevents them going to the Dean of Guild Court?—I think not.

9795. You are aware that in recent years the Dean of Guild Court has acquired large jurisdiction by statute?—Yes. It is extended much beyond its original limits.

9796. Under the Glasgow Police Act?—Yes.

9797. It is mixed up with kindred municipal bodies in Glasgow?—Yes.

9798. Assuming that 1200 out of 1600 cases a year pass the bar of the Dean of Guild Court without opposition, and at an expense amounting to £3 in each case, do you think that could be obviated in any way? It has been suggested that the proprietor might deposit his plans with the city architect, and give notice to the conterminous proprietors; and if they found, on looking at the plans, that their rights were not infringed on, he should be entitled to go on; while, if they found that they had any objections to state, they should be made the parties to complain, and go to the Sheriff Court or other ordinary court for their remedy. What is your view of that?—I hardly think it would work satisfactorily.

9799. What is your objection to it?—I cannot say that I have considered the question as to the practical rectification of the constitution or work of the court.

9800. Does it not occur to you that the proprietor is sometimes placed in a wrong position in this respect,—that though he does not intend to infringe on his neighbour's rights, he must go and show that?—Quite so.

9801. Do you think he should be put to that expense?—You could hardly get rid of it. If a proprietor is going to make an alteration on his tenement, or erect a new tenement, there must be some mode of giving intimation to his neighbour of the nature and character of the alterations he is going to make, so that he may judge whether his rights are to be interfered with by the projected alterations or not.

9802. It has been proposed that the conterminous proprietors should have notice, and that they should be allowed to examine the plans in the hands of a public officer; and that, in the event of their finding their rights prejudiced, they should seek their remedy?—That, practically, is the result in the Dean of Guild Court at present.

9803. But at the expense of £3 for an undefended proceeding?—Yes. It is a form that entails a certain amount of expense; but if the defender is satisfied that his property is not to be interfered with, he does not require to incur any expense.

9804. But what I am referring to is that the pursuer has to incur the expense?—I don't see how you can obviate a certain amount of expense being incurred by the pursuer; but perhaps it might be lessened by a simpler mode of procedure.

9805. *The Chairman.*—Have you any other suggestions to make?—No.

JAMES LAWSON HILL, Esq., examined.

9806. *The Chairman.*—You are clerk to the Commissary Court of Edinburgh?—I am. I was appointed in January 1860 by the Crown.

9807. You were a practitioner before the Court of Session previous to that?—Yes.

9808. For a number of years?—Yes; for upwards of 25 years.

9809. Do you practise now in the Court of Session?—I do, having partners.

9810. Do the duties of Commissary-clerk occupy much of your time?—Yes; and I may mention that they are daily increasing. In 1860, the year of my appointment, the estates to which I gave a title to administer amounted to £1,237,772; and last year, 1868, the amount was £1,878,698. The amount of probate or stamp duty on inventories passed by the several commissary offices for the whole of Scotland, as exhibited by the Inland Revenue returns, was, in 1860, £118,030, 2s. 6d., of which the Edinburgh office contributed £24,207, being about one-fifth of the whole; and in 1868 the amount for the whole of Scotland was £154,208, 10s., whereof the Edinburgh office contributed £34,224, 10s.

9811. You are remunerated by salary?—Yes.

9812. What is the amount of the salary?—£600 a year.

9813. I believe the Commissary-clerks in the district commissariats are paid by fees?—They are. The fees drawn in their several offices are retained by them as the measure of their remuneration for the work done.

9814. Is it a uniform table of fees for all the districts?—Yes; and on 1st April of each year they make annual returns to the Exchequer, under the Act of Sederunt 19th March 1859, of the amount of fees received the preceding year. That Act of Sederunt was passed in relation to the Scotch Confirmation and Probate Act of the previous year, 1858, under which we now act, and settled the fees of the Commissary-clerks.

9815. Can you give us the amount of those fees returned by the other Commissary-clerks?—I can. The amounts they returned last April were as follows:—Aberdeen, £1020, 11s. 6d.; Argyle, £115, 10s.; Ayr, £700, 13s. 6d.; Banff, £185, 4s. 6d.; Berwick, £191, 9s.; Bute, £85, 18s.; Caithness, £79, 0s. 6d.; Clackmannan, £84, 16s. 2d.; Dumbarton, £161, 5s.; Dumfries, £346, 7s. 8d.; Elgin and Nairn, £193, 3s. 11d.; Fife, £491, 3s. 6d.; Forfar, £343, 14s. 6d. and £411, 8s. 6d.—£755, 3s.; Haddington, £129, 9s. 7d.; Inverness, £137, 17s. 5d.; Kincardine, £141, 17s. 3d.; Kinross, £21, 15s. 6d.; Kirkcudbright, £156, 16s. 9d.; Lanark, £1512, 13s. 3d.; Linlithgow, £84, 4s. 5d.; Orkney, £44, 8s. 9d.; Peebles, £104, 13s. 8d.; Perth, £557, 1s. 8d.; Renfrew, £576, 3s.; Ross and Cromarty, £138, 8s. 9d.; Roxburgh, £168, 12s. 2d.; Selkirk, £31, 12s.; Stirling, £385, 1s. 7d.; Sutherland, £36, 7s. 6d.; Wigtown, £167, 2s.; Zetland, £37, 10s. 6d.

9816. Can you also give us the table of fees?—Yes.

9817. How does it happen that so large a proportion of the whole business of Scotland is done in Edinburgh?—The wealth of the town and district is a great deal

more than one could anticipate. The English Probate Act of 1857 also made it competent for persons dying domiciled in England to have their estates given up in Scotland in certain cases.

9818. *Mr. Webster.*—Was it not that if a party dies domiciled in Scotland, and has funds here, they can be given up here; while a party dying domiciled in England has the same privilege?—Yes, that is so.

9819. *Mr. Murray.*—But Edinburgh is the *commune forum* for parties dying domiciled furth of Scotland?—Yes, or without any fixed or known domicile.

9820. And that accounts for a large amount?—Yes.

9821. Have you any idea to what extent that affects the amount?—It is not so much as might be supposed.

9822. Then the greater part of the sum you mentioned applies to parties dying within the jurisdiction?—Yes.

9823. *Mr. Webster.*—Could you easily separate the sum, so as to show how much is for the Commissariat of Edinburgh proper, and how much arises from its being the *commune forum*?—Yes. The inventories lodged with me in 1868 of parties dying furth of Scotland, or without any fixed or known domicile, amounted to £133,817, 15s. 10d., which being deducted from the total of £1,878,098, 9s. 3d., left £1,744,280, 13s. 5d. for the Commissariat of Edinburgh proper. I also find that the probates and letters of administration from English and Irish courts, which were entered and sealed in the Commissary Court of Edinburgh in 1868, represented estate amounting to £1,646,150, over and above the sums mentioned; but as these writs contain no inventory or specification of property, and only state their gross amounts, I cannot state what portion of that sum was Scotch estate.

9824. *The Chairman.*—What assistance have you in the performance of your duty?—I have a depute-clerk, and four other clerks.

9825. Is there full occupation for them?—Yes, I think so; and it requires very regular attendance, and very close attention. If an inventory and settlement is lodged in my office, I undertake that within forty-eight hours the parties shall have the confirmation or testament-testamentar ready to be given out to them, if everything is right; and if probates or letters of administration are lodged to be collated, entered, and sealed, I have them ready in twenty-four hours, they lodging a copy.

9826. *Mr. Baxter.*—Do you record all the deeds of settlement?—Yes.

9827. Whether they be recorded in other registers or not?—Invariably. The rule for that is contained in the 48 Geo. III. c. 149, § 38, which renders it imperative upon every Commissary-clerk to record all testamentary writings lodged with an inventory, as adjuncts to that inventory. This may have originated in the necessity of the Inland Revenue Office obtaining information as to how to exact legacy and now also succession duty. It is from these records that the Inland Revenue Office afterwards get their information, which we supply regularly.

9828. *Mr. Murray.*—Do you find that many principal writs are produced to you, or is it not rather the extracts of writs which have been already recorded?—The settlements as to large estates are generally in the shape of extracts, but I can't say the smaller are. I was struck one day in the office by hearing some country people come in, who had apparently brought an extract will with them, because the Inland Revenue schedule bore, in the form they give out, that an extract will might be produced; and when I had occasion lately to communicate with the Inland Revenue as to adjusting a new schedule, having in view the Act which brought heritable bonds under moveable property, on 1st January last, I suggested to the Solicitor that, although it might look a little odd, we might state in these schedules that wills did not require to be previously recorded, and extracts produced, if the principals were lodged with the inventory; and I have not the least doubt that, by and by, in a great many cases, people will bring original wills to the Commissary office, whereas formerly they recorded them before doing so.

9829. But where a will has been already recorded in the books of Council and Session, is there practically any use in re-recording it in the Commissary books? Would it not be sufficient to give a reference in these books to the record in which it could be found?—The Act was apparently framed for revenue purposes, and the Inland Revenue officers would have something to say on the subject if this were to be altered.

9830. Why cannot the Inland Revenue officers go to the books of Council and Session, as well as to the Commissary books?—They are not all recorded in the books of Council and Session.

9831. But if a deed has been previously recorded in a public register, a reference would be sufficient in the Commissary books?—People abroad, and people in England, seem to assume that they will find a copy of the will in the Commissary Office, which is equivalent to their Probate Office. From Hong-Kong I get returns of all wills recorded there sent to my office, also the wills of Scotch soldiers from the War Office, showing how much the general impression is that it is to the Commissary Office they must come to look for a will. Uniformity in the practice might, therefore, be a convenience; but to answer the abstract question, whether it is necessary to have a deed recorded twice, I would say that should not be necessary; and I don't know whether it might not be possible that records of the Commissary Office might be advanced so as to be equivalent to records in the books of Council and Session, and let the Commissary Offices transmit wills left with them, periodically, to the Register Office, or anywhere else.

9832. *The Lord Justice-General.*—Do you keep the principal writs, or return them?—I return them.

9833. *Mr. Murray.*—But practically there would be no difficulty in doing it by reference, and that would to some extent diminish the fees?—It would of course diminish the fees; but whether it would be the same practical convenience to the public I am not prepared to say, if there was no copy of a will to be found in the Commissary Office which grants the confirmation.

9834. *Mr. Baxter.*—Do you give out an extract?—No. If I am asked to give an extract, I tell people I am not prepared to say that I am entitled to do so; although, in the Probate Office in England, my extract, or what I give as an extract, with my office seal, is preferred to any extract from the Court of Session.

9835. *The Lord Justice-General.*—Are not the extracts which you send to the Probate Court in England given under the provisions of the Act of 1858?—No.

9836. For what purpose are they sent?—English practitioners wish to exhibit to the Probate Office in England that their clients have already been recognised in the character of executors in the Scotch courts, and that they have been so under a certain deed; and they come to get that deed certified and sealed by me.

9837. *Mr. Murray.*—If it is the fact that your extract is preferred in England, does that not arise from a mistake on the part of the English practitioners?—I don't know.

9838. It is an extract from a record which has not the principal deed, whereas the extract from the books of Council and Session is an extract from books which hold the principal deed?—Yes; but I am told that such is the case; and that where they send extracts, or certified copies, from the Register Office, they have to send certificates, or make affidavits, that these are the best copies they can get. That is not done with my extract.

9839. Does that not greatly arise from this, that you place a large seal on your extract?—Perhaps it may. When I entered the office, there was a large seal, but I reduced it very much, and I now only use a small impressed stamp, which is also more economical for the Government.

9840. *The Chairman.*—Is your office in the same building with the Sheriff Court?—No; it is in the Exchequer Buildings in Parliament Square, and it is in very close proximity to the Parliament House. It is a

James Lawson Hill.

very convenient office; the great body of its practitioners being writers to the Signet and solicitors before the Supreme Courts.

9841. And your records are kept there?—Yes; and I have a safe.

9842. The Sheriff is the judge in your court?—The Sheriff and his substitutes are the Commissary judges and Commissary-deputes. I may say that, practically, the business is conducted by me, as the principal Commissary-clerk; and it is only when we require to have an interlocutor decerning executors to persons dying intestate without having nominated executors, or to prove the domicile, or to restrict caution, or where there are conflicting applications for confirmation, that the interposition of the Sheriffs-commissary are required at all.

9843. When questions do arise, how are the pleadings arranged?—When conflicting petitions for the office of executor are presented, and contention ensues, it is conducted in the ordinary form of a Sheriff Court process.

9844. Do you think there would be any advantage in combining the offices of Sheriff-clerk and Commissary-clerk, or would there be inconvenience?—Judging from the importance and the extent of business in the Commissary Office of Edinburgh, and knowing something of the engagements of the Sheriff-clerk of Edinburgh, I think these offices should be kept separate.

9845. The records must be kept in separate books?—Yes; we have three sets of records—confirmations, inventories, and testamentary writings. We have continual consultations with the most respectable agents, or their representatives, asking advice how to proceed; and I have often seen two or three people at one time standing at the bar of the office getting information. A great many persons come about the office.

9846. *Mr. Murray.*—But your opinion has reference to Edinburgh alone?—Yes.

9847. *Mr. Smythe.*—How is the expense of your office paid? Who pays the rent?—The office belongs to the Exchequer; but there are some incidental expenses. I should put them, including stationery and some other things, at about £45 a year. These are the expenses of the office, the property of which belongs to the Government.

9848. *Mr. Murray.*—Your salary is paid by Government, and also the salaries of your depute, and of the three clerks?—Yes.

9849. And you pay over all the fees to the Exchequer?—Yes.

9850. Can you give us a statement of the amount of salaries, and the amount of fees paid?—The present salaries are—my own, £600; the depute, £350; first clerk, £175; second, £120; third, £120; fourth, £85, rising by £5 yearly to £100,—total £1450. The fees which I drew amounted in 1860 to £1711, 12s. 10d., and in 1868 to £2099, 9s. 9d.

9851. *Mr. Baxter.*—The salaries being the same?—My commission conveyed to me all the fees or emoluments of the office, subject, however, to the orders of the Treasury. In June 1860, after I had entered upon the duties of the office, Mr. Henderson fixed my salary at £500 only; my depute at £300; the first clerk £150; the second and third clerks at £100; and the then fourth clerk at £90. These sums were paid direct from Exchequer,—all the fees I drew, and which greatly exceeded these salaries, being paid to Mr. Henderson in Exchequer. In 1867 I waited on him, and represented that it was unequal to continue to pay me, the metropolitan Commissary-clerk, with a small salary, while all the other Commissary-clerks received the increased fees for their additional and increasing work. He would only consent, however, to my salary being raised £100, and my establishment got also small additions, making the present salaries the sums I have stated. All the fees of the office I pay over periodically to the Exchequer. I lodge them in bank every week, and I pay them over generally in four quarterly payments. They have access to my books as often as they like, and they audit these books now and then.

9852. *Mr. Webster.*—Practically, in that way your office is made a source of free revenue to the Government?—Last year they must have benefited by my office to the extent of about £600.

9853. That is at the expense of the estates of parties dying within this county, or whose inventories are given up here?—Yes.

9854. *The Lord Justice-General.*—Is there any reason why these fees should not be reduced?—The fees for granting Scotch confirmations are very much less than those charged in England for granting probates and letters of administration. The only complaint that I have heard about the fees is, that we should try to reduce them on small estates.

9855. Are they *ad valorem* fees?—Yes. They are not large. In testate successions, assuming a short deed and inventory, where the estate is under £100, the fees of my office are £1, 9s.; under £200, £1, 11s. 6d; under £300, £1, 14s.; and under £500, £1, 18s. After that amount, the *ad valorem* fee mounts up considerably. I mean the item of *ad valorem* fee on confirmation alone. But taking an ordinary estate, with an ordinary amount of writing, the fees for a confirmation in a testate estate amounting to £40,000 would be £9, 4s. In intestate successions they are much less. The fees of an intestate estate of £40,000 would be £4, 8s. 6d.

9856. Is there any reason for that?—Apparently the reason for that is, that in the schedule of fees attached to the Act of Sederunt of 1859, before referred to, there is no *ad valorem* fee on the confirmations or testament-dative in intestate succession. There is a sum of 3s. allowed for that step; and whatever be the amount of the estate, whether it be £40 or £40,000, there is no more than 3s. for the step of confirmation on an intestate estate. I never could comprehend why there should be such a difference.

9857. *Mr. Murray.*—Do these fees include the recording of the deed?—Yes, the fees I have stated include that; assuming, as I said, a short deed of say 8 pages, and a short inventory.

9858. *The Lord Justice-General.*—Then it would seem, from the examples which you have given us, that the hardship, if there be one, is in regard to very small estates?—I think so; more especially as the tendency of legislation lately has been, if possible, to relieve small estates. For instance, estates under £100 now pay no inventory duty; and in 1863 there was a Savings Bank Act, by which the savings banks managers have the power to pay sums of £50 without confirmation; also post-office savings banks can pay sums of £50 without confirmation. Poor people often get into the hands of parties who charge them very high in helping them about their deceased friends' estates; and I have seen that for an estate amounting to £66, consisting of one sum in the savings bank and £2, 10s. of body clothes, a party had an account of £8, 1s. 6d. to pay for being decerned executor, and getting confirmation. I did not see that account necessarily as Commissary-clerk, but it was shown me.

9859. *Mr. Murray.*—Is there any reason why the *ad valorem* fee should stop at £40,000?—I think not; and it does not do so in England. The probate fee in England for an estate of £40,000 would be £10, 6s. 8d.; for £100,000, £20, 12s. 6d., and so on. For letters of administration of intestate estates in England the fees are also higher: £40,000 pays a fee of £13, 11s. 3d., instead of the Scotch Commissary-clerk's fees of 3s. for the confirmation and £3 for business connected with the inventory, making £3, 3s.; and for £100,000 the English fee is £29, 1s. 3d., and so on. I think it would be a great boon to the public if confirmation could be dispensed with on estates under £100, and, in any revision of fees, to reduce the fees on the small estates 40 or 50 per cent. up to £400 or £500, and in lieu of these reductions to carry out the *ad valorem* fee on estates above £40,000 as in England, and put an *ad valorem* fee on the confirmation of intestate estates.

9860. *Mr. Webster.*—Is it not often the case that you have large sums in inventories and corresponding fees, when in the end the estate is bankrupt, and where the inventory duty is got back, but none of the fees can be got back?—No; in my experience that does not often happen. I have many a time had inventories

above £40,000, and I do not see many instances of that.

9861. Would that come within your knowledge?—Officially it would not necessarily come within my knowledge; but from living in Edinburgh, and knowing something of Edinburgh people, I am surprised at the wealth the business of the office exhibits.

9862. Do you see any reason why a tax should be levied out of an estate, by means of fees derived by this kind of procedure, for the benefit of the public, at the cost of the estate?—Certainly not; but while I speak of fees, there is one portion of the expense in Scotland which I think deserves consideration, and that is the fees and expenses attached to petitions for proving the domicile. By the Act of 1858, it is an interlocutor of the Sheriff which finds that a deceased party died domiciled in Scotland, and which is the warrant for the Commissary-clerk to include English estate, in the confirmation of an executor, whereby the executor may go with his confirmation to the Probate Court in London and have it sealed, and so take up the English estate. Now I find that, by the English Probate Act, and the practice under it, parties are not put to the same expense in regard to that matter as they are in Scotland. There an executor has only to make an affidavit that the deceased died domiciled in England, and the registrar is entitled to make what is called a notation to that effect on the probate when issuing it. All that I see on the probate to authorize me to seal it in my office, and enable Scotch property to be taken up, is the notation referred to, that the deceased died domiciled in England. The fee for that notation to the registrar in England appears to be only 5s. Now, while the Probate Act of 1858 has been a great improvement on Commissary practice in Scotland in this matter of domicile, it seems unnecessarily expensive. The procedure is a petition to the Sheriff, proof of two witnesses, and an interlocutor, all costing, I think, £4 or £5, including the fees payable to the Commissary Office of 10s., never more or less. I would suggest that, if any alteration were to be made on the practice in the Commissary Courts, Commissary-clerks should be authorized to be satisfied with an affidavit, made by the party presenting the inventory, that the deceased died domiciled in Scotland.

9863. Or a clause inserted in the oath of the inventory?—Of course; I do not mean a separate affidavit. And if I made a notation of domicile on the margin of the confirmation, it should be equivalent to the notation of domicile under the English Probate Act, that we get written by the registrars on probates coming from England. The fees of the Commissary-clerks for this should be reduced from 10s. to 5s. The number of petitions and proofs of domicile in my office last year was 95; the fees of the office would therefore be reduced £23, 15s., and the saving to the public would be upwards of £400.

9864. *The Lord Justice-General.*—You spoke of the English Probate Act: what Act do you mean?—The 20th and 21st Vict. c. 77, of 25th August 1857.

9865. Is not the thing you were speaking about just now—the mode of sending up probate to Scotland to be sealed here—provided for by the same Act of 1858 as you spoke of before?—Yes.

9866. Then what is provided by that Act is merely the way of certifying the fact of domicile?—Yes.

9867. *Mr. Webster.*—Ascertaining and certifying it?—Yes. The cause of our more expensive mode is, I think, the word 'interlocutor' in our Scotch Act. The relative Act of Sederunt to the Act of 1858, naturally provided that there must be something going before a judge before he could write an interlocutor, and therefore a petition came to be used and presented to the Sheriff-commissary.

9868. *Mr. Clark.*—Do you think it would be quite safe to let a person claiming the estate of a party who died abroad, reach the estate on his simple affidavit that the deceased was domiciled in Scotland?—I never confirm estate abroad. The inventory refers to any estate abroad, but no confirmation of it is given.

9869. But you are proposing a remedy, are you not?—Only for England; one that would put us on the same footing as the English people.

9870. Is that satisfactory?—Apparently so.

9871. *Mr. Campbell.*—Have you not known cases where a judge refused petitions to find that the party died domiciled in Scotland?—Very rarely; but there have been cases.

9872. There was a case of a young man who died in India a year ago, where a petition was refused, that the Commissary thought that he was domiciled in India. Are you aware of that case?—Yes; but we may keep in view that the 17th section of the Confirmation and Probate Act of 1858 declares that this finding that the deceased died domiciled in Scotland 'shall be evidence and have effect for the purposes of this Act only.'

9873. *The Chairman.*—Have you any other suggestion to make?—There is another expense which parties in Scotland are often subjected to in regard to eiks of confirmation. There is nothing more common than for Commissary-clerks to give eiks of confirmation of estate omitted; and if a party applies for an eik to a confirmation of English estate, I would give it to him on his proving the domicile in the ordinary way. But when that eik is taken to the English Probate Court they won't recognise it, because it does not come up to the definition of what is a confirmation in the Act of 1858; that is, because the estate which is eiked or added to the original confirmation is only English estate, and has no Scotch estate in terms of section 12. Now, I would suggest a provision that the English Probate Courts should recognise as a confirmation, entitled to all privileges, an eik, providing that the original confirmation with the eik be laid before them for seal. I think that something of that kind would get over the difficulty. The necessity for an eik is of very common occurrence; and the result of the present state of the matter, when additional English estate has been discovered, is, that parties in Scotland, in order to get a title to it, must go to the Probate Court and apply for letters of administration or probate, as the case may be, as if there had been no previous procedure, incurring very great expense.

9874. *Mr. Webster.*—And often having an extra amount of inventory duty or probate duty to pay?—Yes. There is another matter which is of daily occurrence in my office: I refer to the matter of trust funds. In England, under the 35th section of the Act of 48 Geo. III. c. 149, an English executor, producing a probate, takes up trust funds as a matter of course, and pays no duty on them. With us the law seems to be held to be, that the office of trustee being personal, the executor of a deceased party holding trust funds cannot take them up. This is a matter of daily occurrence, and it causes great expense. I think it is very often arranged that, where the parties are respectable and understand each other, the executor includes them in his own inventory, and so gets a title to them; but this is *ex gratia*, and it all causes a great deal more expense to parties in Scotland than to parties in England in similar cases.

9875. *The Chairman.*—What do you suggest?—It is very difficult indeed to suggest anything. It occurred to me that if there could be any provision that executors of parties holding trust funds might be entitled to include them in their own inventory, and realize them, to the effect of paying them over to the beneficiaries, it would go so far. The 42d section of the Act of 48 Geo. III. goes so far, but not far enough.

9876. *Mr. Webster.*—Is that not provided for by a clause in the recent Act, which enables a beneficiary to apply to the court to give a direct title, whether in heritable or moveable, where a property was vested in a trustee, or tutor, or curator?—No, it is not held to be so.

9877. *Mr. Paterson.*—Supposing it set out in the inventory that there was a certain amount of the funds on a deposit-receipt in name of the deceased, or in which he was not beneficially interested, the confirmation on that gives an executor a title to uplift the money and pay it over to the beneficiaries?—I, in my court, cannot confirm in that case.

9878. *Mr. Murray.*—The practice of the Commissary Court has always been to strike out trust funds?—Yes, from confirmation.

James Lawson Hill.

9879. *Mr. Webster.*—Is not that a very great inconvenience?—Yes. I have heard that in some Commissary Courts that is done. The Inland Revenue officers, to whom the inventories of all the Commissary-clerks of Scotland are sent at the end of every month, have told me that they sometimes see it, but it is not very regular.

9880. *Mr. Murray.*—The practice has been changed?—It was changed.

9881. *Mr. Paterson.*—Are you aware of the practice of any other court where that prevails?—I am not aware of the practice of any district Commissary Court.

9882. *Mr. Smythe.*—Could the Sheriff, as Commissary, not ordain you to alter your present practice, and to confirm in such a case?—If he gave such an order, I would attend to it; but the office of trustee seems to be regarded as personal. It was on a judgment in 1853 by Sheriff-substitute Jameson, reviewed by Sheriff Gordon, that the rule has been since acted on; and the ground of their decision was that it was a personal office, and that neither the office nor the estate connected with it transmitted to the representative.

9883. *Mr. Paterson.*—That would only hold where the character of the proceedings appeared on the face of the writing. Supposing a deposit-receipt to have been in name of A. B., without anything to indicate that he was a trustee?—The advantage of treating it as trust funds is that you should escape paying probate duty. If you include it in your inventory as ordinary funds of the deceased, you will have to pay the ordinary probate duty, while the executor will only realize and account for the funds. I saw a very hard case the other day, where a person died in Edinburgh, leaving trust funds to about £7000 in England, and probate had to be taken out in England, for the reason I have been stating. I believe the Probate Court allowed the party to imagine that the estate he was taking out probate for was £20, and that gave him a title to go to the holders of the English funds and get possession of them.

9884. *The Chairman.*—Have you any further suggestions to make?—In the printed notice which I got there is a memorandum as to privileges of agents. The practitioners in the judicial proceedings of the Commissary Court of Edinburgh are the solicitors-at-law. They are a small body, about 28 in number; and as the great bulk of the ordinary business is carried on by writers to the Signet and solicitors before the Supreme Courts, their interposition only comes in when petitions require to be presented to the Sheriff. In that way there are a great many cases of two agents. The writer to the Signet, or the solicitor before the Supreme Courts, conducts all the proper confirmation business; and when an application in the same matter has to be made to the Sheriff, the solicitor-at-law is called in. It would certainly save expense to parties if one agent was entitled to conduct the whole business.

9885. You mean, if the solicitor before the Supreme Courts or the writer to the Signet were entitled to do the whole?—Yes, if they chose. I think the solicitor-at-law would find that these bodies would interfere very little with any business except the executry business. The Society of Writers to the Signet passed resolutions on this subject in the year 1858.

9886. *Mr. Baxter.*—You mean if the exclusive privileges of the solicitors-at-law were done away with?—Yes.

9887. *The Chairman.*—Have you anything more to suggest?—I would suggest that, looking at the importance of the business of the Commissary Office of Edinburgh, the growing extent of it, and the responsibilities, the salary of Commissary-clerk should be considered by this Commission, when they have the fees, which represent the work done, under their notice. I think it is unreasonable that, with larger jurisdiction, more duties, and greater responsibility attached to my office, I should be paid less than other Commissary-clerks, as if I held a subordinate appointment, and all that my office might be made one of revenue.

9888. *Mr. Baxter.*—Is yours an exceptional case—payment by salary?—Quite. After I was appointed, Mr. Henderson, of the Exchequer, in whose hands these matters were, told me, when he was arranging my salary, his intention was to regulate all the other Commissary-clerks' offices, and allow no fees to be retained; and when I mentioned the smallness of my salary in comparison to the fees retained by some other clerks, he said he would cut down all the others when the regulation came; but the Lanarkshire, at Glasgow, and other appointments have been made since then, and they all retain the fees for their responsibility and work done. The Commissary-clerk of Lanarkshire has large fees; but he does the work, and is therefore entitled to them, and I only mention his case in contrast.

9889. *Mr. Murray.*—Have you had occasion to contrast the fees paid in the Probate Courts in England?—Yes. The salaries of the registrars in London begin with £1600. There are four of them; one has that sum, and two of them have £1500 a year each, and the fourth £1000. Even the district registrars in England begin with £1200 a year.

9890. *Mr. Baxter.*—You would be well satisfied if you got the fees?—Yes; but I might not expect them all. I only ask equitable consideration.

9891. *The Chairman.*—In Lanarkshire the emoluments are much larger?—Yes.

9892. The fees are very large there?—Yes; but they are not so large as in my office.

9893. Do you mean that the total amount is not so great?—Neither the business done, nor the fees, are as great. The fees returned by the Commissary-clerk of Lanarkshire, as drawn last year, were £1512, 13s. 3d.

9894. *Mr. Smythe.*—Are they the same scale of fees?—Yes.

9895. *Mr. Webster.*—Can you tell us whether those registrars whose salaries you have mentioned have to give their whole time to their office, or have they the privilege, like you, of carrying on other business?—I cannot say definitely. There is a clause in my commission that I shall discharge in person the duties of the office. The responsibility is very great, and the questions that arise are various, and they all compel my attention to the work.

9896. *Mr. Murray.*—In England is there not a printed abstract of probates published?—Yes; and in Ireland.

9897. It is published at the public expense?—Yes.

9898. Does not that greatly facilitate the searches in reference to the granting of administrations?—Yes, very much.

9899. *Mr. Webster.*—A copy of that book is kept in your office?—Yes. The volumes, as published, are regularly transmitted from the Probate Offices of London and Dublin, for reference in Scotland at my office.

9900. *Mr. Murray.*—But nothing equivalent has ever been done in Scotland?—Never. I think it would be an immense advantage to have it.

9901. Part of the surplus fees might be applied to that purpose?—Yes. I was prepared to suggest a calendar or abstract like this for Scotland to this Commission. I had brought one of these books to show how they are arranged, and how convenient they must be to the public. By sec. 67 of the English Probate Act of 1857, calendars of all probates and administrations granted in England are ordered to be prepared, containing the following particulars:—Date of grant, registry from which it is issued, defunct's name and designation, place and date of death, names and designations of executors and administrators, and value of estate. By sec. 51, monthly lists of all grants issued by the several district registrars are sent to the Principal Probate Office, London, where the calendars are prepared. By sec. 68, copies of the calendars are sent to each District Registry in England, also to the Probate Court of Dublin, and to the Commissary Court of Edinburgh. A similar system is in operation in Ireland. Were the system extended to Scotland, copies could be deposited in every local Commissary Court, and also in the Probate Courts of London and Dublin, and thus the greatest facilities given for discovering the estate and representatives of a defunct. At present it is often doubtful where the search should be made. In my office there are upwards of one hundred people coming to make searches in the course of a year.

9902. *Mr. Smythe.*—The County Commissary-clerks in England have to provide their own offices and pay

their own expenses out of their fees?—I see that the highest salary of a district registrar in England is £1200 a year, and he has a special allowance of £200 a year besides.

9903. Is that for his office?—The blue-book does not say what it is for. There are other three with £1000 a year each and an allowance of £200, and another with £800 a year and an allowance of £150, and so on. There are forty of them altogether.

9904. You only conjecture that that allowance is to pay the expenses of the office?—I presume so. I don't know what else it is for.

9905. You don't know that the fact is that they do pay their office expenses, providing an office?—I don't know. I see that Government pays for a large staff of clerks for district registrars. There are 136 clerks so paid for, and their several salaries commence at £450, £400, and downwards.

9906. *Mr. Murray.*—Do you think it would conduce to the public advantage if Edinburgh was made the *commune forum*, in which the executors of any party deceasing throughout Scotland could obtain confirmation, leaving it to them to obtain it either in the county in which the party died, or in Edinburgh?—I think it would, and that would be carrying out the provisions of the English Probate Act of 1857, and giving the same accommodation to the Scotch as is given to the English people.

9907. In England they may either go to the Probate Court of London or the District Court?—Yes.

9908. An equivalent to that would be that Edinburgh should be a *commune forum* for Scotland?—Yes.

9909. *Mr Paterson.*—Would you make that optional or imperative?—Optional; and we might get over difficult questions of domicile frequently. Questions often arise whether a person has acquired a domicile abroad, or whether he has retained a domicile in Scotland; and if so, where. If there was a general provision of this kind, allowing parties to choose either Edinburgh or the provinces, there would be no questions of that kind, which are sometimes very troublesome. *James Lawson Hill.*

9910. *The Chairman.*—There would be a search in two places, would there not?—There would; but if it was combined with the calendar which has been suggested, this objection would, I think, be obviated.

9911. Have you any suggestion to offer as to the form of dealing with contested cases?—No.

9912. You think the forms are right enough?—Yes. They are very simple, and nothing can be more efficient and expeditious in my estimation. The Sheriffs-commissaries are very accessible, and very prompt.

9913. Have you had any experience of the ordinary Sheriff Court?—No.

9914. *Mr. Murray.*—Have you any suggestion to offer in reference to cautioners?—No.

9915. Have you found practically that they are very little called upon?—Yes. I have often inquired, and I never could ascertain that for the last forty years, in the Commissary Court of Edinburgh, there had been any case of a cautioner having been called to answer for his obligations under a bond.

9916. *The Chairman*—That circumstance would not lead you to dispense with caution?—Most certainly not.

9917. Have you any further suggestions to make about your office?—No.

MONDAY, 8TH FEBRUARY 1869.

Members Present:—

LORD COLONSAY.
E. S. GORDON, Esq., Q.C.
JAMES CAMPBELL, Esq.
W. SMYTHE, Esq.
A. ORR EWING, Esq.
GEORGE HARRISON, Esq.
JAMES ADAM, Esq.
A. B. SHAND, Esq.
T. GRAHAM MURRAY, Esq.
JAMES WEBSTER, Esq.
J. B. BAXTER, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

THOMAS LINTON, Esq., examined.

9918. *The Chairman.*—You are connected with the police establishment in Edinburgh?—I am Superintendent of Police. *Thomas Linton.*

9919. *Mr. Gordon.*—That is equivalent to Chief Constable in England?—Yes.

9920. *The Chairman.*—Have you been so long?—About eighteen years.

9921. You act as prosecutor in cases that are brought before the police magistrates?—I was appointed Procurator-fiscal under the Provisional Order of 1867; but I have acted all along.

9922. The Police Court is presided over by one of the magistrates of Edinburgh one month, and by one of the Sheriff-substitutes the next month?—Yes; they take alternate months.

9923. Is it generally the same magistrate that attends for the month, or do they change?—There are six magistrates; and the usual practice is, that two magistrates take a month between them, and in that way each of the six is twice on duty during the year for half a month.

9924. *Mr. Murray.*—One magistrate only sits?—Only one at a time.

9925. The Lord Provost never sits?—I never saw him sit except on one occasion.

9926. *Mr. Baxter.*—Who are the magistrates who sit?—The six bailies.

9927. The Dean of Guild does not sit?—He does not.

9928. *The Chairman.*—It has been suggested that it would be an advantage if there was one magistrate who sat constantly in that court. What is your opinion as to that suggestion?—I think there is a good deal to be said on both sides. I think there are some reasons in favour of the present arrangement, and there are others not so.

9929. What are the circumstances which are in favour of the present arrangement?—One thing that weighs a good deal with me is the amount of control which the Town Council is allowed to exercise over the police force; and considering that, I think it is an advantage that some members of their body—and of course each bailie is a prominent member of the Town Council—should have the opportunity, which they have as judges of police, of knowing something of the duties and responsibilities of the police.

9930. And also perhaps of acquiring a knowledge of the characters in different localities of the town?—Undoubtedly.

9931. What are the considerations on the other side?—Of course legal training and experience would be an advantage in any person discharging the duties

Thomas Linton.

of judge of police, and several of the bailies have not that advantage. Usually some of them are lawyers: we have at present two lawyers, but the other four are not lawyers.

9932. *Mr. Baxter.*—Have they an assessor?—There is no assessor in the court.

9933. *The Chairman.*—Uniformity of procedure would be an advantage?—I think so.

9934. That would be better attained by one person of legal attainments sitting?—Undoubtedly. Comparing the bailies with the Sheriffs as judges, I think a prominent defect is, that in pronouncing judgment upon convicted persons the bailies are less careful in varying the sentence according to the greater or less degree of the offence.

9935. *Mr. Smythe.*—Does the clerk not act in some degree as an assessor, and keep them right in matters of form?—He does. I think the tendency is rather towards indiscriminate leniency on the part of the bailies, as compared with the Sheriffs who sit in the court.

9936. *Mr. Shand.*—When you speak of the desirability of uniformity, I understand you are not referring to the forms of procedure, but to the degrees of punishment?—Exactly.

9937. *Mr. Murray.*—Is it not the case that, with reference to some crimes, different bailies take very different views of the amount of punishment to be awarded?—That has not been so much the case of late years.

9938. Is it not the case as regards the crime of solicitation on the streets?—There has been considerable uniformity in that since the Provisional Order came into operation.

9939. Do some of them not impose imprisonment, while others do not?—The rule has rather been, that both Sheriffs and bailies impose imprisonment since that power was given. Of course every magistrate now-a-days is a gentleman of education and business experience, and I must say that they are conscientiously anxious to master the details of the Police Acts, and generally they don't take long in doing so.

9940. *The Chairman.*—Do they complain of the labour it imposes upon them?—I do not think so. I suspect they would be very unwilling to part with the position.

9941. *Mr. Baxter.*—Have you a court daily?—Yes.

9942. *Mr. Murray.*—How long does it last on an average?—About an hour on an average.

9943. *Mr. Shand.*—What is the utmost amount of punishment that a bailie can award?—Sixty days' imprisonment. There is power given under the Provisional Order to add to that caution with an alternative of imprisonment for thirty days.

9944. *Mr. Baxter.*—That is ninety days in all?—Yes. That is under the Police Act. But under the Public Houses Act, there is a power to imprison for six months for a third and every subsequent offence.

9945. *Mr. Shand.*—And what are the pecuniary penalties?—£30 is the alternative to the six months' imprisonment. The highest pecuniary penalty in the Police Act is £20.

9946. *Mr. Baxter.*—The bailies can in that way sentence to a longer period of imprisonment than the Sheriff can do in his ordinary Summary Court?—The Sheriff, as judge of police, has the same power as the bailies.

9947. But in his own court, when trying prisoners summarily, he can only give sixty days' imprisonment?—Yes.

9948. And the magistrate can give ninety days?—Yes. That power has been given under the Police Act.

9949. *Mr. Adam.*—How many cases are disposed of in the Police Court upon an average in a day?—The average is about 12,000 in a year. That is about 40 a day. That of course includes contraventions of every description.

9950. You are public prosecutor?—I am.

9951. Do you prepare the petition or complaints?—All of them. They are prepared by clerks, and I am responsible for their accuracy.

9952. Do you, in point of fact, have any precognition or knowledge of the cases before you take them to court?—If the case is of any special importance, I always have.

9953. *Mr. Gordon.*—Do you mean other than the police reports, or merely from the police reports?—I frequently examine private parties who are witnesses, if there is any doubt or difficulty.

9954. *Mr. Adam.*—In any case in which it is suggested to you that that is a desirable course?—Certainly; or where it occurs to myself that it is a right thing to do, before presenting my complaint.

9955. *Mr. Shand.*—In the ordinary case, you proceed on the police reports given by the constables?—Yes; in ordinary cases.

9956. And in unusual cases you take a precognition?—Yes, or what amounts to that.

9957. *The Chairman.*—Do you find that the duty of prosecutor interferes in any degree with your other duties as head of the police?—It must to some extent interfere; but my duties under the statutes, as Superintendent of Police, give me serious responsibility, whether I am prosecutor or not. For instance, we have some 9000 persons apprehended every year, and as Superintendent of Police I am responsible at the time of their apprehension for inquiry, and also for determining whether the person is or is not to be detained in custody. In fact, I am responsible up till the time that the person is produced before the judge of police. Looking at that fact, I think it is of some advantage that the case shall from first to last be taken charge of by the same person. It prevents difference of opinion which might arise if there were two officials.

9958. *Mr. Smythe.*—Do you exercise your discretion whether a case is to be prosecuted or not?—In all cases of apprehension I must do so, under the police statutes.

9959. Are there many cases where there are apprehensions which are not prosecuted?—A good many; and there, of course, the parties are not even detained. The inquiry is made on the instant; and if it is found that the case is not sufficient, the party is discharged. There is also another reason for the present arrangement. As head of the police I am vested with the power of appointing all the members of the force, and of removing them at pleasure, and the statute gives that power on the ground that I am responsible for having proper persons for all the duties of the police. Now, I think that even if I were not prosecutor, it would be my duty to be frequently in the Police Court, because there I can observe whether the officers are proper persons for their most important duties in regard to the public interests.

9960. *Mr. Baxter.*—Have you the power of removing the lieutenants of police?—Yes; I have the power of removing the lieutenants and all the members of the force. There is another reason that weighs with me: if I were not the prosecutor, it would be left to the Town Council to appoint during pleasure a person to be public prosecutor, and I think that is objectionable. I do not think that the public prosecutor should be appointed by such a body as the Town Council, and hold office at their pleasure.

9961. Who appoints you?—I am appointed by the Lord Provost and Sheriff, or, if they differ in opinion, by the Lord Advocate.

9962. Are you subject to removal?—The power of removal is the same.

9963. *The Chairman.*—Upon the whole, then, you consider it an expedient arrangement that the head of the police should prosecute in the Police Court?—I do; so long as he is charged with his present responsibilities.

9964. It does not interfere so materially with his other duties as to make it inconvenient, because he must be often there, even though he were not the prosecutor?—Yes.

9965. And it gives him the opportunity of seeing a case followed out from its commencement to its conclusion, and it enables him to learn what has been the conduct of various officers when they have been engaged in connection with these cases?—Just so.

9966. *Mr. Shand.*—If a stipendiary magistrate were appointed, there would not be duty for him in the Police Court alone?—I do not think so.

9967. If any change were made, it would be rather that the Sheriff should take the duty, than that a separate officer should be appointed to preside in that court?—I think the person so appointed could discharge other duties.

9968. Judicial duties?—Yes.

9969. *The Chairman.*—Have you any suggestions to make to the Commission in regard to the Police Court, or the duties connected with it?—There is one point as regards the bailies. Under the existing Act it is provided that the Lord Provost, the chief magistrate, shall always hold office for three years after his appointment. It is not so with the bailies, and I think it would render them more independent as judges of police if they were put in the same position as the chief magistrate. At present a bailie may be appointed what is called interim bailie, and within a few months he may have to go to his ward to seek re-election, and afterwards to the Town Council; and I have known instances, one instance in particular, of a bailie in that position, who was ousted from his ward mainly on account of what he had done as judge in the Police Court.

9970. *Mr. Shand.*—In what class of cases?—There were two or three cases. Party feeling ran rather high. One statement made against him was, that a person in a respectable station in life, who had been brought before him, had not been sent to prison, but fined.

9971. *Mr. Murray.*—What was the nature of the crime?—It was an assault; but I have no doubt that where a bailie has to seek re-election soon after having been appointed a bailie, he is liable to be influenced by the consideration of what is most likely to secure his re-election to office.

9972. *Mr. Shand.*—You think he sits under fear that he may be turned out at next election?—Yes; and on that ground I think that an appointment for three years would make a bailie more independent in the discharge of his duties as judge of police.

9973. *Mr. Webster.*—But even three years have an end?—Of course; but we don't usually find that bailies want to remain longer than three years. They are generally willing to go out of office; at all events they say that they are willing.

9974. *The Chairman.*—Do you find that in regard to contraventions of the Public-Houses Act, there is less uniformity of decision among the bailies than in other cases?—They must be uniform now, for the sentence is fixed by the statute, and the judge cannot vary it.

9975. But the establishment of the fact is not fixed by the statute?—No; of course not. Some, who have a very strong notion that the Public-Houses Act is doing a great amount of good, are perhaps more apt, than persons holding the contrary opinion, to take a view of the fact favourable for the prosecution.

9976. Are there any other observations which you wish to make to the Commission?—There is a slight matter, but it has been made ground of complaint very often. We have to bring into the Police Court numbers of respectable citizens, and persons in their service, for trifling contraventions, and at present these persons are summoned to the ordinary Police Court; and there being only one court-room, it is complained that they are placed in the same position, as regards attendance there, as criminals, or notorious offenders. I have frequently suggested that there should be a court held, once or twice a week, for the disposal of such cases, apart altogether from ordinary police cases.

9977. What is the class of cases to which you refer?—Parties summoned for their chimneys being on fire, or servants for laying down ashes.

9978. *Mr. Shand.*—Breaches of municipal regulations?—Yes.

9979. Can you not fine them 5s. without requiring their attendance at court?—They must all attend, or some one must attend for them.

9980. That is a matter that is within the arrangement of the police magistrate, without any specific power being required for it?—I think it should be so.

9981. It does not require any assistance from the Legislature?—I have suggested it often, but it has never been carried out.

9982. *The Chairman.*—Your suggestion is to hold a court a certain number of times in the week, at a different hour from the other court?—Just so. I think once a week would probably serve the purpose.

9983. *Mr. Shand.*—Are there many cases of forfeited bail in the Police Court of Edinburgh?—Not very many. There may be a couple of hundred in the year. But, besides forfeiting bail, we always apprehend the persons on the warrant granted, if they can be found.

9984. At what hour does the court meet?—Ten o'clock.

9985. *The Chairman.*—Have you any suggestion to make as to a change in the forms of procedure?—I think they are complicated, and might be simplified, even under our present Police Acts.

9986. What is the objection to them, and what is the improvement which you would recommend?—The judge is made to grant warrant to summon. Now, under our Police Act the constables are specially empowered to summon without a warrant, but that is a signature in every complaint of the kind for the judge. Then he grants power to apprehend, the Police Acts giving power to constables, without warrant to apprehend.

9987. Why is recourse had to the magistrate?—The form has always been so. Our assessor, Mr. Young, was consulted about it, and he said, 'Oh, just let it remain; it is there, it does no harm.'

9988. But you are satisfied you have the power without it?—Quite; and we exercise the power. The warrant is usually got long after the person is in custody.

9989. As to the forms of complaint, have you any suggestion to make?—I think we have simplified them as far as we thought we could properly do so.

9990. Have you no suggestion of any change in the forms to make?—No specific suggestion.

9991. *Mr. Adam.*—Who prosecutes in your necessary absence?—The lieutenant of police, who is the officer charged with the preliminary investigation. The lieutenant sits in the police office, and all parties who are apprehended are brought before him. If I am not present, he has to hear the case, and determine whether it is a proper case for detention or not.

9992. Does he attend along with you in the Police Court?—He does.

9993. *The Chairman.*—The police, of which you are the head, are the police of the city of Edinburgh?—Yes.

9994. Have you found any clashing between you and the jurisdiction of the police of the county?—I cannot say that I have. I have always maintained a very good understanding with Mr. List.

9995. The two forces are disposed to aid each other?—Undoubtedly; and beyond that the Sheriff has power over the city police force.

9996. *Mr. Murray.*—There are a number of provisions in the Provisional Order as to bringing water to houses, etc., which are obviously not enforced. Does it not lie on you to enforce these?—I have not explained that there are two other persons besides myself entitled to act as Procurator-fiscal in the Police Court. These are the Inspector of Lighting and Cleaning, and the Burgh Engineer. Each of these officers is entitled to and does prosecute in cases falling within his department.

9997. Do you not interfere with cases which come properly under their department?—I have not interfered with these cases.

9998. You would not prosecute in a case where water had not been brought to a tenement?—I would be entitled to do so; but the practice has been to leave it to the official having charge of that department.

9999. *Mr. Gordon.*—To what official?—The Burgh Engineer, in that case.

Thomas Linton.

10000. *Mr. Baxter.*—Has he ever prosecuted?—Yes; he does so from day to day, in cases falling within his department.

10001. *Mr. Murray.*—Have you received instructions from the magistrates not to prosecute in these cases?—No; I never apply to the magistrates for instructions.

10002. *Mr. Smythe.*—Do these parties hold their appointment from the Lord Provost in the same way as you do?—No; they are appointed by the Town Council. I think it is rather an anomaly that one person should not conduct all the prosecutions; but that has been the practice hitherto.

10003. *Mr. Orr Ewing.*—The magistrates have no power in regard to your appointment?—No.

10004. That arrangement is peculiar to Edinburgh?—Yes.

10005. *The Chairman.*—Do you take any share in regard to the granting of licences?—I always attend the courts, and my special duty is to report convictions, if any have been obtained against parties applying for licences.

10006. To be, as it were, a witness?—Yes; and the Public-Houses Act specially names the Chief Constable as a person to attend, and make reports, and give information.

10007. *Mr. Shand.*—You exercise a check on the granting of licences to improper parties?—Yes.

10008. Or to premises which are not suitable?—The magistrates take that into their own hands. They are required under the Act personally to inspect and certify whether the premises are suitable or not.

10009. *The Chairman.*—That is in regard to granting of licences for the first time?—Yes.

10010. *Mr. Shand.*—Have you any suggestion to make in reference to the Licensing Court? Do you think the original court and the court of appeal work well?—I don't think so. I think the court of appeal is by far too numerous, and gives rise to very awkward results.

10011. In what way?—I have frequently observed that, after one or two cases have been disposed of, with a strong muster of the Justices, a number of them leave the court, and the remaining cases are disposed of quite differently, depending very much upon which party has the majority in court.

10012. As a rule, do you find the appeal court more liberal or more restricted in granting licences than the magistrates?—Sometimes the one way and sometimes the other, depending very much on which of the two sides is in the majority.

10013. Are your reports to the magistrates always respected?—Yes.

10014. And given effect to?—Generally. I have nothing to complain of as regards that.

10015. Do you think it would be satisfactory that the power should be vested in the magistrates, without any power of appeal to the Justices?—I think that would be better than the present system. Perhaps it would be right that there should be an appeal; but I would like that it should be a very different sort of appeal. There are above 100 Justices.

10016. *The Chairman.*—What kind of appeal would you suggest?—I have some difficulty in giving a very decided opinion as to that. I think it ought to be to a responsible public official, whether to the Sheriff or to another official I am not prepared to suggest.

10017. *Mr. Smythe.*—Is there anything like a 'whip' to get up friends to attend?—I have no doubt of it.

10018. *Mr. Webster.*—On both sides?—I think so.

10019. *Mr. Orr Ewing.*—You speak with reference to the Justices?—Yes; specially with reference to the appeal court.

10020. It is not so with reference to the magistrates?—I am afraid they are annoyed with applications out of doors; but I don't think that operates to anything like the same extent as in the appeal court.

10021. *Mr. Baxter.*—You would like an appeal to some independent party?—I think so.

10022. *Mr. Orr Ewing.*—Would it not be better to leave the whole power of granting licences in cities and burghs to the magistrates, who are responsible for the peace and order of the community?—I think that would be better than the present system.

10023. Without any appeal whatever?—Even without any appeal.

10024. *Mr. Smythe.*—You think the magistrates less liable to be influenced by personal feeling towards the individuals who apply?—I think so.

10025. Would that be the case in small burghs as well as in large burghs?—There would be more difficulty, perhaps, in small burghs.

10026. *The Chairman.*—But, on the whole, you think an appeal to such a person as the Sheriff would be a beneficial thing?—I think so.

10027. It would be a check in regard to the course taken by those who are the judges in the first instance?—Yes.

10028. And it would give an opportunity of correcting anything that happened to be done wrong, by mistake or otherwise?—Certainly.

10029. It is an annual duty. How much time does it occupy?—It is an annual duty; and the court sits for four or five hours. Usually, at the principal court in April, the sitting occupies several hours.

10030. One day?—Sometimes two days. I have not known it extend over two days.

10031. *Mr. Baxter.*—How many public-houses are there in the city?—There are about 360 public-houses; but there are altogether nearly 900 licensed persons. There are more persons licensed as grocers and dealers in excisable liquors than publicans.

10032. *The Chairman.*—Are the licences as matter of course renewed, if there is no objection stated to the conduct of the parties?—The rule is to call over the roll; and if no objection is stated, they are renewed.

10033. *Mr. Murray.*—How many shebeens are there?—It is very difficult to say. I got a return about a year ago, and it showed that there might be from 80 to 100.

10034. *Mr. Webster.*—Have you any idea how many there were before the passing of the Forbes Mackenzie Act, or if there were any?—Brothels have always been in one sense of the term shebeens, before and since; but before that Act there were certainly many fewer shebeens not used as brothels.

10035. *Mr. Orr Ewing.*—The increase has taken place because of the restricting of the hours of sale?—We find the traffic is principally carried on from Saturday night to Monday morning, when, under the Acts, the licensed houses are shut up.

10036. But it is not because of the reduction of the number of houses licensed?—I don't think so.

10037. *Mr. Shand.*—How many magistrates take part in granting licences?—The whole of them.

10038. They sit as a body?—Yes; and the Lord Provost also.

10039. How many are usually on the bench on these occasions?—They generally all attend.

10040. How many?—Seven altogether.

10041. It is a public court?—Yes.

10042. And it is under the influence of public opinion?—Yes.

10043. Sufficiently to make it a final court?—Well, I would hesitate as to making it a final court.

10044. Why would you do that?—Because all the magistrates are popularly elected. That is one reason.

10045. *Mr. Smythe.*—Is there often a division of opinion as to whether a licence should be granted or not?—Oh yes.

10046. *Mr. Orr Ewing.*—Don't you think it is an advantage that they are popularly elected, and that if they were going against the feeling of the community they would be turned out at next election?—I don't think that is an advantage.

10047. Are the spirit-dealers a strong body?—Yes; and their support may have to be looked to in order to obtain election.

10048. Is that not a good reason for depriving the magistrates of the power of licensing altogether?—It might be so.

10049. *Mr. Webster.*—Are the gentlemen who are

elected to the magistracy generally men who have taken a pretty extreme view on one side or other of such questions?—They are elected by the Town Council; and, of course, they are generally men who have taken a prominent part in the discussions, either on one side or other, and their friends try to get them appointed.

10050. *Mr. Baxter.*—Are they ever spirit-dealers themselves?—That has happened, but on very rare occasions. But a spirit-dealer is not allowed to sit either as a magistrate or a Justice of Peace in the Licensing Court.

10051. *Mr. Smythe.*—I suppose very few of them are interested in public-house property?—I don't think they are personally; but the people who are interested could exercise great influence in the wards which they represent.

10052. Some of them may be interested in temperance establishments?—Yes; I have known some magistrates who have a strong bias of that kind.

10053. *The Chairman.*—And some members of the Council may perhaps be themselves the holders of temperance establishments?—Yes; that is so at present.

THE HON. LORD ARDMILLAN, examined.

10054. *The Chairman.*—You are one of the judges of the Supreme Court,—both in the Civil Court and in the Criminal Court?—I am.

10055. In what year did you come to the bar?—In 1829.

10056. You acted for some time as one of the Lord Advocate's deputes?—I did, for several years.

10057. After that you were Sheriff of the county of Perth?—I became Sheriff of Perthshire in March 1849, and I remained so till September 1853.

10058. You then became Solicitor-General?—Yes, I became Solicitor-General.

10059. How long have you been on the bench?—Since the end of 1854.

10060. The Commission are desirous at present to have your views in regard to the Sheriff Courts. Have you considered the matter of the constitution of these courts as consisting of the Sheriffs and their substitutes?—I have. I had some experience as a Sheriff in that matter myself, and I have frequently considered that question. I have no doubt that the arrangement of what is called the double Sheriffship, that is, the arrangement which places as the responsible local judge of every county a gentleman chosen from the bar by the Crown, who keeps up his connection with the legal profession by attendance and practice in the courts, maturing his mind by laying up stores of legal knowledge, by work as well as by reading, with a substitute under him, appointed by him, and for whom he is responsible, is an arrangement which has, upon the whole, worked extremely well; and although capable, perhaps, of some slight modification, I am decidedly of opinion that that arrangement ought not to be subverted. I think it is an arrangement for the good of the country. I think experience has proved that; and so far as I am able to judge, I see no strong objection to it, although, as I said before, some modifications of it may perhaps be necessary.

10061. What are the kind of modifications that occur to you?—I think it possible that in some counties there is not quite work enough to occupy all the time that a Sheriff ought to give to the duties,—in short, that some of the districts are too small, both as regards the Sheriff and the Sheriff-substitute. There are places that might easily be mentioned where the Sheriff-substitute's duty approaches very nearly to a sinecure, and no blame to him at all; but, from the want of business in the place, he really can have very little to do. And there are counties where the duties of the Sheriff-depute are also very light. It is a question not unattended with difficulty, even in regard to these small Sheriffdoms, whether the joining one or two together might not have the effect of making the work so much more severe in proportion to the remuneration, as to make it difficult to get men of the class required to hold the office of Sheriff; and I am not forgetting that difficulty. I appreciate it fully, and I agree in thinking that is a difficulty in the matter. But still I think there may be some instances in which two, or perhaps three, certainly two of the existing counties, might be put under one Sheriff with no disadvantage to the public service.

The Hon. Lord Ardmillan.

10062. In any such arrangement, would you consider it material to have regard to the facilities of access to the court from distant parts of a county?—Certainly; I have no doubt that that is a material consideration. I would never suggest the combining counties under circumstances which would prevent the superintendence and supervision of the whole district comprising the jurisdiction of the Sheriff, by him. I consider that the personal supervision of the district over which he is Sheriff is of the greatest public importance, and has practically, I think, been found to be of great use and value, and I should be very sorry to suggest anything which would diminish that.

10063. Do you approve of the appeal from the Sheriff-substitute to the Sheriff?—I certainly do. I think it is now made very cheap; it is promptly attended to, and it is conducted on a footing that gives opportunity to both parties to state their case fully to the Sheriff, and I think that, generally speaking, it is satisfactory. I am not possessed of accurate statistical information, but I should suppose the effect of it to be to stop at least three-fourths of the appeals which leave the Sheriff-substitute, and to prevent them coming to the Court of Session. Probably I am far within the mark. It is to be presumed that those which are stopped there are satisfactorily settled. The parties are satisfied, and don't go further.

10064. Some of them may be matters of small amount, and the expense of an appeal to the Court of Session may deter some of them?—There is no doubt of that.

10065. It has been suggested that a better arrangement would be, that instead of a Sheriff, to whom appeal may be taken as now, and who has the superintendence of the district, there should be judges of appeal—that Scotland should be divided into five districts, and that two of these appeal judges should, as it were, perambulate each district, and hold courts at different places as judges in appeal from the Sheriff-substitute; that these gentlemen should be in a high position at the bar; that they should be precluded from practice, and confined to the performance of their duties as appellate judges. Do you think that would be an improvement on the present system?—I think not at all. In the first place, I think that by such an arrangement you would lose the great advantage of personal attendance and supervision of the particular county by the Sheriff. In the next place, I think you would lose, what I regard as a great benefit, the Sheriff-depute going to the county as often as he can, and trying the criminal cases that are tried with a jury. When I was Sheriff of Perthshire, though I had a most efficient substitute, I tried almost every criminal cause in the county that was tried by a jury, and I think that is a duty which the Sheriff should perform as often as he can. It is an important part of his duty, and one which his remaining at the bar, and keeping pace with the progress and practice of the law, enables him to perform; and I think he ought to perform it whenever he can. But I don't think that it would be as well done, or as much done, if these itinerating courts of appeal were substituted for the present system. I also doubt whether two is a good number for such an appellate court. They may differ. They may be men of minds in some respects so differently constituted that they may differ very frequently; and the result of their difference must be, I suppose, nothing else than the judgment appealed from standing, because there is no third party that can adjudicate, unless the difference be held as at once bringing the case to the Court of Session, which would certainly not be desirable. There-

The Hon. Lord Ardmillan.

fore one of the objects of such an appellate tribunal would, I think, be lost by that form of procedure.

10066. Do you think that a review by the Sheriff, as now, of the judgment of his substitute before it comes to the Court of Session, is calculated to clear the case and reduce it to its proper elements, more than if the appeal were direct from the Sheriff-substitute to the Court of Session?—I think that a question of some difficulty. I could understand that an appeal from the Sheriff-substitute to the court direct, as of course it would be cheaper to some extent than taking first the intermediate appeal, might be as satisfactory as an appeal through the medium of the Sheriff-depute, if it were not for the other advantages to which I have referred, which I think are attendant on the jurisdiction of the Sheriff. I think that the case is prepared for decision by passing under the review of the Sheriff. But I don't see that the mere preparation of the case by the Sheriff would be so great an advantage as, taken alone, to sustain the double jurisdiction; though I think that, taken along with the other subjects which I have mentioned, it tends in the same direction, and confirms my opinion that it would not be desirable to abolish the double Sheriffship.

10067. Then do I understand your view to be, that as regards the civil business, and also as regards what may be called the executive duties of a Sheriff, the present system is preferable to any that you have heard suggested?—I think so certainly; and I may add, that I think the mode of appointing both the one and the other is better than any I have heard suggested. I think the appointment of the Sheriff-depute by the Crown, out of the practising bar, and the appointment by the Sheriff of his substitute, he being responsible for his substitute, and it being quite necessary, both for the harmonious and the efficient conduct of procedure in the county, that they should agree well together, is the best mode of appointment. The Sheriff-substitutes are also generally members of the bar, though not necessarily so; and I may venture to say that in the few instances I know of exceptions, such as Glasgow, Perth, Cupar, and Stirling, the extremely creditable manner in which the duties are discharged, would seem to me to show that occasional exceptions in that direction are not bad. I think all these gentlemen, and I daresay there are more of them, discharge their duties extremely well, and to the great satisfaction of every one.

10068. *Mr. Webster.*—The principal Sheriff has not the appointment of his substitute, unless a vacancy occur in the office of substitute after the principal Sheriff is appointed?—That is so.

10069. Has that any effect upon your view as to the mode of selecting the substitute?—Of course you cannot suppose that the feeling is transmitted with the office, and therefore it must have some modification; but since the Sheriff-substitute now holds, and I think rightly holds, his office *ad vitam aut culpam*, nothing else can be arranged. I don't think it would do to impinge upon that.

10070. You would not transfer the selection of the substitute to the same tribunal that selects the Sheriff-principal?—I don't see any necessity for doing that. I cannot suppose that that can be the wish of the Sheriffs-substitute. They cannot think otherwise than that the Sheriffs-depute judged very wisely in their selection; and as some have suggested that occasionally not very wise selections are made by the Crown, I think it is safer to leave it where it is well done, than to transfer it to where it is said to have a chance of being ill done. Not that I think it is ill done by the Crown—very much the reverse. I think all the appointments made by the Crown, whatever Government is in office, have been made very carefully, and with a desire to do right. And when we see the gentlemen who have been appointed Sheriffs, I don't think it can be said to have been ill done.

10071. *The Chairman.*—The Sheriff has a material interest to select the best person he can get as his substitute to aid him in the performance of his duties?—He has; and he is responsible for him.

10072. And if he takes him from the bar, he has a knowledge of the gentlemen from whom he makes the selection?—Yes.

10073. And if he does not take him from the bar, he has to make the same inquiries that the Crown would have to make?—Yes.

10074. *Mr. Orr Ewing.*—If you found that the Sheriff-substitutes would prefer their appointment direct from the Crown, would that not lead you to modify your views upon that point?—It is not a matter about which one can have a very strong opinion any way. I believe very good appointments might be made from the one quarter or the other; but it appears to me not unreasonable that the holder of an office who is responsible for the substitute who discharges the duties in his absence, has perhaps as great an interest and as great a motive to select well as anybody else.

10075. But would it not be necessary, in order to carry out that to the full extent, to give the Sheriff-depute the power to remove the Sheriff-substitute whom he found in office, and to appoint one whom he himself had confidence in?—Well, permanency of official position secures independence of judicial character.

10076. The Sheriff-depute who appoints the Sheriff-substitute may not be Sheriff-depute over that substitute for more than two months after he is appointed?—That is perfectly true.

10077. And the new Sheriff-depute may not have the same confidence in the Sheriff-substitute appointed by his predecessor?—That is quite true. The same thing would apply in the case of the Lord Advocate. The Lord Advocate who appoints him may cease to be Lord Advocate before the gentleman appointed begins his work, but he has made the selection when he had the interest and the duty to select. The interest and the duty may cease, but it is not a bad mode of selecting for all that.

10078. Would it not raise the status of the Sheriff-substitute if he was appointed by the Crown?—I scarcely think so. I entertain a very strong feeling in favour of the manner in which the Sheriff-substitutes discharge their duties, and also in favour of the claims of the Sheriff-substitutes to consideration for further remuneration in several respects. I believe the whole course of recent legislation has been to increase and multiply the duties of the Sheriff in a great many ways, and the weight of that increase of business falling upon the Sheriff is, from the Sheriff-substitute residing in the county, to a large extent or chiefly put upon him; and I think that that may very fairly be held as giving the Sheriff-substitute a claim to increased favourable consideration in the matter of remuneration. When I see the way in which local judges are remunerated in England, I must say that I think it would be very desirable, and very just, that the Sheriffs-substitute should have their claims in that respect favourably considered. But that does not alter the opinion that, upon the whole, the appointment by the Sheriff of his substitute is the best plan. But it is not a thing about which one has a very decided opinion, and I daresay it might be very justly done either way.

10079. *Mr. Baxter.*—Your Lordship is aware that the Sheriffs-substitute were not formerly the regularly trained lawyers that they are now?—Yes.

10080. And that they had not the same encouragement to accept of the office that men of ability now have?—Yes.

10081. And in these times the appeal from the Sheriff-substitute to the Sheriff-depute was always highly estemed. At present the state of matters has very considerably changed. The Sheriff-substitutes are men who are highly educated, bred to the practice of the profession, well but not yet sufficiently paid, in most instances members of the bar, and judged very much to be now on a par with the Sheriffs. In these circumstances it is considered that that appeal from the Sheriff-substitute, a single judge, is not of the same weight as it was formerly. We look upon it now very much in the same light as one would look upon an appeal from one judge of the Court of Session to another. And therefore the idea that the appeal court

is weak, and that it would be strengthened by having two minds to deliberate and consult together, has received very general favour with us. There is another consideration which has led to the same result, viz. that we think our Sheriff-substitute has more advantages for forming his judgment than the Sheriff-depute. He is in the case from the beginning; he prepares the record, and in cases of disputed fact he takes the proof; he sees and hears the witnesses, and he is able from their demeanour, and their readiness of answering, and many other particulars, to judge of their credibility; and therefore we have considerably lost confidence in the present appeal from the Sheriff-substitute to the Sheriff, and are very anxious to have the appeal court strengthened. We therefore think that if the court consisted of two judges instead of one, that would materially strengthen it?—I am quite aware of these considerations, and they are not without weight; but I confess they do not move me from the opinion which I have already expressed in the matter. Giving all credit to the Sheriff-substitute for legal education and knowledge of his business, I am not prepared to say that an appeal from the Sheriff-substitute to the Sheriff depute or principal is not an appeal from an inferior to a higher jurisdiction; and I would add, without the least disrespect, that I think it is to be held as an appeal from the inferior judicial qualities to the higher judicial qualities. I don't say that that is always the case, but we must deal with a question of that kind on the general aspect and presumptions of it. I think that a gentleman who is living entirely in the district, in the midst of local prepossessions and opinions,—it may be prejudices,—is not so good a judge as a gentleman who is continuing his practice at the bar; and there are many men among the present Sheriffs who would be selected for arbiters or for judges by all those whose cases come before the Sheriff-substitute at present. As long as you have the position of Sheriff-depute filled, or open to be filled, by such gentlemen, I think it is desirable to retain the appeal as it stands; and I doubt very much if a perambulating body of two would permanently give the same satisfaction as the appellate jurisdiction which we have now. The proposal to have itinerating courts has only recently been brought before the public mind, and I don't see the advantage of it over the present system.

10082. *Mr. Shand.*—The other circumstance mentioned by Mr. Baxter, that the Sheriff-substitute sees the witnesses, and has the preparation of the case, has existed as long as the office has existed?—That is an important circumstance, but I think it is quite capable of being a little over-estimated. All the cases upon proof that come up from the Sheriffs to the Court of Session must necessarily be judged of by judges who have not seen the witnesses; and although there is a certain amount of advantage in seeing the witnesses, yet people accustomed to deal with evidence can, generally speaking, if the examination is well conducted, get pretty well at the truth of it, although they have not seen the witnesses; and whether we can do it well or not, it is the only way in which, in such causes, we can get at the truth of the case.

10083. What are the administrative duties of the Sheriff to which you attach importance?—I may mention, in the first place, that I consider that the whole system of public prosecution in Scotland, which is a very important part of our procedure, assumes as part of the system, that in the detection of crime and the prosecution of the criminal—I speak prior to the period when it comes to trial—every step shall be taken with the sanction and under the eye of the Sheriff. I think the law looks to the Sheriff as occupying the position of guarding the whole procedure of the public prosecutor both against attempts to frustrate or evade justice on the one hand, and against attempts to oppress or injure an accused person on the other hand. The Sheriff occupies a most important position in all that kind of proceeding. When cases occur out of the usual line—take the case of a man of great position and influence, who is either the person injured, or who, as in some cases, has been the person who did the wrong—I think it is extremely desirable, and eminently satisfactory to the Procurator-fiscal acting for the Lord Advocate in the matter, that the Sheriff, who takes charge of the whole proceeding, should be some one totally separated from the local interests and feelings of the place; and I could easily suggest cases which have occurred where the Sheriff-principal resident in Edinburgh has immediately proceeded to the county to take steps in a case of that kind.

10084. *Mr. Baxter.*—I suppose you are aware that in practice, the Sheriff very seldom knows or takes any action in criminal matters, and that they are reported directly from the Fiscal to the Crown lawyers, without the intervention of the Sheriff?—That is quite true. The Sheriff resident in Edinburgh is very rarely applied to by the Crown. It is not generally from the Crown that the application comes. When these cases occur, there is generally a notice of some kind or another sent to the Sheriff from the county, and the Sheriff at once proceeds to his county. But occasionally he is applied to by the Crown lawyers.

10085. Don't you think the resident Sheriff would be capable of doing the duty?—I am very far from saying that he would not be capable; but I don't think he could do it with the same authority, or with the same satisfaction to the public, if he were living at the gate of the proprietor who had either been attacked, or who had been the attacker. I feel quite satisfied that his procedure would not carry the same weight with it as the procedure of the Sheriff leaving Edinburgh, and taking the matter up. And I think there have been cases where that has been done.

10086. *The Chairman.*—I daresay you may have known of cases in which, when there was great local excitement or disturbance, the Sheriff, perhaps upon the suggestion of the Lord Advocate, immediately repaired to his county to restore order?—Certainly, there are several cases where that has happened.

10087. As regards the jurisdiction of the Sheriff, there are some classes of cases in which it has been thought that his jurisdiction is unwisely excluded. Questions of heritable estate of small amount have been stated, and it has been suggested that in such cases he ought to have jurisdiction. It has also been suggested that his jurisdiction should be extended to any case of heritable right, the party having the power of course eventually to appeal to the Court of Session. Do you think there would be convenience in giving him jurisdiction either where the amount of heritage is small, or where it is large, with perhaps a power to the party to remove it to the Court of Session, in the manner provided by the 40th section of the Judicature Act?—Where the question of heritable right is purely raised, as for instance in an action of declarator, or an action of reduction of the title of an heritable estate, I would be of opinion that that should not be within the jurisdiction of the Sheriff. But where the question of heritable right is raised incidentally in the course of another proceeding, I do not think that any harm would arise from extending the jurisdiction of the Sheriff, both parties consenting thereto. But I do not think that one party—the other objecting—should be permitted to keep a question of heritable right in the Sheriff Court.

10088. It has been suggested that some questions are of such small value that they could not bear the cost of discussion in the Court of Session, and that in such cases it would be desirable that the Sheriff should have jurisdiction; and as a modification of that, it has been suggested by some, that if such an action was raised, it should be in the power of either party to remove it. Do you see any objection to giving the Sheriff jurisdiction in small cases in that way?—I cannot say that I do, particularly if the questions arise incidentally; but I still think that proper actions of declarator and actions of reduction of heritable titles should be with the Supreme Court.

10089. *Mr. Baxter.*—Is that from the difficulty of the questions?—No. Sometimes another kind of question may be quite as difficult; but it is because it

The Hon. Lord Ardmillan.

has always been held, and I think wisely enough held, that land rights should be disposed of by the Supreme Court. Where the question is incidental, I think it might very well be retained in the Sheriff Court, especially when of small value; but I am not in favour of extending the jurisdiction to proper actions of declarator.

10090. *Mr. Smythe.*—Take questions of boundary as between two parties, where the heritable right can hardly be said to be affected, but it is merely a question of evidence?—I think that is a very natural and proper question to leave to the Sheriff, because then it arises incidentally.

10091. *Mr. Shand.*—But supposing a question of property as to one of those small feus, on which a weaver has built his cottage and invested all his means, and a dispute arises as to the property of that between two poor people, is it not hard that they should have to go to the Court of Session with that?—I have already said, that if both parties choose to agree, I would have no objection to its remaining in the Sheriff Court; but I think that one party should have no right to keep a question of heritable right out of the Court of Session.

10092. *Mr. Baxter.*—Would your Lordship allow it to be competent in the Sheriff Court, with power to the defender to remove it to the Court of Session?—In these small cases I think I would allow the Sheriff to say to the parties when it was raised before him, "This is a case in which I cannot judge unless you both agree;" and if both agree, he should proceed with it.

10093. *Mr. Shand.*—Would that not leave in the hands of a possessor who was holding property, it might be, wrongly, the power of compelling his adversary to adopt means that would cost a great deal of money?—But there is always a certain amount of presumption in favour of possession, and I am not sure that we should allow a person to bring a very summary procedure before the Sheriff Court to invert possession.

10094. Even supposing the remedy was limited to cases of the value of so much a year, or to the value as appearing in the valuation roll, would you still be against allowing it except of consent?—I must say, when it becomes a question of title, I feel a little reluctance to extend it. An action of removing is competent before the Sheriff, but that is a possessory action.

10095. *Mr. Baxter.*—Would you allow all actions of removing, including extraordinary removings, to be brought before the Sheriff?—I don't think any actions of removing should be excluded from the Sheriff's jurisdiction.

10096. *Mr. Campbell.*—There was a period when the great interests of persons possessed of property in this country were all heritable, and the pecuniary interests were comparatively insignificant. In the present state of society the pecuniary interests irrespective of land, greatly outweigh in actual amount the interests in the land?—Yes.

10097. Don't you think that that change in civilisation has a tendency to lead one to doubt the propriety of excluding an ordinary court which has unlimited jurisdiction in moveables from entertaining any question of heritable right?—I think it may very well suggest a doubt about it; but I feel a little reluctant to give up the exclusive jurisdiction of the Supreme Court in matters of proper declarator of heritable right. There may be an apparent benefit in conceding that jurisdiction, but it might lead to great difficulties. It might not be sufficiently expiscated; you might have erroneous judgments and appeals upon them; and I think, in short, that the man who has his title fixed upon land is entitled to hold it, and ought to hold it, until he has the opposing claim disposed of by the Supreme Court of the country.

10098. You don't think the right of appeal to the Supreme Court would be a sufficient check on errors or mistakes of that kind?—In small cases I think it might. I have already said I would not object to that in cases where the value is small, and both parties concur; but I don't think that an action to test the right of property in an estate of £1000 a year of rental should be brought before the Sheriff-substitute.

10099. But do you think that where there was an estate of such value, there would be the slightest chance of either litigant beginning in the Sheriff Court a suit which would certainly terminate in the Supreme Court? Don't you think they would go to the Supreme Court at once?—I am not at all sure of that. We have had some very singular cases of claims that had nothing whatever in them. There was a claim in regard to the estates held by the family of my own name—the Craufurd estates—that was made many years ago, and went through a great course of litigation. But suppose that case had begun in a Sheriff Court, and a proof had been at once allowed, and all sorts of conflicting evidence had been taken, there would have been great additional difficulty, cost, and delay in dealing with it. The other day a claim was raised in regard to the Breadalbane estates. Now it would not do to have these cases sent in the first instance to the Sheriff Court for trial.

10100. Might that difficulty not be met by allowing the party who thought that the tribunal was unsuited for disposing of interests of such magnitude, to apply to have it transferred?—Well, perhaps that might be sufficient. They would be pretty sure to apply, I think. In the small cases that have been adverted to, I think the requiring the concurrence of both parties might be sufficient to support the extension of the Sheriff's jurisdiction. But I see great difficulty in leaving very important cases of heritable right to no other security than that. I think there is no occasion for extending the Sheriff's jurisdiction to these.

10101. *The Chairman.*—What is your opinion in regard to giving the Sheriff jurisdiction in questions of status—such as declarators of marriage, declarators of legitimacy, or actions of divorce?—I would say the same thing with reference to them. I think it better not to extend the Sheriff's jurisdiction to these cases.

10102. It has been said that poor people sustain great hardship, especially in the matter of divorce, from inability to prosecute their rights in the Supreme Court, by reason of its expense; and that the consequence has been, or may be, that they have either to sit under the injury they have sustained, or that they are driven to immoral courses. Do you think that that is a reason why a power of divorce should be given to the Sheriff?—I am not satisfied that it would be prudent to do so. The jurisdiction in divorce is a very peculiar thing. One of the matters to be most carefully guarded against is the possibility of collusion; and a very ready and cheap mode of obtaining divorce might lead to people wilfully separating themselves, and breaking a bond which they were bound to hold faithfully till death. In our courts there is the greatest possible care taken that there never shall be a decree of divorce pronounced which could be collusive.

10103. *Mr. Campbell.*—You doubt whether the Sheriffs generally could be entrusted safely with such a power?—I think there is not quite the same security. And it probably must come up to the Court of Session eventually. But it would never come up to the Court of Session if there was any collusion.

10104. *Mr. Adam*—Would not requiring information to be given to the Procurator-fiscal in such cases be a sufficient protection against collusion?—It would be some protection. It would be a great thing if the procedure were made as cheap as possible, and as prompt as possible, in the superior courts. I think that would be very proper, but I look on the hazard of collusion in matters of divorce as a very serious thing; and I am afraid that if a person could obtain divorce very quickly and cheaply in the Sheriff Court, and the person against whom the decree is obtained immediately and very readily acquiesces, a great deal of moral evil of a serious nature would be produced. It would enable people to get quit of the most serious and abiding of all human contracts.

10105. *Mr. Webster.*—Would there be the same objection if the oath of calumny was taken before the Sheriff as it always has been before the Commissaries and the Judges of the Court of Session?—We never have held the oath of calumny to be very effectual as a

protection against collusion. We have always gone on the principle, that no person shall ever be divorced without the same amount of proof as would be required if the case were resolutely opposed; and that is the real protection.

10106. But the proof which is required relates only to two matters—first to marriage, and second to breach of duty?—Yes.

10107. And the proof has never any reference in the Court of Session to the matter of collusion?—Unless the question of collusion is raised in some way, you are quite right; but the whole circumstances come out, and ought to come out. And there have been cases in which people have thrown facilities in the way, to enable them to get quit of a wife, which have come out on the trial for divorce, and the divorce has been refused on that ground; and I think that is quite right.

10108. *Mr. Shand.*—If the evil of collusion could be guarded against, do you see any other objection to the Sheriff's jurisdiction being extended to cases of divorce?—No; I have perfect confidence that the Sheriffs would try the cases fairly and intelligently. I have no doubt they are perfectly capable of trying the cases well; but I think the hazard of collusion presents a serious difficulty.

10109. Does it occur to you to make any other suggestion except that which has been mentioned, of an intimation in all cases to the Procurator-fiscal, so that he might inquire into the facts? Is there any other safeguard that you would suggest?—I think it is one of those cases in which the very general record, which is the practice in the Sheriff Court, under the recent Act, should be departed from. I think that in an action for divorce, the most precise and careful record should be put in by the party making the statements; and that a general record in an accusation of adultery as a ground for divorce should not be sustained. I would suggest that if the Sheriff is to try a case of divorce, the record by the pursuer of the action should be much more specific than the record in a case for the payment of a £20 debt.

10110. *Mr. Baxter.*—I think you recognise it as a great hardship on a poor man, who is not able to pay the expense of getting a divorce in the Court of Session, that he should not have a remedy?—I quite feel that it is so; and if the interests of society in what I think an important moral question in regard to collusion could be effectually protected, I don't see any objection; but I think that is an important object.

10111. *Mr. Smythe.*—Might not the action be brought with the concurrence of the Procurator-fiscal, as in some cases of criminal prosecutions?—It would be a very serious thing to make the Procurator-fiscal undertake the responsibility of judging upon these questions in the first place, whether he should give his concurrence or not. In most criminal prosecutions brought with concurrence of the prosecutor, the Fiscal's concurrence is given lightly enough. It is given almost when asked; but that would not do in these cases.

10112. *The Chairman.*—Do you think that in the Court of Session it would be an expedient thing, and operate as a check upon collusion, that notice should be given of the action to the public prosecutor, and that he should have a power to intervene if he apprehended collusion?—I think it would. I think that either in the Court of Session or the Sheriff Court that would be a very proper thing to do.

10113. Do you think it would be expedient that alleged paramours should be cited as co-respondents in the action?—I think so.

10114. That would tend also to expiscate the question of collusion?—I think it is the practice now to cite them, and I think it is quite right that they should be cited. It would tend to expiscate the truth.

10115. *Mr. Campbell.*—In former times in Scotland the Commissaries were the original judges in cases of divorce?—Yes.

10116. Were their qualifications, in your opinion, higher than those of the Sheriff-substitutes now administering justice in Scotland?—I don't think that they were higher. I don't think that was a very good mode of dealing with these cases, and I would just as soon send them to the Sheriffs.

10117. In the experience of the old Commissary Court, was there reason to believe that collusion was frequent in cases of divorce, or was that any reason for the alteration of the jurisdiction in regard to these cases?—I cannot say that it was a reason for the alteration of the jurisdiction; but unless I am mistaken, there were cases in the Commissary records of a hundred years back, where there were very curious and singular instances of collusion on the one hand, and of fraudulent procedure on the other.

10118. These are cases going very far back?—Very far back.

10119. *Mr. Murray.*—Latterly the public were not quite satisfied with the Commissaries?—Not quite.

10120. *The Chairman.*—Does it appear to you that cases of declarator of marriage ought also to be confined to the Supreme Court?—I think so, for the same reason, and as involving status.

10121. Do you think there would be any inexpediency in giving the Sheriffs a power to name factors *loco tutoris*, judicial factors, trustees on lapsed trusts, and officers of that kind?—That is a question that could hardly be answered at once, and with reference to the whole class of cases. I could understand that there may be some cases of that kind, where it was necessary for the immediate extrication of a lapsed trust, that such an appointment might be properly left to the Sheriff. But I don't think it would be right to extend, *per aversionem*, the whole powers of the court in such a matter at once to the Sheriff Court.

10122. *Mr. Campbell.*—An Act was passed recently for the purpose of securing to married women living separately from their husbands, the proceeds of their own industry. The persons to whom that Act afforded relief are generally persons of a very humble class of society. Do you think it would be advisable to give the Sheriff power to entertain such cases?—I see no objection whatever to his jurisdiction being extended to that class of cases. The substantial facts of the marriage, etc., are there made out otherwise.

10123. *Mr. Smythe.*—In cases where lunatics have very small properties, there is sometimes at present the greatest difficulty of getting at the property, and it is desirable to have a prompt and cheap means of doing so. Would you give the Sheriff jurisdiction in these cases?—I don't think it would be a very difficult matter for a good man of business, accustomed to deal with these things, to select the kind of appointments which the Sheriff might make, and to leave untouched those more delicate applications, or those graver matters which should still be left to the Court of Session. Their jurisdiction is somewhat of what would be called in England a Chancery character, and I would not be disposed to hand the whole of it over to the Sheriff Court. But any person experienced in our court business here, could easily prepare a list of those factorships and offices to which the Sheriff might appoint.

10124. *The Chairman.*—Do you think it would be expedient to extend to the Sheriff Court the power of trying civil actions by jury?—I would much rather limit the trying of civil actions by jury in our own court. I don't think it would do any good at all to extend that to the Sheriff Court. I would far rather have the judgment of the Sheriff. But on that subject I have a suggestion to make. If I mistake not, there was a plan, I think in the Rutherfurd Act, by which, if the parties agreed, they might have their cause tried by a judge instead of by a jury; and it is wonderful how few cases did come to be so tried. There have been a few, perhaps a good many, but not near the number that was expected when his Lordship proposed that. Now, excepting certain cases of damages and defamation, and others which might easily be selected, I think it would be a great improvement if even in our own courts the process were exactly reversed,—that where the parties choose, they shall have their case tried by a jury,—that where one party proposes it, and the other does not agree, the judge before whom the

The Hon. Lord Ardmillan.

cause depends shall decide whether it shall be sent to a jury or not, and that it shall be tried by the judge, excepting when the parties agree to go before a jury, or where the judge so directs on hearing the motion.

10125. But in regard to the Sheriff Court, you are not in favour of introducing jury trial?—Not at all. Criminal causes, of course, would be tried by jury.

10126. In regard to criminal causes, do you think it would be a convenient and expedient thing that the Sheriff should have power to sentence to penal servitude? It has been suggested that there are a number of cases which, in consequence of repeated convictions, the public prosecutor is compelled to bring before the Circuit Court or the High Court, because the Sheriff cannot pronounce the sentence that is considered suitable, viz. penal servitude, say for five years. Do you think it would be expedient that he should have that power?—Looking to the present provision, that there should be no term of penal servitude under five years in the Justiciary Court, and that it shall be seven years whenever it is an offence after previous conviction, I think it might be safely permitted to the Sheriff—and by safely I mean expediently—that he should impose a sentence of penal servitude for some period fixed, less than five years,—say three years; and I think that would be found quite sufficient to remedy the evil to which your Lordship points. It would then be for the public prosecutor to select the cases to be tried before the Sheriff, and the Sheriff would see whether they were cases to which a sentence of three years' penal servitude was appropriate.

10127. Do you think that such an enactment would lead to the trial coming more rapidly after the offence?—Yes.

10128. And it might save expense, and prevent the loss of evidence?—Yes.

10129. *Mr. Smythe.*—Do you think the number of jurors in criminal cases could with safety be reduced?—I think 15 is an awkward number. I think the jury should be in all cases, whether in the Court of Justiciary or in the Sheriff Court, and whether civil or criminal, 12 in number. That would be a great relief to the jurors, and it would permit of the introduction of what I have long thought would be an advantageous rule. To demand unanimity, as is done in England, seems to me quite irrational; I cannot see any good ground for that. But it is quite true that convictions by 8 to 7—a majority of one out of 15—are not very satisfactory; and I would suggest that 12 should be the number of the jury, and that two-thirds should be necessary to conviction, in which case you would have convictions by 8 to 4; and I believe in that way you would get convictions in every case in which the evidence really warrants it. It would also be a great saving to jurors, because it would liberate 3 out of every 15.

10130. Would you approve of a jury of 7?—That would possess very much the same disadvantage as 15, viz. that there would be a majority of 1.

10131. *Mr. Webster.*—But you might require a majority of 5 out of the 7?—You might do that. I certainly think that 12 would be an improvement on the present number; but I am not prepared to make it lower at present. It is an advantage to have men of intelligence on the jury; and if the number was 7, and challenging was freely exercised, it might be contrived that there would not be a single person of intelligence left on the jury. I believe that great good will be accomplished by the removing of the exemptions that existed, which have at almost every circuit in Scotland prevented the court from having the benefit of seeing on the jury the gentlemen round about of most education, position, and intelligence, not one of whom is generally to be found upon a jury.

10132. *The Chairman.*—Are not most of these exemptions removed by the Act of last session?—Yes; and I think that will do a great deal of good.

10133. *Mr. Baxter.*—I suppose you have often observed the very thin line between theft and robbery?—Yes.

10134. Would you be inclined to extend the jurisdiction of the Sheriff to try cases of robbery, leaving it to the Crown lawyers to determine what cases they should send to him?—I think so. I think it is a defeat of justice, that a person accused of theft shall escape at the trial, because he has just added enough of violence to his procedure to make it robbery.

10135. *Mr. Shand.*—Have you seen counsel for the defence endeavour to bring the case up to robbery?—Yes.

10136. *Mr. Baxter.*—Are you of opinion that previous convictions should be given in evidence to the jury before their verdict?—That is a matter of some nicety, and it depends a little upon the class of cases. In principle, I agree with the suggestion, that as the jury are always told, and rightly told, that they must try the particular case upon the evidence, and not consider the previous convictions till they are satisfied upon the evidence, it is not in accordance with strict justice, that the previous convictions should be laid before the jury; and therefore, in cases of theft, robbery, etc., I think it would probably be a better plan if the evidence of previous conviction were laid only before the judge. But there are one or two kinds of cases in which, upon the soundest principles of justice, a different course should be adopted. Take the case of reset. I think nothing can be clearer than that a man that has been practising reset, where the case comes to turn upon his guilty knowledge, should not be permitted to hide from the jury the fact that he, who is pleading innocent possession, has been in the habit of resetting before; and so, in a case of uttering base coin, I must say that, if a man has been convicted over and over again of uttering base coin, it is scarcely just that he shall hide that fact from the jury, and have his counsel declaring, 'This is a man that has done no more than any of you, gentlemen of the jury, might have done; he got a bad shilling, and he gave it away, just as you might have done.' In these cases, I think it is quite right that the jury should know the fact.

10137. *Mr. Adam.*—Is it not the law at present that you may produce in evidence the previous conviction of uttering base coin?—That is the reason why I would leave that to the jury; but it is not the case at present, that you can enforce a charge of theft by saying that he has done that before.

10138. *Mr. Baxter.*—Or where a prisoner pleads a good character and puts his character in issue?—Yes.

10139. *Mr. Adam.*—Would you think it right that the judge should have the power of amending an indictment during trial? Supposing it turns out that there is a discrepancy between the statement in the indictment and the facts proved, do you think that in such a case the judge might be entrusted with the power of amending the indictment?—I think, if the difference was serious, it would be a little hazardous to allow the prosecutor the power. If the difference was not serious, and raised no more than a purely technical objection, I think that as the court have in recent years been permitted to authorize amendments of record in the court, the same principle might sanction the alteration of a word or two at the trial; but it should be done before the trial begins, and on the motion of whatever party chooses to make it.

10140. I was putting the case where a discrepancy in fact came to light during the trial?—I would doubt as to allowing an amendment there.

10141. *The Chairman.*—For instance, the mislibelling of the *locus* or of the name—would you allow that to be amended?—I doubt that. I think it is the duty of the public prosecutor, and it is a duty very rarely failed in, to state the *locus* correctly and the names correctly; and at all events, if he should have failed in stating these correctly, to ascertain when it comes to trial, whether he has or has not; and if at the commencement of the proceeding the public prosecutor or the prisoner's counsel were to point out that the man was called Robert in the indictment while his name was John, I would allow that amendment at once, before the procedure commenced; but I doubt exceedingly as to allowing the prosecutor to adjust his procedure to emerging circum-

stances. That is an encroachment on the rights of the accused which I would not like to see.

10142. *Mr. Shand.*—Suppose that when the case has progressed nearly to its close, it is found that the property libelled belongs to A. B. & Co., in place of A. B., do you not think it would be better that the libel should be at once amended, than that the prisoner should escape, he being guilty?—I think it would. That is a very peculiar kind of case, and a very critical objection. If it belongs to A. B. & Co., and A. and B. are partners of the company, I would not be very ready to sustain an objection in that case. It is generally put, 'the property or in the lawful possession of.' It is not often that the difficulty arises; but I would be tenacious of the rights of the accused, and would hesitate as to allowing the adjustment of the procedure by the public prosecutor on a trial, to suit emerging circumstances.

10143. Would you allow amendments of consent of the panel at any time?—If it was of consent, I cannot see any strong objection to allowing it. I would certainly allow it of consent before the trial commenced.

10144. *Mr. Baxter.*—It is not likely to be consented to after the trial has commenced?—No; but it might be the interest of the prisoner to consent, rather than have the diet deserted *pro loco et tempore*, and be sent back to prison.

10145. *Mr. Adam.*—Suppose it appeared that there was to be some miscarriage, would you allow the case to be adjourned and tried by another jury? I mean such a miscarriage as has been referred to, the property being libelled as the property of A. B., and it coming out that it was the property of A. B. & Co. In such a case would you allow a new trial, where the prisoner had not tholed an assize?—I am a bit of a purist in these matters. I would not like to encroach on the rights of the accused; on the other hand, I would not allow such a thing to happen as happened long ago, where a man was accused of the murder of a person living in the house of a man of a certain name—

10146. *The Chairman.*—Hannay?—Yes. I would, as a judge, have held that as he was acquitted there because the proof showed that he killed a person of a different name than the name libelled, it might very fairly have been held that he had not been tried on the charge; and that opinion has been held by more than one eminent judge. I would have no objection to a new trial being made lawful in such a case where it could be held that the prisoner had not really tholed an assize.

10147. *Mr. Adam.*—Before taking a verdict, might the judge not send the case to be tried before another jury?—If it amounted to a case such as I have mentioned, I would quite acknowledge the wisdom of it; but it is a sort of judicial discretion that I certainly should not like to exercise. If a man were tried for his life, and at the close of the trial a difficulty occurred owing to the absence of a witness, or anything of that kind, I don't think I would allow that man to be sent back to prison and tried again.

10148. *The Chairman.*—The principle you hold in regard to such special cases as have been put appears to be this, that that is not the offence with which the man has been charged?—Yes.

10149. And if it is not the offence with which he has been charged, he has been acquitted of the offence with which he was charged?—Yes.

10150. But he has never been charged with the offence founded on a correct libel?—Yes; that is the answer to the case of Hannay.

10151. And therefore you think that the cases should not be held to be cases in which the party has tholed an assize?—No, I think not. While upon the subject of criminal prosecutions, I have a suggestion or two to make in regard to them, which I think important. I think that the benefit of the Act 1701, c. 6, should be extended to all parties accused of crime as soon as they are committed for trial, and by force of the warrant of commitment, and should not be a privilege to be obtained only by those who are wise enough and rich enough to pay for it. It is a protection against undue delay or protracted imprisonment; and I don't think that the protection against protracted imprisonment should be confined to those who have either the knowledge or the money to take the benefit of it. The poorest should be entitled to the very same remedy; and as the prosecutor can be forced to try the case, however difficult, in 100 days, with letters at the end of it, if he thinks fit, under the Act 1701, I don't think that, considering the facilities of procedure nowadays, there would be the least difficulty in his trying all cases subject to the same rule. I would qualify that by permitting the prosecutor always to obtain delay from the court upon cause shown; but unless cause is shown, I think that every person accused and committed for trial should be immediately, by force of law, brought within the remedy of the Act 1701.

10152. *Mr. Adam.*—Even though he were out on bail?—I am speaking only to those who are committed for trial, and in prison. In regard to persons on bail, I think that they ought to have the benefit of the statute also, because it is a great wrong to a man that he shall remain all his life under a charge, without being either tried for it or liberated from it; and therefore I think that that statute may be made available for persons on bail. But I would not extend it at once to all persons on bail. I would have persons on bail to make the application for it by a short and simple notice, with power to the prosecutor to resist it, or to obtain delay on cause shown. I could quite understand that a person is accused of an offence, and that after being accused his innocence appeared so plainly that he never was meant to be prosecuted; but he has been accused, apprehended, committed to prison, liberated on bail, and he may be a man of the highest character. I think it is a right that he has, to obtain either a trial or a liberation by warrant of the public prosecutor, and that the Act of 1701, if he were entitled to take the benefit of it, would lead to that result; but I would not at once extend it to persons on bail, without notice by them.

10153. *The Chairman.*—Would you have the power to apprehend him of new, on new criminal letters, in the event of its turning out, after an interval of years perhaps, that there was clear evidence of his guilt?—I think I would. That is a separate power which arises at the expiry of the term under the Act 1701. In the event of new evidence being discovered, I think it would be a just protection to the public interest.

10154. *Mr. Adam.*—Would that necessitate more circuits in Scotland?—I don't think so. I remember asking some parties who had good means of knowing, and it appeared that the number of cases where the trial takes place at a longer period after the commission of the offence than would be competent under the Act 1701 is very small. By far the greater proportion of cases are tried within the necessary time.

10155. *Mr. Baxter.*—And if the Sheriff had the extended jurisdiction which your Lordship proposes, any extra case might be brought to the High Court?—Yes.

10156. *Mr. Murray.*—You would not maintain the present distinction as to criminal letters; you would make the whole one?—I would make the whole one.

10157. *Mr. Smythe.*—And you would make it imperative without any act done by the prisoner?—Unless he was on bail. I would not leave it for him to take procedure in the matter, except he was on bail.

10158. *Mr. Baxter.*—But the commitment, if he were in prison, would operate as an intimation under the present Act?—Yes. There is another point connected also with the trial of criminal cases, and here the suggestion I have to make is one which probably will not be concurred in by a number of people; but I have thought a great deal of it. There is a proposal that was made by no less an authority than Lord Brougham, and by others, to allow an accused person, if he thought fit, to tender himself as a witness in his own cause; and I have come to the conclusion that that is a proposal that ought not to be acceded to. It must rest on one of two alternative footings: either he is to be only competent for himself, and not competent against himself, or he is to be competent either way. If he is to be competent only for himself, then every man who does

The Hon. Lord Ardmillan.

not call himself will be believed by the jury to be guilty, because as he has himself always at his hand ready to say whether he is guilty or innocent, and does not choose to call himself, he will be at once believed to be guilty; and it would be no favour to prisoners to put them in that position. Then as to his giving explanations, according to the improved system of taking declarations—for I think the system has been very much improved—the declaration affords him an opportunity of making every fair explanation. The declarations should not be, and are not, in the hands of superior and judicious Fiscals, used for entrapping prisoners now; and therefore, as the declaration affords him the opportunity for explanation, I see no use—indeed, I see very much the reverse—of permitting him to call himself as a witness, when he cannot be called against himself. But then his Lordship and others used to say, Why not make him competent either way? Now, I have a still stronger opinion as to that. I think the conviction of the guilty, although one, and perhaps the chief end of criminal prosecution and justice, is not the only end; it is the conviction of the guilty by means which commend themselves to the confidence of the public. I daresay torture did at one period sometimes lead to the conviction of the guilty. I have no doubt that there have been other things that led to the conviction of the guilty—as, for instance, listeners. I think your Lordship in the chair will recollect very well evidence given by people who went to the door of a cell and listened, and heard the secret conversations of two wretched persons immured within it, and told them in the court; and one case in which a person listening heard, and repeated in court, the murmurings of an accused man in his sleep within the cell. Now it may be very possible that the conviction of the guilty might be obtained in all these ways, but they are all bad, and it is not according to the principle or spirit of British justice to obtain convictions by wringing confessions from the accused; and I don't think the calling a man as a witness, and putting him on oath against himself, is a thing that ought to be tolerated in a criminal trial in this country. Therefore I think, on both these alternatives, the proposal cannot stand. I would not have said anything about it, had it not been a good deal mooted and talked about lately; and having formed a decided opinion upon it, I have not hesitated to express it.

10159. *The Chairman.*—According to the present mode of taking declarations, which is an exceedingly fair mode to the prisoner, he has every opportunity of making such statements as he chooses. Do you think he ought to be entitled to insist on his declaration being read to the jury?—In some cases, I answer, Certainly. Even as a judge, I have repeatedly allowed the prisoner's declaration to be read, when the prosecutor did not put it in, and the prisoner wished it to be read. I have said it is not evidence for the prisoner, but the fact that he made a candid statement is shown by the declaration; and if he wishes the jury to know that fact, it should be read. The prosecutor always allows it to be read, on any suggestion from the bench.

10160. Sometimes it is proper to strike out of the declaration, before it is read, accusations against other prisoners or parties?—That is quite right, and is done.

10161. If the accused is entitled to make any statement he pleases in his declaration, and to insist on its being read to the jury, he has then the opportunity of making a statement upon which there has been no opportunity of putting questions to him, because it is not the practice to interrogate the prisoner. If he tenders himself as a witness at the trial, he can be interrogated; but if he tells his story in his declaration, and is entitled to have it read to the jury without any interrogatories having been put to him to test it, do you think that is expedient? You desire it to be read, not as evidence, but as the candid statement of the party at the time. Now it might or might not be a candid statement, but the opportunity of testing its candour did not exist when it was made, and is now passed?—That is quite true. There are some declarations which I would think it my duty not to allow to be read to the jury; for example, where an accusation is made in them against another prisoner; but where the object is to show that the story which the prisoner means to prove by his witnesses is the same story which he made in his declaration, it is reasonable that the jury should see that he is not for the first time presenting that case to them.

10162. I think you have stated that you have never known the prosecutor refuse to allow it to be read?—I never knew the prosecutor refuse to allow it to be read, where the judge thought it might fairly be read. I have known cases where the prosecutor refused to allow it to be read, where he was quite right on the grounds already mentioned.

10163. *Mr. Shand.*—When you have acted as counsel for a prisoner, have you never felt that it was an injustice to you to have the declaration refused?—I cannot at present recollect an instance in which, for the purpose I have mentioned, a declaration was refused. The general rule, I think, is that, if the counsel for the prisoner indicates to the court his wish to have the declaration read, on the grounds I have now stated, it was the habit of the court to allow it to be read.

10164. Do you hold that the prosecutor is not entitled to refuse to give the declaration?—I think the prosecutor is bound to show a reason for refusing it, if the court is appealed to.

10165. And that it is in the hands of the court to say whether it shall be read?—Yes; I think so. I may say that the only instance I know almost of a declaration being used which I thought ought not to have been used, is a case which is reported in the books. I was not counsel in the case, but I was present at the time. Mr. Baxter knows the case well. It was a case of two persons in Dundee who were accused of a very serious robbery, I think. The one pleaded guilty, and the public prosecutor declined to take the plea; they both went to trial, and the prosecutor read the declaration of the man who had pleaded guilty. I think that was wrong, and I have always thought so. The prosecutor was well entitled not to take the plea, because he was entitled to bring out the whole case; but he could have no motive for reading the declaration of the man who before the jury had offered a plea of guilty, except for the benefit he might get from it against the other party accused in that declaration. Therefore I think that declaration ought not to have been read. I was of that opinion at the time, and I have been so ever since; and if I were on the bench in a case of that kind, I would not allow the declaration to be read, because it would prejudice the other party accused. But that is the only instance that I recollect of, where the declaration was unfairly read or unfairly withheld.

10166. *The Chairman.*—That is not a legitimate use of a declaration, because the judge always tells the jury that it can be no evidence against the other prisoner. But a declaration in order to be used by a prosecutor must be libelled upon as a production?—Yes.

10167. Being there as well as the other productions, the prisoner is entitled to have it, unless there be a reason against it?—Yes.

10168. The reason generally assigned for not giving it is, that it can be no evidence for the prisoner?—Yes.

10169. But though it may not be evidence of the facts contained in it, it may tend to support the veracity of the party and the honesty of his case, when taken in connection with the evidence he has adduced, not as exactly making it evidence for him, but as producing an impression in his favour?—Yes.

10170. *Mr. Shand.*—Are you aware that some gentlemen, who have held the position of public prosecutors, hold that it is entirely within their control whether the declaration is to be used or not?—I am aware that some of them hold it to be within their control. I do not myself hold that. I hold it is under their control, in so far that they can show cause why it should not be used.

10171. It is a production by the Crown entirely?—Entirely.

10172. Is there not a doubt whether a prisoner is entitled to use that which is not given in his list of

productions?—He cannot use it as his evidence; but he is entitled, I think, to let the jury know that he has all along made the same statement. In the case of an *alibi*, a man brings forward witnesses to prove that on the day on which a murder was committed he was at the other end of Edinburgh from where it took place. If he made exactly the same statement when he was apprehended, it is a circumstance in his favour that he did so. The statement is not to be held as true, unless he proves his *alibi;* but the fact that he then made it may be a fact in his favour, and it is only to that effect that I think it should be read.

10173. Your Lordship is satisfied that the prosecutor has not the absolute power of refusing the declaration?—I never had to rule it. I always put it exactly as I put it to-day,—that if the public prosecutor can show that there is anything in it which attacks another person or another prisoner, or any ground for refusing it, it shall not be read; but if the only object of reading it is to show that the man is not inventing a story now for the first time, but told the same story when apprehended, then it ought to be read. I never ruled it, but I have frequently so stated it; and I never yet found that the public prosecutor stated any objection. If the prosecutor, among other things, produces a pistol, and discovers that the pistol which he has produced as evidence against the accused is not what he intended, I should have very great doubt indeed whether the prisoner is not entitled to insist on the production of that pistol, and on its being shown to the jury. If the prosecutor has libelled it as a production which he means to use against him, I have very great doubt whether the prisoner is not entitled to say, 'You should not have brought it here if you did not mean to use it.'

10174. Do you approve of the present system of taking declarations?—I think it is a great improvement on the previous system; and I think a declaration well taken is a good thing for an innocent party. The former plan of taking declarations was not right; and I do not at all approve of what I have seen, but not very recently: a man is asked a whole series of questions; to the first he says he declines to answer, whereupon, emboldened by that refusal, they go on to put every other question they can put, each more nearly touching his guilt, just to have the satisfaction of recording that he declines to answer every one of them.

10175. Do you think it right that the prisoner should not be entitled to consult a legal adviser before his declaration is taken?—I am not quite sure about that. At first sight it has an aspect of justice that he should consult his legal adviser; but I am not very sure about it. I think a declaration is a thing in which, if the party chooses, he is entitled to say nothing at all, and therefore he had better be simply asked his name, whether he was present, and questions of that sort, and then asked if he has any explanation to offer; and I don't think it is necessary to consult a man of business before doing that. I look upon the declarations as they are now taken, to be very fairly conducted; but they were not so in old days, a long time back.

10176. Do you approve of the double form of verdict—not proven and not guilty?—Yes; I think that right.

10177. *Mr. Murray.*—Have you ever considered whether a party who is accused and is acquitted ought not to get some compensation in the way of expenses from the Crown?—I have never considered that question. Of course it must only be on an absolute acquittal. I think it should not be done, as matter of right; it may well be left to the discretion of the Crown.

10178. *Mr. Baxter.*—I suppose your Lordship has very seldom seen a person tried without some ground for trying him?—Very seldom. It is quite another thing in a country where there are private prosecutors; but I think there is no occasion for it in a country where there is a public prosecutor, who always acts on public grounds, and can have no motive to accuse wrongfully.

10179. *The Chairman.*—Have you any further suggestions to offer to the Commission?—There is a point mentioned in the memorandum in regard to the possibility of review in criminal matters. Of course I can see no possibility of review on the merits at the close of the entire case; I don't see how you could review the evidence; and I think it is not practicable to have that review. But there is one species of review which I think might be obtained. I think a ruling in point of law, where it comes out clearly, might be excepted from, and I think that that exception might be taken to the Justiciary Court.

10180. Would you take it direct to the Court of Justiciary, whether it was a ruling of the Sheriff-substitute or of the Sheriff?—I think so. Of course I mean a ruling upon a point of law that should not stop the cause; and then it would be for the court to say, as the Court of Session says in the analogous case of verdicts in civil causes, whether the point raised, if the ruling in law was found erroneous, is a point that ought to have led to a different result. There has been a recent enactment on that subject. It does not follow now that every exception to the direction of a judge in a civil cause shall be fatal to the verdict of a jury. The court have now the power of saying first whether the direction was right or wrong—whether evidence, for instance, was admitted that should have been excluded, or excluded that should have been admitted; and there is a provision that the court which disposes of the exception shall have power to say whether, if the evidence had been admitted which was excluded, or excluded which was admitted, the verdict ought to have been otherwise; and I think there should be the same power given here in a case of exception from a point ruled.

10181. *Mr. Adam.*—Would you allow that at the instance of the prosecutor as well as the panel?—I don't know that you could refuse it. It might lead to difficulties, but I don't know that you could refuse it. They do so in England. There is also another matter which I may mention. You have now a double diet; and at the first diet, where the relevancy is disposed of, supposing that a decision upon relevancy is given, and that an indictment were either sustained or rejected, I think there might very well be a very brief summary appeal on that point. There would be time for it between the diets. I could understand that the prosecutor may have an objection sustained against him on a very important question, and it may be for his interest to get that question disposed of rapidly, by an appeal upon the relevancy to the court. I could still more easily conceive that an accused might state a most important objection to relevancy, and have his objection repelled, in which case he comes up for his trial at next diet, and he cannot at present repeat his objection to the relevancy. Now I think it might be well that he should have power, by some rapid appeal, to get the objections to relevancy disposed of during the period between the first and second diet.

10182. *The Chairman.*—If he was detained longer in prison by reason of that, it would be his own doing?—Yes.

10183. If he was on bail, the bail would continue?—Yes.

10184. Have you any other suggestion?—No.

FRIDAY, 12TH FEBRUARY 1869.

Members Present:—

LORD COLONSAY.
THE LORD JUSTICE-CLERK.
E. S. GORDON, Esq., Q.C.
JAMES CAMPBELL, Esq.
W. SMYTHE, Esq.
GEORGE HARRISON, Esq.
JAMES ADAM, Esq.
T. GRAHAM MURRAY, Esq.
J. B. BAXTER, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

The Hon. Lord Deas.

THE HONOURABLE LORD DEAS, examined.

10185. *The Chairman.*—You are one of the Senators of the College of Justice?—I am.

10186. And one of the Commissioners of Justiciary?—I am.

10187. In what year did you come to the bar?—In 1828.

10188. You acted for some time as an Advocate-depute?—I acted for some years as counsel for the Crown in the Sheriff Courts, in all the more important criminal trials by jury, and sometimes even in such trials without a jury, under Lord Advocate Murray; about 1840 or beginning of 1841 I became one of the regular Advocates-depute, and I continued to be so, with a comparatively short interval while a different Government was in power, down to 1850.

10189. After that you were Sheriff of the county of Ross?—In 1850 I became Sheriff of the united counties of Ross and Cromarty, and I continued to be so till 1851, when I became Solicitor-General. I remained in that office till the Government went out. In 1853 I was appointed one of the judges of the Court of Session, and in 1854 one of the judges of the High Court of Justiciary, and I have held both these offices since.

10190. In these various capacities have you had an opportunity of observing the working of the system of Sheriff Courts in Scotland?—I think I have had as much opportunity for such observation as any one could well have,—ever since I came to the bar I may say, now upwards of 40 years.

10191. Have you considered the constitution of the Sheriff Courts as consisting of a Sheriff and his substitute or substitutes, and the expediency of that arrangement?—I have.

10192. What opinion have you formed in regard to it?—In forming an opinion upon that matter I assume two things: in the *first* place, that it is most important, looking to the extensive civil and criminal jurisdiction of these courts, to be able to secure the judicial services of men of great legal knowledge, and who are not only impartial, but as free as may be from personal and local prejudice; and, in the *second* place, that it is important, although not equally important, that as little ground as possible should be afforded, to even the most suspicious of litigants or of the public, for want of confidence in the qualifications of the judges of these courts, or for suspecting either partiality or prejudice. Assuming these two things, the opinion which I have formed with regard to the Scotch system of a resident Sheriff-substitute and of a non-resident Sheriff practising at the bar of the Supreme Court, is that there has been no system, ancient or modern, in this country or in any other with the history of which I am acquainted, better calculated to secure the two things I have just mentioned,—I mean the qualifications, and the confidence in these qualifications; and if the Commission desire it, I shall state some of the grounds of that opinion.

10193. If you please?—There are very obvious advantages in having a resident judge with the qualifications which are usually found in a Sheriff-substitute. There are a great many things, both civil and criminal, which require all the despatch that can be given to them, which of course is facilitated by the Sheriff-substitute being always easily accessible. Sequestrations for rent, removings and ejections from heritable property, interdicts, and various other things of a civil nature, are of that description; and in regard to criminal matters, warrants of apprehension and detention, taking of declarations of prisoners, warrants of liberation or of commitment in due course of law, are of a similar nature as respects the necessity for despatch. And as regards the public peace, it is of course important to have a judge upon the spot, who may interfere in cases of emergency of that kind. A resident judge has also the advantage of becoming acquainted with the habits and industries of the people around him. Whether these consist of agricultural pursuits, mining operations, shipping (if it be a shipping port), manufactures or commerce,—in regard to all these things a resident judge has the opportunity, and to some extent is under the necessity, of acquiring a practical knowledge of how these industries are carried on, which every man who has long exercised judicial functions knows may be very important in enabling him the better to apply, or preventing him from misapplying, the strict principles of law. It is not necessary that a Sheriff-substitute should be an advocate. There have been no better appointments of Sheriff-substitutes than some who were not advocates. Men bred to the law in some department or another, and of great practical experience, have performed these duties as well as they could be performed; and when an advocate is appointed, and goes to reside permanently in the locality, he has the opportunity, and, in course of time, he will almost necessarily acquire a great deal of the same kind of practical experience which that other class of men may happen to possess at the outset. Even the personal knowledge of individual character,—for instance, the knowledge of how far, as a judge, he can trust a man of skill; sometimes even (though that is a more delicate matter, and to be exercised much more cautiously) how far he can trust the credibility of parties—may become important. But, on the other hand, some of these advantages may very easily pass into disadvantages. A man may, unconsciously to himself, imbibe personal or local prejudices; and it might be possible (though I don't think it likely), even partialities, which it is desirable should not even be suspected. A resident Sheriff-substitute is likewise placed at a disadvantage with respect to books. He may have a very good library, but he cannot by possibility have such access to law books ancient and modern as if he were in the Parliament House, and to authorities and decisions in other countries, such as England and America, which it is becoming more and more necessary to be acquainted with as trade and commerce extend. He has likewise no opportunity of conversing or consulting with other persons equally qualified with himself to form an opinion upon cases which are depending before him. He may have a very good argument from his procurators or solicitors; but he has no entirely unconnected qualified persons round about him to discuss or consult with. He does not hear the discussions that take place and the opinions pronounced in the Supreme Court upon his own judgments, nor the remarks of the pro-

fession upon the result. He may read the reports, but these often don't carry so adequate an idea to the mind as when a man is present listening to what takes place; and there are various other disadvantages in the position in which he is necessarily placed. Some of these disadvantages seem to me to be converted into actual advantages, and others of them to be entirely supplied, by the system of having a non-resident Sheriff in active practice at the bar of the Supreme Court, with the qualifications which these gentlemen generally have. They are unconnected with the county; they have generally no personal knowledge of the litigants; there is no room whatever even for the most suspicious individuals,—and it would be incredible, if one did not know it, how suspicious some litigants are,—there is scarcely a possibility of suspecting him of partiality or personal prejudice; and the consequence of that is, that even if such were likely to influence the mind of the Sheriff-substitute, he would be prevented from giving way to it, because it would be of no use. The ready and immediate appeal to the Sheriff not only fortifies the Sheriff-substitute in his habitual purity, but prevents the suspicion of anything else. As respects the practical knowledge which the Sheriff will soon come to be able to estimate in the Sheriff-substitute, he will, of course, make a due allowance for that in considering the judgments of the substitute before he alters them; and he will bring to that task all the knowledge of legal principle, which he has still better means of being possessed of than the Sheriff-substitute. The Sheriffs have always considered it a privilege they were entitled to exercise, to consult with any or all of the other Sheriffs upon any matters of difficulty which come up to them for decision. They have access, of course, to all the books in the Faculty Library; they hear the discussions and opinions on the judgments which they themselves have pronounced, and which their substitutes have pronounced; and they hear the criticisms of the profession, which are often freely expressed in the Outer House, upon these judgments. Moreover, being themselves, or most of them, in active practice, they necessarily have their wits more sharpened than can well be expected from a man sitting in his own closet in a distant part of the country. A great advantage of the system, I think, is, that for a comparatively moderate salary, you can command the services of men in the highest and most extensive practice at the bar. You can command their services with reference to the cases that belong to their own county, and their advice and observations are at the command of every one of the other Sheriffs who may not happen to be in the same extensive practice. No man, in my experience, ever either refused or resigned the office of Sheriff because of its interference with his practice in the Supreme Court. The office is considered highly honourable; and however small the salary, such men as generally reach the higher departments of the profession have usually a pleasure in exercising the abilities and knowledge of which they are possessed, for the better dispensation of justice; and they have never been in the practice of resigning the office because it was less lucrative than the profession in which they were engaged. I remember, indeed, one instance of a Sheriff resigning, and some of his friends represented that it was on account of the pressure of professional business; but there were two things that threw a doubt upon that. In the first place, the Government of the day wanted an opportunity to make a Sheriff; and in the second place, within a remarkably short time, he was appointed Solicitor-General; and putting these two things together, nobody thought he was an exception to the rule I have mentioned, of men retaining their Sheriffships, even with the highest practice. The late Lord Moncreiff, than whom there never was a more able lawyer at the bar, or a man in more high employment, retained his Sheriffship when he was Dean of the Faculty of Advocates, and up to the time when he came to the bench. I don't suppose the emoluments of his Sheriffship at that time were above £300 or £350 a year; and I don't think that the opportunity of commanding the services of such men depends at all upon the amount of the salaries, if you leave them their professional employment over and above. No doubt, if you wish to continue to have the services of such men, you must not increase the duties too much; more particularly, you must not make it necessary to go too frequently to the county. The result of combining several counties, and making it necessary for the Sheriff to go very often to the county, would, I think, probably be, that you would lose the services of such men as I have mentioned. They could not be expected any longer to accept or to hold the office. But as things are at present, you can command the services of men as Sheriffs, to whom it would be the reverse of an object to be raised to the bench. One instance of that is a Sheriff, most deservedly in the highest practice (a member of this Commission), who declined to allow himself to be recommended to Her Majesty for promotion to the bench, but who never thought, so far as I know, of resigning his Sheriffship. Another instance, I may say, is a gentleman, likewise deservedly in the highest practice, who was a Sheriff until he was appointed to a higher office, incompatible with the exercise of the duties of Sheriff, and who likewise declined, on account of the pecuniary sacrifice, to allow himself to be recommended to Her Majesty for the high appointment I have just mentioned. There is almost a third; for there is another gentleman in still higher office who is not a Sheriff, because it would not be compatible with that high office to be a Sheriff, but who has made the same declinature, on the same ground of pecuniary sacrifice, and who, I have no doubt, if he were a Sheriff, and did not hold an office incompatible with it, would continue to be a Sheriff, although he has been long at the head of the profession. Now, I cannot help thinking that a system which enables you to command the services of such men at very moderate salaries—because the salaries are not, and don't require to be, upon the footing of remunerating them for their whole time, which would be a very serious matter—such a system, I say, appears to me very valuable, both as respects the duties which they perform, and as respects the aid which they may give to others who are not in equally extensive practice. And a consequence of that, necessarily, is great confidence, throughout the country, among litigants, in the judgments which are pronounced in these courts; and one benefit of that, amongst others, is, that a large number of their judgments are acquiesced in, which tends to prevent the Court of Session from being inundated with a flood of trashy cases—cases in a general point of view not important—and enables that court, or at least gives it opportunity to perform the function which is, and always ought to be, the distinguishing feature of a Supreme Court,—viz. to preserve, ripen, and mature a system of jurisprudence which shall command the respect of the civilised world.

10194. It has been suggested that the appeal from the resident Sheriff to the principal Sheriff might be put on a different footing, by dividing Scotland into say five districts, and appointing two gentlemen of high position at the bar as appellate judges for each district, to go round and decide the cases, leaving open an appeal to the Court of Session, either in all cases, or in cases exceeding a certain value. Does it appear to you that that system would be beneficial or not?—It does not appear to me that that system would be nearly so satisfactory as the present system of appeal to Sheriffs having the opportunities to which I have referred.

10195. *Mr. Smythe.*—Particularly with reference to the disadvantages under which you have stated that the Sheriff-substitutes labour at present, and which you think are compensated and remedied by the present plan, do you think that such a tribunal would have the same effect of remedying those disadvantages?—I think not.

10196. *Mr. Baxter.*—Would your Lordship allow me to explain what has been a general feeling among my professional brethren in the country regarding the present constitution and working of the Sheriff Courts? Probably your Lordship may remember, as I do, a time when the Sheriff-substitutes were not the regularly educated and bred lawyers that they are now. Their

The Hon. Lord Deas.

salaries were extremely small, and the same encouragement to accept the office was not held out to men of ability as at present?—Yes, I remember that.

10197. In those times we held an appeal from the Sheriff-substitutes to the Sheriffs, who were always members of the bar, to be a very necessary measure, and it was then esteemed a very valuable privilege. But now, though your Lordship may not be aware of it so much as we are, that state of matters has very greatly changed. The Sheriff-substitutes are now men who are also highly educated and bred to the profession of the law, in most instances members of the bar, and with some exceptions, to which your Lordship has particularly referred, may be held, and are held, in the country as equal in legal ability to their Sheriffs-principal. It has therefore been held with us, that an appeal from such a Sheriff-substitute to a Sheriff does not, generally speaking, carry the same weight as it formerly did; that, in fact, it would be something very like an appeal from one judge of the Court of Session to another judge of the Court of Session. Besides that, we think that the Sheriff-substitutes, in forming their judgments, have some advantages, to which your Lordship has alluded, which the Sheriffs-principal have not. They preside over the making up of the record, and in cases of disputed fact they take the proofs, and hear and see the witnesses, and are therefore more able, we think, to judge of their credibility; whereas in these cases of disputed facts the Sheriffs review their substitutes' judgments from notes of the evidence; and in these circumstances we have for some time back looked upon the appeal from the Sheriff-substitutes to the Sheriffs to be really an appeal from a judge very nearly, if not of the same order, and better informed upon some points, to a judge not so well informed; and although it is all very well when the Sheriff adheres, still, if he reverses the judgment of the Sheriff-substitute, the unsuccessful party is apt to think, and does think, that he has at least the judgment of an equally competent judge. While, therefore, we highly appreciate a cheap appeal within the Sheriff Courts, we desire to have a stronger appeal than we now possess. For these reasons we have come to be of opinion that the appeal court would be strengthened by having two judges instead of one—two minds instead of one—to consult and deliberate together, and who would thereby, as we believe, arrive at conclusions which would be more satisfactory to the profession and to litigants; and we think that that system would possess both the advantages and the disadvantages possibly which your Lordship has described as attending the present system of resident and non-resident judges. That is the opinion which we entertain, and our reasons for it. Has your Lordship considered these?—I think it is one of the advantages of the resident Sheriff-substitute that you have him on the spot to prepare the record at the sight of the procurators; and it is also one of the advantages of having him on the spot, that he can take the proofs and hear and see the witnesses; in short, that he can prepare the case for judgment. But with the single exception of seeing the witnesses, I don't think those things are advantages when he comes to pronounce judgment. On the contrary, I think a judgment, generally speaking, can be given better by a judge whose time and attention have not been bestowed upon the preparation of the record. Judgment can generally be better given by a man who comes to it with a fresh eye, after the whole case is prepared to his hand; and still more so if he has, at the same time, the benefit of a careful judgment already formed and pronounced upon it by the Sheriff-substitute. It is quite true that nowadays only notes of the evidence are sent up, and these are not always so satisfactory as the full proof which we had before. If it were practicable to get, in the Sheriff Courts, such a shorthand writer as is now on my left hand, I would very much prefer to have the proof taken in that way; but there is so much urgency in the present day for economy, along with speed, as to prevent the possibility of combining everything. And as respects the credibility of the witnesses, which is the most important thing referred to, every Sheriff, and every judge in the Court of Session takes into account that the Sheriff-substitute heard and saw the witnesses; and the Sheriff-substitute, moreover, has always the opportunity of making a note of anything, noticed by him in the course of the proof, for the information of the Sheriff or court of review. That the judgments of the Sheriff-substitute shall sometimes be reversed, is of the very essence of a right of appeal; there would be no use of an appeal if the Sheriff were never to reverse; but I take it that the Sheriff always reverses very cautiously, and takes into consideration everything that the Sheriff-substitute has said and done, before he reverses. And the advantage that he has is not by any means dependent altogether upon his being a superior lawyer. It is the same advantage as there is this in every case of review—and it is there very much that the value of all review lies—that even if each successive judge, or each successive set of judges, who sit in review upon the judgments, were no better qualified than those who went before them, the case is ripened and sifted, and brought to its elements; and consequently we find that in the court of highest resort in the three kingdoms, even with judges not usually bred to a knowledge of the Scotch law, we have (very much in consequence of the ripening of the case, and reducing it to its elements by sifting out of it of all that is unimportant) judgments, than which, if you take them all together, nothing could well be more satisfactory. As regards the question whether that review, which I think essential, would be better to be committed to two judges who are to go round the country and review the judgments of the resident Sheriffs in the different places where Sheriff Courts are held, I cannot myself see the advantage of that over the present system. They would not get any more light, I think, by travelling about; there must be a great deal more expense to the country; you would not have got Lord Moncreiff when he was Dean of Faculty to travel over the country; you would not get such Sheriffs as I have referred to in the course of my observations to travel over the country; you would not get men of the same class, unless you are prepared to give them salaries of a very different description from what they get now; and when that was done, I don't very well see the advantage of two men who are not bound to agree, going about to pronounce these judgments. On the contrary, in my humble opinion, until you come to the Supreme Court, where experience has indicated that several judges—I should say four judges—are better for the final judgments, I think one man who feels the whole responsibility upon his own shoulders is more likely to come to a sound judgment than two men; and I think that the one man to whom the appeal is to be made is more likely to come to a sound judgment, sitting in his own chamber, or in the library of the Parliament House, 'rich with the spoils of time,' as well as with all modern books at his command, and with his brother Sheriffs, as I have already said, to consult with if he thinks proper,—I think that man, apart from the question of expense altogether and time and trouble wasted, is much more likely to come to a sound conclusion, than he would be when taken out of his ordinary occupation, travelling about the country, sleeping in a good hotel or a bad hotel as the case might be, and altogether what we familiarly call out of his element.

10198. Would not the appeal court, though consisting of two Sheriffs, have the same access to books and to conference with their associates, as one Sheriff now has?—I think if they could carry the Parliament House with them, and the lawyers of the Parliament House, they would; otherwise not.

10199. We presume that they would reside in Edinburgh, except when they are in the country?—I understood it was proposed that they were to go about the country to hear cases in different places, and to decide them then and there. If they were to reserve consideration of the cases, there would be no benefit in their having gone to the place at all.

10200. We don't think it would take up their whole time travelling in the country; and as for the expense,

there would be a smaller number of Sheriffs than there is now?—If it is part of the proposed system to supersede the Sheriffs generally, my objections to that must be sufficiently apparent from what I have stated as to the advantages of the present system.

10201. Would your Lordship give me an instance of an appeal from one judge to one other judge?—All the appeals from the Sheriff-substitute to the Sheriff have been instances of that, for greatly more than a century.

10202. But I meant in any other court?—We have had practically an appeal to one judge in the highest tribunal of the kingdom—I mean the House of Lords. We have had all the appeals going before one judge for years; and no more satisfactory judgments, I believe, ever were pronounced.

10203. Your Lordship means the Lord Chancellor?—The Lord Chancellor,—in Lord Eldon's time in particular.

10204. I suppose that must be taken as an exceptional case?—I was asked for an instance of an appeal to one judge, and I give that as an instance.

10205. *The Lord Justice-Clerk.*—Does not the Lord Chancellor sit on appeals from the judgments of the Vice-Chancellors?—I believe there are plenty of such instances in England, but I did not wish to go into those that I am not perfectly familiar with. Some people have doubted—and I don't say that there might not be room for question—whether, if you could have a permanent Lord Chancellor with undoubted qualifications, you might not be as well in the hands of one man who felt all the responsibility on his shoulders, as in the hands of several men who may unconsciously lean to some extent upon one another.

10206. *Mr. Campbell.*—You mentioned the case of two very distinguished persons, one of them a member of this Commission, and the other a predecessor of his in the office of Sheriff of the same county. Are you aware that both of these gentlemen, the Solicitor-General and the present Sheriff of Haddington, were previously Sheriffs of Inverness-shire?—Yes, I am aware of that.

10207. Inverness is a county in which there is a great deal of business, and many appeals to be disposed of?—Yes.

10208. The united counties of Haddington and Berwick are a Sheriffdom in which there is very little business?—I believe there is less than in many others.

10209. But there is very much less than in Inverness-shire?—I have no doubt there is less than in Inverness-shire.

10210. Are you aware what amount of the time of these gentlemen was occupied in discharging the duties of Sheriff?—It is quite impossible for me to be aware of that. I believe they are unaware of it themselves, and could not know it unless they had kept a note of all the time they were engaged in their counties, and all the time they were considering the interlocutors they were to pronounce, and the judgments they were to give: they could not tell it otherwise.

10211. But do you think that the number of cases disposed of annually, by the Sheriff of that particular county, can very materially affect the public service from their number or importance?—I have no doubt they are very important to the public and to the litigants.

10212. Would you, in speaking of the office of Sheriff, say that the qualifications of these two gentlemen afforded any fair sample of the qualifications of the Sheriffs in Scotland generally?—Well, that is a delicate matter for me to give an opinion about; but if they are not a fair sample of the qualifications of the Sheriffs generally, that is not the fault of the system. It may be the fault of the appointments. But I may say that I am not aware that, if you take the Sheriffs of Scotland as a body, you will find a body of better qualified men for the purpose in any country; and I may be allowed to say, with reference to what you were pointing at as to the duties to be performed in some of these Sheriffdoms being less than in others, that that just illustrates the observation I made, that it is inexpedient to make the duties of Sheriffships too large, because, unless salaries were to be given which the country will not give, you would not then get the same class of men to perform these duties.

10213. Then the practical result is, I should fancy, that the duties of Sheriff of the large counties will usually be discharged by persons who are in less practice, and less distinguished at the bar, than those of the smaller counties?—I don't think so. That inference is not to be drawn from anything I have said. I have no doubt, that if a Sheriff holds a very large county, with a great deal to do, he will, when an opportunity offers, be very well pleased to be transferred to a smaller county which will interfere less with his professional practice; but, as I think I said some time ago, I know of no Sheriff, however high his practice, who resigned a Sheriffship, whether his county was large or small, until he was appointed to some office incompatible with the performance of the duties of Sheriff.

10214. But you have known Sheriffs resigning a large county, and a large salary, for a smaller one, in the two instances you mentioned?—I have known Sheriffs transferred from larger counties to smaller ones, I suppose somewhat upon the principle that clergymen are, in the opposite way, transferred from small livings to larger ones.

10215. Have you any idea of the relative numbers of those Sheriffs who are presently in the active practice of their profession, and of the number of those Sheriffs who are not at present in active practice, but merely in attendance at the Parliament House?—I have not collected any statistics upon that matter; but we all know that it is a necessary qualification for a Sheriff that he shall be in actual practice, except in the cases of Edinburgh and Glasgow, where the Sheriffs are resident.

10216. That is to say, it is a necessary qualification that they shall be in attendance in the Parliament House?—I am not going to construe the enactment. The rule is, that the Sheriff must be in actual practice. I am not here to decide what actual practice is.

10217. Do you not know instances of Sheriffs who for the last ten years have not had practice upon which any pecuniary estimate could be placed at all?—I cannot call to my recollection any such Sheriffs. There may be. People, if they don't die, get old; and I have in my recollection at this moment one or two whose age sufficiently accounts for their dropping, to some extent, out of the practice which they once had.

10218. Are there not instances of gentlemen holding the office of the Sheriff who never were recognised by the profession generally as persons in civil practice at the bar at all?—I cannot call to mind any such instances. But, as I said before, that depends upon the way in which the patronage is exercised, and not upon the system, which is the matter about which I have given my opinion. I may say that, when I was Sheriff of Ross and Cromarty, I was not without professional business; and nevertheless I decided all the cases that came to me, without, I think, any delay. Every man who is in large practice and who is a Sheriff, or holds any other office of an important kind, must, of course, make available every minute of his time; and if he does that, I don't know that there is any man in such practice, or who can well be in such practice at the bar, as to prevent him from being able to perform the duties of a Sheriff, with the aid, if I may so express it, of that very practice, which keeps him informed of all the authorities and the decisions, and of everything which is going on, and enables him to come to a satisfactory judgment much more readily, and in much less time, than a man who is not in that practice would do.

10219. As a matter of practical experience, is it the usual course for Sheriffs to sit in court and hear the advocations or appeals from their judgments as Sheriffs discussed and disposed of by the judges in the Court of Session?—So far as I have observed, I don't think that has been so much the practice for a few years back as it used to be. I can remember when it was a constant practice, and I think it is a practice which ought to be followed, and which can very easily be followed.

The Hon. Lord Deas.

10220. According to the present feeling in the profession, is it not usually the case that the Sheriff would absent himself, in order not to hamper the latitude of discussion and of remark on his judgment?—I cannot understand how that should be. I cannot understand how he could affect either the discussion at the bar, or the opinions from the bench in any way, either by his presence or by his absence.

10221. Perhaps you are aware that it would be thought a breach of etiquette in the Sheriff Court for the Sheriff-substitute to hear the argument before the Sheriff, or the decision of the Sheriff?—I am not aware of that. If it is so, I am surprised at it, and regret to hear it.

10222. Are you aware that it is now generally the practice for Sheriffs to dispose of appeals from the Sheriff-substitutes upon oral hearings?—I believe it is more frequent than it was at one time for the Sheriff to have an argument by counsel before him before he decides the appeal, and I think that is an improvement. That could not so well be done, or at least was not so likely to be done, until an Act of Parliament was passed which enables the Sheriff to give and sign his judgment in Edinburgh.

10223. Is it not the fact that the Sheriff disposes of most of his cases at the sittings in the county town of his Sheriffdom?—I am not aware that that is so. It was not so in my time, when I was a Sheriff.

10224. Did you generally dispose of cases upon reclaiming petitions and answers?—I generally disposed of cases sent up on appeal after the cause was so far prepared, and an interlocutor or judgment pronounced by the Sheriff-substitute, which was brought under review.

10225. *Mr. Baxter.*—Upon written pleadings?—They were all written pleadings at that time.

10226. *Mr. Campbell.*—If you were informed that the Sheriffs generally dispose of their appeals upon oral hearings held in their county town, would you not think that they would be in the same position with reference to the despatch of that part of their business as the ambulatory court would be? They are not at home in their own chambers, but are in their county towns?—I am not aware that the Sheriffs dispose of most of their appeals in the county towns, and I can hardly think that they can do so, because they only go to the county towns at stated periods, and the appeals go on and come up nearly all the days of the year. Besides, if they hear appeals in the county town when they happen to be there, they can make avizandum with them, and consider them afterwards; and I know that it is the practice of Sheriffs to have hearings before them in Edinburgh, by counsel on each side, whenever they think the case of such importance or difficulty as to deserve that mode of hearing it.

10227. Could not the ambulatory judges make avizandum also after hearing the parties in the county towns?—Certainly.

10228. *Mr. Baxter.*—I suppose you know that the cases in which counsel are heard before the Sheriffs in Edinburgh very seldom happen?—I presume they happen only when the importance of the cases, either in law or in some other respect, requires it; because the Sheriffs will be naturally anxious not to put the parties to that expense unless they think it necessary for the ends of justice.

10229. *Mr. Adam.*—Do you think that, without prejudice to the present system in other respects, the Sheriffs-principal might be required to go more frequently to their counties than they do at present?—I think not, for the reason that I formerly stated. I think, if you make it imperative upon the Sheriffs to go much more frequently to their counties than they do now, you are not likely to get the same class of men that you get now to hold these offices.

10230. *Mr. Baxter.*—Is your Lordship aware that they only go four times a year?—These are the statutory times; but I am likewise aware that they go much more frequently. I am aware that, when there is an important criminal trial, or anything of that kind, the Sheriff very often goes, altogether apart from his statutory periods.

10231. *Mr. Smythe.*—And the Sheriffs are always liable to be sent at other times, upon a requisition from the Lord Advocate, if he thinks it desirable that they should go,—I mean in cases of riot or disturbance?—I don't know that they are bound to obey a requisition from the Lord Advocate; but I know there is no Sheriff in Scotland who would not act upon that at once.

10232. *The Chairman.*—The system of two ambulatory judges to hear appeals implies, I understand, that these gentlemen are not to practise in the Court of Session, and that they are to have nothing to do except in their appellate jurisdiction. Therefore the superintendence of the Sheriff, according to the present constitution, in reference to matters magisterial or executive, or in reference to trying criminal cases, would be altogether withdrawn. Do you think that would be a great disadvantage?—I think it would, and that such a change would go far to destroy all the advantages of the present system of Sheriffs, which I have endeavoured to point out.

10233. It has been suggested that the jurisdiction of the Sheriff Court should be extended to all classes of cases that are competent in the Court of Session,—cases of heritage, cases of status, the appointment of factors *loco tutoris*, judicial factors, and such cases. Are there any of these in reference to which you think it would be expedient, or any of them in reference to which you think it would be inexpedient, to extend the jurisdiction of the Sheriff?—I think it might not be inexpedient to give Sheriffs the power, in certain cases, of appointing judicial factors, or officers of that kind; and I think it might not be inexpedient to give the Sheriffs somewhat more jurisdiction than they have in regard to some cases of heritable property. I am not disposed to think that that should be unlimited. Looking to the permanent nature of the property, and to the immense value of it in many cases, and to the fact that the mere expense of coming to the Court of Session is not a great consideration to such parties, I don't see any good reason for extending it without limit as respects heritable property; but within a certain value, or with some limitations, I think there might be an extension of that jurisdiction with advantage. I don't remember at this moment almost anything else, in the way of civil jurisdiction, where there is room for much extension of the jurisdiction of the Sheriff, which is very large, and all but universal. As respects criminal matters, I am not of opinion that any more extensive powers of punishment should be conferred upon Sheriffs than they have at present. They may inflict any punishment at present, with the exception of penal servitude and death. I don't know that it is proposed to restore to them the power of capital punishment. The necessity for doing so is not very much recommending itself to public opinion; and I think that, when it comes to a matter so serious as penal servitude, it must be much more satisfactory to the country that the trial takes place in a court which always sits before the eyes of the whole country, and where the ablest assistance of counsel is always to be had for the parties accused; and where the judges, without arrogating to them any natural or adventitious qualifications above those of the Sheriffs, must necessarily come to have more experience in such matters; and I think experience is of great importance, because there is constantly a necessity, in administering criminal jurisdiction, to modify or extend general rules according to circumstances, which it is impossible to define, and the weight due to which circumstances, I think, no man can learn except by experience. And as respects the possibility of suspecting either undue leniency, or undue severity, or anything else than the most perfect impartiality, I think all that is better secured in the Supreme Court than it could be in a local court; and as I believe the system operates to the satisfaction of the country at present, I should not be in favour of making that change upon it.

10234. *The Chairman.*—Your Lordship has not ex-

pressed any opinion as to extending the Sheriff's jurisdiction to questions of status, such as divorce, declarator of marriage, or declarator of legitimacy? — I omitted to say, in answer to that part of your Lordship's question, that, for something of the same kind of reasons as I have just indicated in regard to very high punishments, I should not be for extending the jurisdiction of Sheriffs to questions of status, or questions of declarator of marriage or legitimacy, or of divorce.

10235. Do you think there would be any inexpediency in giving them jurisdiction to deal with the protecting of the funds of married women?—I think there would be no objection to giving them that jurisdiction.

10236. What would your Lordship say in regard to giving them jurisdiction in matters of reduction of deeds, either of heritable title, or will?—Well, one would require some explanations of how that was proposed to be carried out, whether by the verdict of a jury, or in what way. A good deal, I think, would depend upon whether thorough review was secured in these matters, which would go very much to take away any objection that otherwise might be made to it. I would rather be disposed to think that, even if review were secured, any extension of jurisdiction of that kind would require to be under considerable limitations and restrictions.

10237. Has your Lordship ever considered whether trial by jury in civil causes ought to be extended to the Sheriff Court?—I think it should not. I think the opinion is gradually gaining ground that we have quite enough of that already; and I can only say, for my own part, that if I had a cause of importance to be tried, I would rather have it tried and decided by judges who had made law and justice the study of their lives, than by a certain number of men who never had studied law, and never, perhaps, had been called upon to decide a case of any kind before in their lives. At the same time, I am not to be understood as being otherwise than of opinion that there are classes of civil cases in which jury trial is a very valuable thing.

10238. *Mr. Baxter.*—Would you extend the Sheriff's criminal jurisdiction to try robberies of certain kinds, which are sometimes very much akin to theft?—I don't think there would be any absolute objection to give the Sheriff the power of trying robberies; but it would involve the necessity for a great exercise of discretion on the part of Crown counsel who remit cases of that kind to be tried, in selecting the kind of cases; and I should be rather apprehensive that too many cases of robbery might be sent to be so tried, so long as it is not thought expedient—and thinking myself that it is not expedient—to give the power of awarding a sentence of penal servitude to the Sheriffs, because, according to our law and practice, it is only in exceptional cases that any other punishment is thought appropriate for cases of robbery than penal servitude; and I am not aware that there has been any complaint indicated as to the punishments in cases of robbery being too severe.

10239. But the line between robbery and theft is sometimes very fine—almost infinitesimal?—Yes. But when the line becomes almost infinitesimal, I am not aware that there has been found much practical difficulty in trying the offence under the name of theft.

10240. Your Lordship is aware that it has been the practice of the chairmen of Quarter Sessions in England to pronounce sentences of penal servitude?—I believe so. I don't wish to give any opinion about the English system in that respect, with which I am imperfectly acquainted; but I don't think there would be any expediency or any desire for such a power to be given to chairmen of Quarter Sessions, or to Quarter Sessions themselves in Scotland.

10241. Is your Lordship aware that, in the cases of poor persons who wish to get a divorce, the expense of the Court of Session is really a denial of the remedy?—I am quite aware that the expense of obtaining a divorce is not infrequently an obstacle in the way of applying for it. It is not, however, a great obstacle in Scotland, if we may judge from the number of poor persons who do obtain divorces, which is very considerable. The expense is often not what can be called great, and is frequently not more than they are able to provide, if the case requires it. And while, upon the one hand, it might be doing nothing more than justice in many cases to make the remedy of divorce more easy, there are, upon the other hand, strong reasons of expediency against making it too easy. I suppose there are some countries, or portions of countries, in which it is easier to obtain a divorce than in Scotland; but I don't think it is so in other civilised countries generally; and when we consider how very recently it is that, in the richer country of England, even rich men could not get a divorce in courts of law, and how very far they are at this moment behind Scotland in respect of the ease and facility of obtaining a divorce, I would be very chary of altering the law and practice in Scotland for the sake of making it still more easy to obtain divorces. I think jurisdiction in these cases is perhaps about as delicate as any sort of jurisdiction that can be exercised; and with all my respect for Sheriff-substitutes, I think it is better and more satisfactory to the country that these cases are dealt with in the higher tribunals in the way they are now.

10242. Would your Lordship allow me to read a passage from the report of the committee of the United Presbyterian Synod, which Sir Roundell Palmer copied into his report on the Scotch Law of Marriage: 'That, in cases of disputed marriages, the present law, which renders actions of declarator of marriage competent only before the Supreme Court, involves a process so expensive as in many cases to render its benefits beyond the reach of the humbler classes, to the deepest injury of the wife and children; and that to remedy this great evil, jurisdiction should be extended to the Sheriffs to dispose of such cases, subject to appeal to the Supreme Court.' Does your Lordship agree with that?—I cannot say that I agree with it. It is a very serious thing the getting quit of a wife, and it is a very serious thing being fixed with a wife. I cannot say that I think the jurisdiction would be exercised so satisfactorily in the country, by a local tribunal, as it is now. I know that declarators of marriage and declarators of legitimacy have given me more trouble, thought, and consideration, for months together (what is called vacation time included), before I could make up my mind, than almost any other cases I have had to do with.

10243. But is it not a very serious thing, if a woman is really married, and has children, that she shall not be able to establish her condition, and that all the children should be held as illegitimate?—No doubt that is a serious thing; but I must say, with all my 40 years' experience at the bar, and otherwise, I have not become aware of material hardships resulting from the present system of jurisdiction, either in cases of divorce, or in cases of declarator of marriage or of legitimacy.

10244. *Mr. Smythe.*—And the recent changes of the law in England on that subject have confined it to one Supreme Court?—Yes; and I believe the result, so far as the court is concerned, is very satisfactory.

SIR WILLIAM BROUN, Bart., examined.

10245. *The Chairman.* — You are a practitioner before the Sheriff Court at Dumfries?—I am.

10246. How long have you been so?—Since the year 1830.

10247. Do you hold any official situation connected with the body of procurators, or connected with the business of the court?—I hold no official situation connected with the court. I am Dean of the Faculty of the Procurators.

10248. Are the procurators of Dumfries a numerous body?—They are.

10249. How many may there be?—65 in all; but I think 32 only are licensed. There are a good many gentlemen who are procurators who have the manage-

Sir William Broun, Bart.

ment of estates and factorages, but don't practise before the court.

10250. There is, I think, only one seat of a Sheriff Court in the county?—Only one seat.

10251. At Dumfries?—Yes, at Dumfries.

10252. Have you any suggestion to make to the Commission in regard to the constitution of the Sheriff Court, as consisting of the Sheriff and his substitute?—I think that the office of Sheriff and Sheriff-substitute should be abolished, and that we should have one good resident and well-paid Sheriff.

10253. When you say a well-paid Sheriff, have you any sum in your mind?—I think that the Sheriff of Dumfries should have £1500 a year, considering the population of the county, and the importance of his jurisdiction. The population in 1861 was 75,878.

10254. Would you abolish all appeal within the court itself?—No; I think we should have an appeal within the Sheriff Court most decidedly, and that there should be two appeal judges.

10255. What would their functions be?—They should come round, and hear, and decide all the appeals from resident Sheriffs.

10256. What number of such judges would you have? Would you have two judges to do the whole business of Scotland, or would you have Scotland divided into districts?—I think Scotland should be divided into districts, and that from the present Sheriffs appeal judges might be selected. I think it is possible that these appeal judges might take up four, or five, or six counties, according to the extent and population of the districts.

10257. You would take these appeal judges from the bar; but you would take them primarily from the present Sheriffs at starting?—Yes; at first from the present Sheriffs, and afterwards from the bar of Scotland.

10258. Do you contemplate that they should relinquish their practice at the bar?—Yes, I think so.

10259. And confine themselves to the duty of hearing appeals within the district?—Entirely to hearing appeals within the district; and if they have spare time, they might perhaps assist in the Outer House business of the Court of Session.

10260. How would you arrange that?—I presume they would be resident in Edinburgh.

10261. How would you bring them into play in assisting in the Outer House business?—I would do it in this way, that if they were to come round once every month, or once in five or six weeks, as might be arranged, and if it was found that the appeal business allowed them to remain their spare time in Edinburgh, it occurs to me that that spare time might possibly be occupied with advantage in the Court of Session.

10262. Do you mean that they should practise in the Court of Session?—No.

10263. Do you mean that they should act as judges in the Court of Session?—Yes; in hearing motions and assisting the Lords Ordinary, in preparing records, and in the minor business of the court. I think, however, that their time would nearly be fully occupied in considering and discussing appeals from resident Sheriffs.

10264. Would they have anything else to do in relation to the county, excepting the hearing of the appeals?—Nothing else except hearing the appeals, unless cases from the Sheriff Court were remitted to a jury. There are a great many cases coming before the Sheriff Court, that involve questions of servitude and actions of damages, in which eight or ten witnesses are examined on either side; and it has occurred to me, that if the Jury Court were still retained, it might be extended to the Sheriff Court, to the effect that if both the agents agreed to remit the case to these appeal Sheriffs and a jury, that this might be done, and that they might sit as a Jury Court, with a small jury of five or seven.

10265. Do you think it would be desirable to institute trial by jury in civil cases in the Sheriff Court?—I am very much averse to jury trials myself, as at present existing, owing to the immense expense and uncertainty attending them; but I think, if we had two appeal judges coming round to Dumfries periodically, in those cases where there is a large number of witnesses, if the parties, instead of taking a long proof, which might occupy five or six hours for several days, agreed to refer it to a jury, with those appeal judges sitting as judges, the whole case might be disposed of in one day. They might go on and hear the evidence, and the gentlemen of the local bar would conduct and discuss the case, and it would be decided off-hand at once. I don't see anything to prevent that being done.

10266. But generally, do you think that the introduction of jury trial in civil cases in the Sheriff Court would be an expedient thing?—I think it might be expedient, as a trial, in the way I have suggested.

10267. As an experiment?—I think myself that it would succeed.

10268. Would you have these appeal judges to take evidence in any other form?—No; the evidence would be all taken by the resident Sheriff, and the cases would then come on appeal to these judges.

10269. Then they would not, in fact, be Sheriffs at all. Would you propose that as a new appellate court?—Yes; they would be appeal judges.

10270. That would scarcely be a review within the Sheriff Court; but it would be a review by a new tribunal to be established?—It would amount to that, but still, I hold, be a review within the Sheriff Court.

10271. Would you have an appeal from these judges to the Court of Session?—Yes, I would.

10272. Upon matters of fact and upon matters of law?—Yes.

10273. Would you impose any limit upon the appeal as to amount, or would you make their judgment final with reference to any particular amount?—I think it might be well to make their judgment final up to the sum of £50. I may state that, before leaving Dumfries, I ascertained that the number of appeal cases last year, from the Sheriff-substitute to the Sheriff-principal, was 89.

10274. Do you think that is about the usual number?—I am not prepared to say positively. The depute-clerk was absent, and I could only get the information for one year; but I should think that is about the usual number.

10275. Is it the general rule in Dumfries to appeal cases to the Sheriff upon a final judgment of the Sheriff-substitute?—I think it is. There are a good many appeals where the parties are not fully satisfied in regard to the judgment, and by others for delay.

10276. Is it the more frequent course to appeal?—Yes; I think it is.

10277. Where a judgment is pronounced upon preliminary defences, is it ordinarily appealed or acquiesced in?—It is generally appealed.

10278. Is there a frequent appeal upon an interlocutor allowing a proof?—The proofs are very frequently allowed before answer, and of course that precludes appeal; but sometimes there are appeals against relevancy and proof; but these are not so frequent, I think, as with reference to judgments on the preliminary defences.

10279. When you say that a judgment allowing a proof before answer precludes an appeal, do you mean that it excludes the interest to appeal?—Yes.

10280. In the course of taking proof, are there frequent appeals?—Occasionally; but that is not very frequent in my experience.

10281. Is it usual to go on with the proof, allowing these to be disposed of afterwards?—It is.

10282. *Mr Campbell.*—Is that not compulsory by the Act of 1853?—Yes.

10283. *Mr. Baxter.*—Is it not the fact that latterly the Sheriff-substitutes have been well-educated lawyers, and chiefly taken from the bar?—Yes; that is the general rule.

10284. And that the appeal, therefore, from such men to the Sheriffs has been regarded as very much an appeal from one judge to another of very much the same rank and ability?—Yes.

10285. And therefore there is not so much confidence now in the appeal as there used to be, when the

Sheriff-substitute was of an inferior grade?—Yes; that is quite true.

10286. Is that a reason why the practitioners in the country generally wish the appeal court to be strengthened?—It is.

10287. *The Chairman.*—When you say there is not so much confidence in the appeal, do you mean that there is more confidence in the judgment of the Sheriff-substitute than there used to be?—I think the Sheriff-substitutes are a better class of judges than they were formerly, and in consequence we have more reliance on their judgments.

10288. *Mr. Adam.*—Is that opinion confined to the procurators, or is it held by the clients?—I think the procurators regulate their clients in that matter.

10289. *Mr. Baxter.*—Are you satisfied with the way in which the evidence is taken by the Sheriff-substitute?—No; I am far from satisfied with that. I think that we should have a shorthand writer. The mode of taking down proofs at present is objectionable in various points. In the first place, the proof is understood to be gone on with continuously till finished. When the Sheriff orders a proof, the pursuer and defender cite a number of witnesses,—and I have had cases myself where there have been eight on one side and ten on the other, all cited for one diet,—on the assumption that if the pursuer's proof were to finish at one or two o'clock, the defender should then instantly proceed with his proof; whereas it turned out that only three witnesses were examined, and there were fifteen witnesses who had come from different parts of the country distances of ten or twenty miles, some of them professional persons, and these had to be paid. Then the proof does not proceed the next day, because the Sheriff has so many engagements that it cannot go on till a new diet is fixed.

10290. You think a shorthand writer would expedite the taking of the proof?—I think that would facilitate it very much, and we should take the whole proof in one day. I am almost sure of that.

10291. But my question had reference to the Sheriff-substitute taking down the notes of evidence, without the agents knowing what he was taking down?—That is one of the other objections to the present mode. The Sheriff-substitute is only bound to take notes of the evidence, and when the question is put he takes down a note of the answer,—then he looks to the agent, and the agent then puts another question; and it goes on in that way to the end of the day. We never know a word that the Sheriff has taken down, unless we ask him to read a particular answer.

10292. Then you would prefer that the Sheriff-substitute should dictate the evidence?—Unquestionably, the Sheriff-substitute should dictate the evidence, so that the parties should hear and know what is taken down.

10293. *Mr. Adam.*—Do you not approve of a proof going on continuously, so that the defender's proof shall follow immediately after the pursuer's?—I quite approve of that; but it is not very easy to accomplish it under our present system. For instance, Tuesday is a court day, and Wednesday is our market day; and any professional gentlemen having any business at all, cannot possibly attend on that day without great inconvenience and sacrifice of time. Thursday is often a criminal court day, and Friday is our Sheriff Court and Small Debt Court; so that the Sheriff has just Monday, Wednesday, and Saturday; and he objects to take Saturday, as it is a half-holiday.

10294. *Mr. Baxter.*—Do you think that if a shorthand writer were to be employed, the proofs might be taken in one day?—Yes; but I am favourable to the Sheriff exercising the power which he has of naming a commissioner, who could easily, in my opinion, take the proofs with a shorthand writer, and so keep up the business of the court.

10295. *Mr. Adam.*—What is the difficulty in the Sheriff arranging his business so as to take a proof continuously on two consecutive days?—Because he has not two days together to spare. We are not sure of the time that may be occupied, and the Sheriff can scarcely fix a court day to take a proof of any length. These court days, as I have said, are Tuesday and Friday, and the criminal business comes on on the Thursdays. Then we all object to proofs being fixed for the market day, if we can possibly get it put off that day; besides, the Sheriff has to attend frequent Small Debt Circuit Courts.

Sir William Brown, Bart.

10296. *The Chairman.*—Do you think that the having of a shorthand writer would add to or diminish the expense of the proof?—I think it would diminish the expense.

10297. *Mr. Campbell.*—By saving time and the attendance of the professional persons employed?—Both by saving the attendance of the professional persons employed, and of the witnesses who have to be paid.

10298. *The Chairman.*—Is there more difficulty in the Sheriff taking a note of the evidence and finishing the case in a day, than there is in taking a trial in the criminal court or the jury court?—The evidence before the criminal or jury court would, I think, proceed much more rapidly than it does before the Sheriff. The Sheriff takes the evidence pretty fully; and it frequently happens that there are discussions and objections to the examination of witnesses, and these frequently occupy a considerable portion of time.

10299. Is there much of that in your court?—A good deal of it. Questions are often objected to.

10300. The same objection would arise whether there was a jury or not?—But I consider that the evidence would be much more rapidly taken before the appeal judges and a jury, in the form of a jury court, than it could be taken down by the Sheriff.

10301. But without a shorthand writer is there more difficulty in the Sheriff now taking down the evidence in satisfactory notes, than there is in the judge at a jury trial taking down the evidence by satisfactory notes, which are always appealed to as the rule of what has been said?—I think judges take them down shorter in the criminal court, and more rapidly.

10302. But take the case of the civil jury court?—Well, I think the evidence is taken much more rapidly in the civil jury court than the Sheriff takes his notes of the evidence.

10303. But if the Sheriff or any appeal judge sits in the civil jury court, would he take it more rapidly than he does now?—Yes, I think he would.

10304. How?—I think that the notes taken in the jury court would not be taken so fully as they are taken by the Sheriff; and besides, when a jury case is begun, the judges would very likely sit till the case was finished, whereas the Sheriff adjourns the proofs generally at five or six o'clock.

10305. When does he begin the proof?—Sometimes at ten or half-past, and sometimes at eleven.

10306. And generally you get through only two or three witnesses in the course of the day?—That depends on the circumstances. You may get through eight or ten in that time, but at other times you may not get through more than two or three. It all depends on the nature of the cases.

10307. Have you considered what sort of remuneration these gentlemen whom you call appeal judges should get?—I think they should have from £1800 to £2000 a year.

10308. Would that also command their time as assistant judges in the Court of Session, as you have suggested?—Yes, if their time permitted.

10309. Supposing that two appeal judges were to differ in opinion, what would be the condition of matters then?—We would still have the opinion of the Sheriff and one of the appeal judges.

10310. *Mr. Baxter.*—The judgment would stand?—The judgment would stand in that case.

10311. *The Chairman.*—But the two appeal judges would stand as *plus* and *minus*, in equal quantities?—Yes.

10312. And therefore you would just have the judgment of the Sheriff-substitute which was thought to merit appeal?—Yes, but confirmed by another judge.

10313. Have you considered whether the jurisdiction of the Sheriff ought to be extended?—Yes; I am decidedly of opinion that the jurisdiction of the Sheriff should be extended; and I think if we had a court

Sir William Broun, Bart.

constituted as I have described it, it might safely be extended to all civil causes. I was lately of opinion that causes of legitimacy and marriage and divorce might have been reserved for the Court of Session; but upon further consideration I have come to be of opinion, that if the court was constituted as I have said, it might be extended so as to embrace these cases also.

10314. Then there is no class of cases that you would exclude from the Sheriff's jurisdiction?—No; but I think if the jurisdiction was extended in the way I have mentioned, all cases of importance or intricacy would still be brought in the Court of Session.

10315. Would you think it expedient that, in regard to cases of heritable right of a certain value, and cases of status, there should be a power given to either party to remove them at an early stage to the Court of Session, if they desire it?—I think that might be an expedient course.

10316. *Mr. Adam.*—Supposing the system of two appeal judges were not adopted, would you still think that the Sheriff's jurisdiction might be extended?—Yes, I think it might.

10317. To the same extent?—In that case, I think both our Sheriff-substitutes and our Sheriffs should have better salaries, to induce more able men to accept the office.

10318. *The Chairman.*—Have the appointments of Sheriff-substitute in your county been generally satisfactory?—Very satisfactory indeed. We are very much satisfied with the appointment of the present Sheriff-substitute in Dumfries, and Mr. Trotter's appointment was also satisfactory.

10319. The system is satisfactory; but you think it would be improved by what you state?—Yes, I think it would be decidedly improved.

10320. The constitution of it has worked well; but you think it would work better if there were two appeal judges?—I think we can scarcely expect a Sheriff-substitute to leave the bar of Scotland, where he may rise to make from £1000 to £5000, or even more, a year, and to come to a country district for the small sum of £750 or so. My view is, that the salaries of the resident Sheriffs should rise according to the importance of the place, commencing at £1000. For instance, I would give £1500 a year to the Sheriff at Dumfries, probably £1800 to the Sheriff at Dundee, and £2000 to the Sheriffs at Glasgow and Edinburgh; and they should all be entitled to look for promotion. The resident Sheriff of Dumfries might be removed to Dundee, and from there to Glasgow, and he might ultimately be appointed to the bench. If these inducements were held out, I think we would secure a superior set of judges. In that case the Sheriff Court might be made competent to entertain all civil actions; and my own view is, that the Court of Session would become more a court of appeal which would fix the law of Scotland,—though I believe that all cases of importance in point of amount, or difficulty in point of law, would come to the Court of Session, if there was an improved form of process, and more rapid decisions obtained.

10321. Either by appeal or by being originally brought there?—Yes.

10322. *Mr. Campbell.*—Or by being transferred?—Yes.

10323. *The Chairman.*—Have you any observations to make upon the system of pleading in the Sheriff Courts at present—the writs or procedure?—I think the forms might be very easily simplified, and the form of making up the record might be improved. I do not see the use of the address by the Sheriff to Sheriff-officers in the present summons. I would have it just, 'I, A. B., say that C. D. owes me a certain sum of money in terms of the claim indorsed on the back of the writ; and I crave warrant to cite him to the court.' A simple writ of that kind, calling the defender into court, is all that is necessary,—the Sheriff-clerk in name of the Sheriff to grant warrant for citing the defender. Then I think that three days after the citation the pursuer ought to lodge the writ with all his productions in the hands of the Sheriff-clerk; so that the defender could borrow them, and have three days to say whether he was to defend the action. If he does not defend, there should be a certificate of no defence by the Sheriff-clerk, when the case should go to the Sheriff's roll, and decree should be got without the necessity of any one appearing and asking decree.

10324. When you say three days, I suppose you don't mean to fix that absolutely. There may be localities where a longer time would be necessary?—I suggest that it should be a short time. Then I think if the case is defended, the defender should be bound to lodge with his defence all his productions within a certain period; and if he puts in any counter claim, the pursuer should have the opportunity of borrowing up the defence, and counter claim, and productions; and if he has any amendment to make, he should, within a certain limited time, serve that amendment upon the defender, when the case would come before the Sheriff; and at the very first hearing the Sheriff might make any further small adjustment that was necessary, hear parties, close the record at once, and order a debate on preliminary pleas if such pleas are stated, and upon the merits of the case. Following upon that, I think we should have an interlocutor by the Sheriff, finding all the points that were admitted, disposing of the preliminary pleas, if any, fixing the relevancy and the proof; and from that we should have an appeal to the appeal judges, so as to save expense. Proofs are now allowed before answer, and we examine long lists of witnesses, and incur perhaps £30 or £40 of expense; and at the end it is found to be irrelevant and of no use.

10325. *Mr. Baxter.*—You mean that the defence should be lodged without any enrolment in court?—Yes.

10326. And that the first enrolment should be after the defences were lodged, and any replication which the pursuer may require to make; that then the case should be enrolled before the Sheriff, and the parties heard and the record closed?—Yes; and there would be no necessity for agents to appear in court till that time.

10327. Are you in favour of condescendence and answers?—No, I am not. I am averse to them.

10328. *Mr. Smythe.*—Would you have no statement of the plaintiff's claim?—I would have the statement indorsed on the back of the writ or summons, which would be like a short condescendence.

10329. *The Chairman.*—Would it be articulate?—It would run in this way: 'A. B. owes me £20 per bill dated so and so; and he owes me a farther sum of £10,' and so on; that is all that is necessary.

10330. *Mr. Baxter.*—To identify the claim?—Yes, to make the claim explicit; and he should produce the documents at the same time.

10331. *The Chairman.*—To show the nature of it?—Yes.

10332. And the defender, if he has a specific defence, should also state the facts connected with it?—I would have him to state them very shortly; and if he has a counter claim, he should state and aver that it is owing.

10333. And explain how?—Yes.

10334. How would you compel the defender to make his statement short?—He should be appointed to put in a simple statement of facts, without argument.

10335. That is, a condescendence?—It must come partly to that.

10336. Have you any other suggestion to make with reference to the Sheriff Courts?—I may say that I don't think the present form of appeal under the new Court of Session Act will be satisfactory.

10337. What is the objection to it?—The objection I have to it is, that when it comes into court, the court has not only the power of ordering the record, proof, interlocutors, and all the productions to be printed, which often incurs a very large expense, but they can allow amendments. They can also decide the case upon pleas in law that have not been before the inferior judges, and they can also take farther proof. I don't look on that as an appeal at all. It is like beginning a new case in the Court of Session.

10338. Do they allow new statements of fact?—

They allow amendments. The Act provides for amendments, so as to decide the case upon the proper points of law, whether they are stated to the inferior court or not, and proof also may be allowed.

10339. Do you object to the case being decided upon the proper points of law, though these have not been stated in the inferior court?—No, I don't go that length; but I object to amendments, and to proof particularly, because I think that involves something like a new case.

10340. If it appeared to the Supreme Court that the matter had not been properly expiscated in the inferior court, and that there was a miscarriage as to the real case between the parties, what do you think the court should do?—I cannot well suggest that. I think that would scarcely take place if we had the new system of a good resident Sheriff and two appeal Sheriffs.

10341. Does not the statement of the case in the court below depend somewhat upon having good procurators to state it?—No doubt of it.

10342. I don't suppose you anticipate having better procurators?—Yes; we anticipate that too. I think there is no doubt, now that Faculties have been established, and that all apprentices require to be specially examined before being admitted to their indentures at all, besides periodical examinations during their apprenticeship, and a stringent examination before a board of the General Council of Procurators, that we shall have a better class of procurators.

10343. But even with the best practitioners there may be such a miscarriage as I have stated?—No doubt of it.

10344. Do you think it expedient that the practitioners in one Sheriff Court should have the power of pleading in another?—I am in favour of all agents being put on an equal footing; and I think they should be allowed to practise in all the courts.

10345. In the Supreme Court, and in inferior courts also?—Yes.

10346. Would you have them admitted by the Supreme Court?—No. I think the same examination should be applied to the whole of them; and when they have undergone the proper course of study, and passed that examination, they should be entitled to practise in any court.

10347. And that the Supreme Court should have no control over the admission of parties to practise before it?—No; I think if these practitioners were admitted in the way I propose, they would be qualified, and should be entitled to practise in the superior court without any farther control of the Court of Session.

10348. The court having nothing to do with their admission?—No.

10349. *Mr. Adam.*—Is the Certain Debts Recovery Act much used in your county?—Yes, a good deal.

10350. Does it give satisfaction?—No; we are very averse to it, and I think it ought to be repealed.

10351. On what ground?—There are various grounds in which it is objectionable. For instance, after you get a decree, you cannot attach heritable property; that is one ground of objection. You cannot raise inhibition; that is another. You cannot adjudge; that is a third. Under the decree, there is no power to the officer to open shut and lockfast places to apprehend a party; and if a person produces a counter claim of £12, it is incompetent to state it. It is thrown out altogether, and the defender has to go into another court to establish it. That is a matter of great hardship.

10352. Is there any objection to the costs under it?—The costs in some instances are too high, and in others far too low.

10353. *Mr. Baxter.*—And you have no oral hearing on appeals?—No, I am not aware that the point has been tried; but it is supposed that if an action of multiplepoinding was raised, and five or six claimants were to come forward with claims of £12 or under, they would be all thrown out.

10354. *Mr. Adam.*—But, notwithstanding, the Act is considerably used in your county?—Yes.

10355. *Mr. Campbell.*—Is the Sheriff-substitute usually required to make a note of the evidence in cases under the Debts Recovery Act?—I believe he is; but I have not attended the Debts Recovery Court much myself. The Act also allows considerable delay. Thus a defender appears at the bar, and makes a number of difficulties as to putting in a defence, and he asks the Sheriff to adjourn the case till the next court. The Sheriff very frequently gives this delay, when anything like a good reason can be assigned for it. But, at the next court, the defender does not appear at all, and then there is a decree in absence. At the end of the ten days of charge, he takes out a sist, and serves it upon the pursuer. In this way he gets five or six weeks' delay, and there is no help for it. There is another most decided objection to the Debts Recovery Act, viz. that the defender has the power of appealing, by two or three lines of appeal, to one of the Divisions of the Court of Session; and when he does that, the Sheriff-clerk is bound to remit the case to Edinburgh. And I know a case where the defender never appeared in the Court of Session at all to support the appeal, and yet it cost the pursuer £13 before he could get the case sent back to the inferior court. The pursuer had to employ counsel, and to give intimation to the defender; and it cost him £13 before that small debt case could be remitted back to the Sheriff of Kirkcudbright.

10356. *The Chairman.*—Was any new question raised in the Court of Session?—No; not except this, that their Lordships hesitated to dismiss the appeal without some intimation being made to the defender. Counsel had to appear, and intimation was ordered to be made personally on the defender.

10357. Have you any farther suggestions to make?—We experience a difficulty in enforcing Sheriff Court decrees. We can get them indorsed in the different counties; but we sometimes have them against parties who shift from county to county. It may be indorsed at Edinburgh, but before it can be enforced the party has gone to Glasgow, and before it has been indorsed there, he has gone to Aberdeen. That causes great inconvenience and trouble. If these Sheriff Court decrees were indorsed by the clerk of the Court of Session, so as to enable us to execute them all over Scotland, that would be a great advantage.

10358. *Mr. Campbell.*—Would it not be a simpler plan to give the decree of any Sheriff in Scotland force over the whole of Scotland?—That would still be more simple.

10359. *The Chairman.*—Have you any other suggestion to make?—It is the general opinion in Dumfriesshire that we should have the Small Debt Act and the Sheriff Court Act combined, and that the Small Debt Act should be extended to cases of £50, but that, when they come above £12, we should have the power of moving the Sheriff to remit them to the ordinary roll, if there is any intricacy or difficulty about them. We think that would work well, and that it would shorten the procedure in a great many cases. In all cases where there were decrees in absence, we would in this way be able to get a decree for a few shillings. We only pay 2s. 1d. for a small debt summons; and the officer executes it for 1s., with 6d. a mile if he travels; so that the expenses are generally under 5s.; the ordinary cost with us is 4s. 1d.

10360. *Mr. Baxter.*—Is your Sheriff-clerk resident?—Yes.

10361. Does he carry on any other business than that of Sheriff-clerk?—He is a member of the firm of Gordon & Whitelaw. He is a banker, and they have private practice as agents.

10362. *The Chairman.*—Do they practise as agents before the court?—His partner, Mr. Whitelaw, used to practise a little before the court; but I think of late years he has given up court practice altogether.

10363. *Mr. Adam.*—Does the Sheriff-clerk do his duty in person?—He attends occasionally; but he has a depute who attends the court and does the details of the work.

10364. *The Chairman.*—Have you any further suggestion?—As the court is at present constituted, I

Sir William Broun, Bart.

think it would be a great advantage when a proof is ordered, that both parties, before bringing up their witnesses, should be bound to lodge a list of their witnesses with the Sheriff a couple of days before the proof, and to have a meeting with him to arrange the number of witnesses likely to be examined, so as to save the expenses of citing ten or twelve men to attend who cannot possibly be examined.

10365. Upon what elements would that arrangement take place?—We would meet the Sheriff, who should know about the nature of the case beforehand, and he should ask the probable time that each witness's examination would take. We could then show the Sheriff the length of the precognitions, and in that way he would be able to judge and fix whether four or six or ten witnesses could be examined, when we would cite the number accordingly, and save the expense of calling superfluous witnesses.

10366. By superfluous witnesses, you mean witnesses who could not be examined that day?—Yes. There is another point which we think would be of great advantage, viz. that we should be able to bring actions of removing in the Small Debt Court up to £50. At the present moment there is no form of removing—to remove a man from a small house and garden, for instance, except by the agent writing out an authority to an officer to warn him before two witnesses. We have no decree against him, and when twelve o'clock on the term day comes, he says he won't go out, and a summary petition has to be presented to the Sheriff to put him out. That is attended with great inconvenience, because the incoming tenant is there with his furniture to go in, and it may land the proprietor in an action of damages.

10367. *Mr. Smythe.*—What is the remedy which you propose?—I would propose that we should be able to summon the man in the Small Debt Court to remove. We would get the summons for 2s. 1d., and execute it; and if he does not appear then, we have a decree to turn him out at twelve o'clock on the term day. In regard to farms, and matters of more importance, we raise a summons in the ordinary court, and obtain decree in that way, so as to have it to act upon if necessary.

10368. *The Chairman.*—Have you anything else to state?—If we had the two appeal judges whom I have suggested, I think the appeals under the Small Debt Act, instead of being to the Justiciary judges, should be to these two appeal judges. I also think that the Justice of Peace Court, and Burgh Court, and Dean of Guild Court, should all be abolished, and that we should have instead a stipendiary magistrate at a small salary, who would conduct the police business of the burgh of Dumfries, and who could take up all cases of nuisance, small cases of battery, and petty cases of theft and trespass over the county: he might even be a Circuit judge.

10369. Do the magistrates of Dumfries hold a Bailie Court for cases of debt?—No. They have the power to do so; but it is in abeyance. I have conducted many cases in the Burgh Court myself; but it has been in abeyance for a number of years.

10370. Does your Dean of Guild exercise jurisdiction?—The Dean of Guild still exercises jurisdiction, and has a Dean of Guild Court; but his powers are partly superseded by the new Police Act, which gives the power to the surveyor of the town to condemn houses.

10371. *Mr. Smythe.*—What is the duty of the Justice of Peace Court as distinct from the Burgh Court?—They decide all cases up to £5, and they decide cases of nuisance, poaching, and trespass all over the county.

10372. *The Chairman.*—Do they decide many cases of debt up to £5?—Yes; there is a regular court at Dumfries every week, as well as occasional Circuit courts.

10373. Have they an assessor?—They have a clerk; but it is understood that he is not entitled to assess them. They may ask his opinion occasionally, but they are not bound to follow it. The only other matter I have to mention is, that I think we should have a new and adjusted table of fees.

10374. Do you think they are too high or too low?—Some parts of them are high enough, and others far too low. As an instance, I may state that suppose an agent goes from Dumfries to precognosce a witness a distance of twenty miles, he is merely entitled to 3s. 6d. for doing so. He may spend the whole day on it, but all he can get from the other side, if he gains the case, is 3s. 6d., with his outlay for travelling expenses.

EDINBURGH: PRINTED BY MURRAY AND GIBB,
FOR HER MAJESTY'S STATIONERY OFFICE.

SECOND REPORT

OF

THE COMMISSIONERS

APPOINTED TO INQUIRE INTO

THE COURTS OF LAW IN SCOTLAND.

TOGETHER WITH

MINUTES OF EVIDENCE.

Presented to both Houses of Parliament by Command of Her Majesty.

EDINBURGH:
PRINTED BY MURRAY AND GIBB
FOR HER MAJESTY'S STATIONERY OFFICE.

1869.

COMMISSION.

VICTORIA, by the grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith:—To our right trusty and well-beloved Councillor DUNCAN, BARON COLONSAY; our right trusty and well-beloved Councillor JOHN INGLIS, Lord Justice-General, and President of the Court of Session in Scotland; our right trusty and well-beloved Councillor Sir WILLIAM PAGE WOOD, Knight, a Judge of the Court of Appeal in Chancery; our right trusty and well-beloved Councillor GEORGE PATTON, Lord Justice-Clerk; our trusty and well-beloved Sir JAMES SHAW WILLES, Knight, one of the Justices of the Court of Common Pleas; our trusty and well-beloved EDWARD FREDERICK MAITLAND, Esquire, one of the Senators of our College of Justice in Scotland; our trusty and well-beloved EDWARD STRATHEARN GORDON, Esquire, our Advocate in Scotland; our trusty and well-beloved Sir EDWARD COLEBROOKE, Baronet; our trusty and well-beloved Sir ROUNDELL PALMER, Knight, one of our Counsel learned in the Law; our trusty and well-beloved JAMES MONCREIFF, Esquire, one of our Counsel learned in the Law, Dean of the Faculty of Advocates in Scotland; our trusty and well-beloved GEORGE SCLATER BOOTH, Esquire, one of the Secretaries of our Treasury; our trusty and well-beloved ANDREW RUTHERFURD CLARK, Esquire, Sheriff of the County of Berwick; our trusty and well-beloved HUGH BARCLAY, Esquire, Sheriff-substitute of the County of Perth; our trusty and well-beloved JAMES CAMPBELL, Esquire, Sheriff-substitute of Edinburgh; our trusty and well-beloved WILLIAM SMYTHE, of Methven, Esquire, Convener of the County of Perth; our trusty and well-beloved ARCHIBALD ORR EWING, Esquire, Dean of Guild of Glasgow; our trusty and well-beloved GEORGE HARRISON, Esquire, Chairman of the Chamber of Commerce, Edinburgh; our trusty and well-beloved JAMES ADAM, Esquire, Advocate; our trusty and well-beloved ALEXANDER BURNS SHAND, Esquire, Advocate; our trusty and well-beloved THOMAS GRAHAM MURRAY, Esquire, Writer to our Signet; our trusty and well-beloved CHARLES MORTON, Esquire, Writer to our Signet; our trusty and well-beloved JAMES WEBSTER, Esquire, Solicitor before the Supreme Courts; our trusty and well-beloved JOHN BOYD BAXTER, Esquire, President of the Council of Procurators in Scotland; and our trusty and well-beloved ADAM PATERSON, Esquire, Writer in Glasgow, greeting:—WHEREAS, We did, by letters-patent, dated second day of October 1868, made and passed under the Seal appointed by the Treaty of Union to be kept and made use of in place of the Great Seal of Scotland, appoint you, the said Duncan, Baron Colonsay, John Inglis, George Patton, Sir Roundell Palmer, Edward Strathearn Gordon, Edward

Frederick Maitland, James Moncreiff, George Sclater Booth, Andrew Rutherfurd Clark, Hugh Barclay, William Smythe of Methven, Archibald Orr Ewing, George Harrison, Thomas Graham Murray, Charles Morton, James Webster, John Boyd Baxter, and Adam Paterson, together with our right trusty and well-beloved Councillor RICHARD BARON WESTBURY, to be our Commissioners to inquire into the Constitution and Jurisdiction of the various Courts for the Administration of Justice—Civil and Criminal—in Scotland; to wit, the Court of Session, the Court of Justiciary, the Commission for Plantation of Kirks and Valuation of Teinds, the Sheriff Courts, Commissary Courts, Burgh Courts, Dean of Guild Courts, Baron and Regality Courts, Police Courts, and Justice of Peace Courts; and also to inquire into the forms of Writs and Pleadings, and the Rules of Procedure, and the Privileges of Agents in the said several Courts; and also to inquire into the system of Review of, and Appeal from, the Decrees, Interlocutors, and Orders issued by these Courts respectively:

Now, know ye that We have revoked and determined, and do by these presents revoke and determine, the said Commission, bearing date the second day of October 1868, and every matter and thing therein contained:

And We, reposing great trust and confidence in your zeal, ability, and discretion, have authorized and appointed, and do by these presents authorize and appoint you, the said Duncan, Baron Colonsay, John Inglis, Sir William Page Wood, George Patton, Sir James Shaw Willes, Edward Frederick Maitland, Edward Strathearn Gordon, Sir Edward Colebrooke, Sir Roundell Palmer, James Moncreiff, George Sclater Booth, Andrew Rutherfurd Clark, Hugh Barclay, James Campbell, William Smythe of Methven, Archibald Orr Ewing, George Harrison, James Adam, Alexander Burns Shand, Thomas Graham Murray, Charles Morton, James Webster, John Boyd Baxter, and Adam Paterson, or any six or more of you, to make diligent and full inquiry into the constitution and jurisdiction of the said several Courts, and into the forms of writs and pleadings, and the rules of procedure, and the privileges of Agents, at present in use and force in the said several Courts, and into the operation and effect of the existing laws and arrangements for distributing and transacting the judicial business of the said Courts respectively, as well in Court as in the various Offices of the Clerks of the said Courts, and other Offices connected with the said several Courts, and into the duties and emoluments of all Officers acting under us before said Courts, and into the system of review of, and appeal from, the Decrees, Interlocutors, and Orders issued by the said Courts respectively, with a view to ascertaining whether any, and what changes and improvements, either by altering the constitution or jurisdiction of, or the forms of writs and pleadings, and procedure, and privileges of Agents in the said Courts, or any of them, or otherwise, may be advantageously made, so as to provide for the more speedy, economical, and satisfactory despatch of the judicial business now transacted by the said Courts: And for the better discovery of the truth in the premises, WE DO, by these presents, GIVE and GRANT to you, or any six or more of you, full power and authority to call before you, or any six or more of you, such Judges and so many of the Officers and Clerks of our said Courts, and all such other persons as you shall judge necessary, by whom you may be informed of the truth in the premises, and to inquire of the premises by all other lawful ways and means whatsoever: AND WE DO

HEREBY GIVE and GRANT unto you, or any six or more of you, full power and authority to cause all or any of the Officers and Clerks of any of our said Courts to bring and produce before you, or any six or more of you, all records, orders, books, papers, or other writings belonging to any of our said Courts, or in the custody of any of the Officers within the same: AND our further will and pleasure is, that as soon as the same can conveniently be done (using all diligence), you certify unto us, under the hands and seals of you, or any six or more of you, what you shall have done in the premises: AND We further will and command that this, our Commission, shall continue in full force and virtue, and that you our said Commissioners, or any six or more of you, shall and may from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment: And for your assistance in the due execution of this our Commission, we have made choice of our trusty and well-beloved Norman Macpherson, Advocate, Professor of Scots Law in the University of Edinburgh, to be Secretary to this our Commission, and to attend you, whose service and assistance we require you to use from time to time, as occasion may require. IN WITNESS whereof, we have ordered the Seal, appointed by the Treaty of Union to be kept and made use of in place of the Great Seal of Scotland, to be appended hereto. GIVEN at our Court at Saint James's, the nineteenth day of November, in the year One thousand eight hundred and sixty-eight, and in the Thirty-second year of our reign.

Per Signaturam Manu S. D. R. Reginæ supra scriptam.

Written to the Seal, and Registered the twenty-fourth day of November 1868.

(Signed) JOHN M. LINDSAY,
Director of Chancery.

Sealed at Edinburgh the twenty-fourth day of November in the year one thousand eight hundred and sixty-eight.

(Signed) COLIN MACKENZIE,
Deputy Keeper of the Seal.

By a Royal Warrant under Her Majesty's Sign-manual, dated the 23d and sealed the 29th day of April 1869, GEORGE YOUNG, Esq., Her Majesty's Solicitor-General for Scotland, was added to the Commission.

SECOND REPORT.

TO THE QUEEN'S MOST EXCELLENT MAJESTY.

We, your Majesty's Commissioners, appointed to inquire into the Constitution and Jurisdiction of the various Courts for the administration of Justice—Civil and Criminal—in Scotland, and into the forms of Writs and Pleadings, and the Rules of Procedure, and the Privileges of Agents, at present in use and force in the said several Courts, and into the operation and effect of the existing Laws and Arrangements for distributing and transacting the Judicial Business of the said Courts respectively, as well in Court as in the various Offices of the Clerks of the said Courts, and other Offices connected with the said several Courts, and into the Duties and Emoluments of all Officers acting under your Majesty before said Courts, and into the system of Review of, and Appeal from, the Decrees, Interlocutors, and Orders issued by the said Courts respectively, with a view to ascertaining whether any, and what changes and improvements, either by altering the constitution or jurisdiction of, or the forms of writs and pleadings, and procedure, and privileges of agents in the said Courts, or any of them, or otherwise, may be advantageously made so as to provide for the more speedy, economical, and satisfactory despatch of the judicial business now transacted by the said Courts, have since the date of our First Report held several meetings, and humbly beg leave to submit to your Majesty the evidence given before us at our meetings held upon the 29th and 31st days of March; the 1st, 2d, 3d, 29th, and 30th days of April; the 3d, 4th, 5th, 19th, 20th, 21st, and 22d days of May 1869.

COLONSAY.

JOHN INGLIS.
HATHERLY.
GEORGE PATTON.
J. S. WILLES.
E. F. MAITLAND.
J. MONCREIFF.
EDW. COLEBROOKE.
ROUNDELL PALMER.
GEO. YOUNG.
G. SCLATER BOOTH.
EDWARD S. GORDON.
AND. R. CLARK.
HUGH BARCLAY.
WILLIAM SMYTHE.
ARCHD. ORR EWING.
JAMES CAMPBELL.
GEORGE HARRISON.
JAMES ADAM.
ALEX. BURNS SHAND.
T. G. MURRAY.
CHARLES MORTON.
JAMES WEBSTER.
JOHN B. BAXTER.
ADAM PATERSON.

CONTENTS.

COMMISSION, ... III

REPORT, ... VII

MINUTES OF EVIDENCE—

WITNESSES WHOSE EVIDENCE WAS APPENDED TO THE FIRST REPORT.

Ardmillan, The Hon. Lord 367
Barty, James Webster, Procurator-fiscal for the Western District of Perthshire . . 307
Bell, A. Beatson, Sheriff-substitute of Fifeshire . 60
Bell, Henry Glassford, LL.D., Sheriff of Lanarkshire 1
Broun, Sir William, Bart., Dean of the Faculty of Procurators, Dumfries 381
Davidson, Archibald, Sheriff of the County of Edinburgh 33
Deas, The Hon. Lord 376
Dunbar, William Bishop, Procurator-fiscal, Dundee 322
Gair, John, Procurator-fiscal at Falkirk . . 171
Gray, Henry Cowan, Auditor of the Sheriff Court of Ayr 70
Hill, James Lawson, Commissary Clerk, Edinburgh 358
Jameson, Andrew, Sheriff of Aberdeenshire . 327
Jameson, James, Writer, Elgin 275
Johnston, Robert Bruce, Procurator-fiscal for the County of the City of Edinburgh . . 336
Law, William, Dean of Guild, Edinburgh . . 271
Linton, Thomas, Superintendent of Police, Edinburgh 363
Livingstone, Josiah, J.P., Edinburgh . . 290
Macandrew, Henry Cockburn, Solicitor, Inverness. 202
Mackenzie, Donald, Sheriff of Fifeshire . . 17
M'Clure, William, Writer, Greenock . . 191
M'Neel-Caird, Alex., Procurator-fiscal, Wigtown . 136
Maitland, Kenmure, Sheriff-clerk of Edinburgh . 303
Morice, David Robert, Advocate, Assessor of the Dean of Guild Court in Aberdeen . . 241
Morison, Peter, Secretary to the Scottish Trade Protection Society 125
Naismith, John, Writer, Glasgow . . . 225
Neill, Robert, Writer, Greenock . . . 261
Nicholson, Alexander, Writer, Cupar . . 314
Ogg, W. F., Advocate in Aberdeen . . 343
Russell, Francis, Sheriff-substitute of Roxburghshire. (*See also Second Report*) . . . 43
Sconce, Robert, Sheriff-substitute of Stirlingshire . 105
Shiress, William, Writer, Brechin . . . 249
Skeete, Horace, Writer, Perth 210
Smith, J. Guthrie, Sheriff-substitute at Dundee . 114
Thomson, J. Comrie, Sheriff-substitute of Aberdeenshire 91
Thomson, John William, Writer, Dundee . . . 154
Turner, Angus, Town-clerk of Glasgow . . 284
Webster, George, Sheriff-clerk of the County of Forfar 293
White, James, Glasgow 349
Wilson, John Dove, Sheriff-substitute of Kincardineshire 81

WITNESSES WHOSE EVIDENCE IS APPENDED TO SECOND REPORT.

Anderson, James, Q.C., Lincoln's Inn, London . 515
Bell, John D., Barrister-at-law, London . . 505
Bramwell, The Hon. Baron 460
Brodie, John Clerk, W.S., Edinburgh . . 398
Carment, John, Preses of the Society of Solicitors before the Supreme Courts . . . 520
Cheere, Robert, Registrar of Clerkenwell County Court of Middlesex 477
Doyne, Richard Vigors, Barrister-at-law, London . 508
Fraser, Patrick, Advocate, Sheriff of Renfrewshire 412
Gifford, Adam, Advocate, Edinburgh . . 555
Hollams, John, Solicitor, London . . . 510
Hume, George, one of the Taxing Masters of the Court of Chancery 445
Kinnear, John Boyd, Barrister-at-law, Lincoln's Inn, London 502
Le Riche, Edward William, Solicitor, London . 490
M'Laren, John, Sheriff of Chancery . . 388
M'Neill, Right Hon. Sir John, G.C.B., formerly Chairman of the Board of Supervision for the Relief of the Poor in Scotland . . . 387
Monro, George, Advocate 551
Ormidale, The Hon. Lord 430
Rothery, Henry Cadogan, Registrar of the Admiralty Court 496
Russell, Francis, Sheriff-substitute of Roxburghshire, Letter from 562
Scott, Charles, Advocate, Edinburgh . . 537
Walton, William Henry, Queen's Remembrancer; Henry John Hodgson, Master in the Court of Queen's Bench; William Morgan Benett, Master in the Court of Common Pleas . . 469
Wickens, John, Barrister-at-law, Lincoln's Inn, London 484

LAW COURTS COMMISSION.

MINUTES OF EVIDENCE.

MONDAY, 29th MARCH 1869.

Members Present:—

Lord Colonsay.	James Adam, Esq.
The Lord Advocate.	George Harrison, Esq.
The Lord Justice-Clerk.	A. B. Shand, Esq.
James Campbell, Esq.	James Webster, Esq.

J. B. Baxter, Esq.

The Right Hon. LORD COLONSAY in the Chair.

The Right Hon. Sir John M'Neill, G.C.B., examined.

Right Hon. Sir John M'Neill, G.C.B.

10,375. *The Chairman.*—You were lately chairman of the Board of Supervision for the Relief of the Poor in Scotland?—Yes; from September 1845 till March 1868.

10,376. What is the constitution of that Board? Of whom does it consist?—It consists of three commissioners named by the Queen, of the Lords Provost of Edinburgh and Glasgow, of the Solicitor-General for Scotland, and of the three Sheriffs of Perth, Renfrew, and Ross.

10,377. The Sheriffs who are members of the Board have a certain pecuniary allowance for the duties they perform?—When the Board was at first constituted, these three Sheriffs had an allowance of £100 a year each, in consideration of their attendance at the Board. Subsequently modifications were made on the arrangements relating to the Sheriffs, and that allowance of £100 a year was consolidated with their salaries as Sheriffs, the obligation still remaining to perform their duties at the Board of Supervision as part of their duties as Sheriffs.

10,378. Have you found that the attendance of the Sheriffs has been as regular as that of any other members of the Board, or more so?—The attendance of every one of the Sheriffs has been far more frequent than that of any other class of members, except the chairman. Relatively to the other members, that has been more marked in the latter years in which I was at the Board, than it was in the earlier years; but throughout, the persons on whom I could most rely to enable me to make a Board at our weekly meetings were the Sheriffs.

10,379. Your meetings were generally weekly?—We had a stated weekly meeting on Thursday in each week, and occasionally meetings either of the Board or of committee on intermediate days; but that occurred rarely.

10,380. Besides the frequency or constancy of their attendance, did you find that the legal character of the Sheriffs was a matter of importance in the constitution of the Board?—Undoubtedly I did. But the assistance I received from them was not confined to the work which they did at the Board. For a considerable time it has been the practice to send round the papers that were to come before the Board at its next meeting to the Sheriffs, especially when they involved any legal considerations. They made their notes upon these papers. I had an opportunity of seeing these before the Board met, and they were very often of the greatest benefit and assistance to me in preparing to propose what I thought might be expedient, to the Board.

10,381. At meetings of the Board did questions involving matters of law occasionally arise, on which the Sheriffs were useful?—I think there could have been no meeting of the Board at which some question involving considerations of law did not occur. In all these, not being a lawyer myself, I relied mainly upon the opinion of the Sheriffs; and it is my duty to say here that I should have unquestionably felt myself very greatly embarrassed, and I should often have had occasion to request that the opinion of counsel might be taken, at some expense to the public, if I had not had the advantage of such men as the Sheriffs of these three counties have hitherto been.

10,382. Do you know, or have you the means of forming an opinion, as to whether the weight of the Sheriffs' opinion had any effect in preventing or discouraging litigations that might otherwise have arisen either between parishes, or between paupers and the Parochial Board?—As between paupers and the Parochial Board I am not aware that they have had that effect; but as between parishes, or two parties in the same parish, there are numberless instances in which an expression of the opinion of the Board has prevented litigation, and put an end to disputes, mainly, as I believe, resting upon the confidence in the legal judgment of the Board, which the parties had in consideration of the presence of the Sheriffs.

10,383. Are we to understand from what you have stated, that you consider that legal element in the constitution of the Board to be one of very great importance,—almost essential?—My own experience would lead me to say that it is essential. I really do not know how the business could have been conducted without the assistance of that legal element in the Board.

10,384. Do you think that the circumstance of the chairman of the Board being himself bred a lawyer would command the same amount of confidence in the Board, as having so many gentlemen connected with the law on it?—I do not. I think that the knowledge that these Sheriffs were men prominent at the bar, as the Sheriffs of these counties have invariably been, had the greatest possible influence in giving weight to the judgments of the Board upon legal questions, and that parties who would not have been satisfied with the opinion of any chairman of the Board, however good a lawyer he might be, finding the opinion of such a body opposed to their view, were prepared to give way.

10,385. You mentioned that the Solicitor-General

Right Hon. Sir John M'Neill, G.C.B.

was a member of the Board. Did you find that his avocations, or whatever might be the cause, permitted his attendance as frequently as that of the Sheriffs?—Not always. Shortly after the formation of the Board, when Mr. Maitland was Solicitor-General, he was very regular in his attendance. So also was Mr. Anderson, when he was Solicitor-General, and Mr. Mure, Mr. Deas, Mr. Craufurd, and others. Our business was new, and they gave the Board all the assistance they could. More lately we have seen less of the Solicitor-General. His other avocations did not permit him to give attendance at the Board.

10,386. *Mr. Adam.*—By Mr. Maitland you mean Mr. Thomas Maitland?—I mean Mr. Maitland, who afterwards became Lord Dundrennan.

10,387. Can you give us any idea of the number of written opinions which the Sheriffs might give in the course of a year on the papers sent round to them?—I could not venture to do that. I know that in the early part of the Board, one of the things they did was to examine all the cases of lunatics, as a committee, with a view to determine whether they should be ordered to an asylum or not. They had to go through some 3000 or 4000 cases.

10,388. In the course of a year?—They did not accomplish it all within a year; and there were more coming in afterwards.

10,389. *The Chairman.*—And the opinions you got from them at that stage were not necessarily written opinions?—They were not necessarily written opinions.

10,390. But they were expressed at the Board?—Yes. Latterly we have been in the habit of sending round all the more important papers,—all papers involving any legal questions; and I suppose there are generally six, or eight, or ten parcels of papers of that description sent round weekly, which are to form part of the business of the Board.

10,391. *Mr. Baxter.*—How many members were a quorum?—Three were a quorum of the Board; but it occasionally happened that I could not get a quorum together, and the Board passed a resolution authorizing a committee, which the Act sanctioned,—a committee of two, which reported to the next meeting of the Board, and in that way the business which it was very important not to delay was carried through. I refer more especially to complaints of inadequate relief, which the Board was always desirous of disposing of with as little delay as possible.

10,392. You spoke of three commissioners appointed by the Queen. Were they all resident in Edinburgh?—No; the first commissioners named by the Queen were Mr. Home Drummond, Sir George Macpherson Grant, and myself. Sir George Macpherson Grant died, and his son, Sir John Macpherson Grant, was appointed in his place. He died, and Mr. Murray of Henderland was appointed in his place. He died, and Sir William Gibson-Craig was appointed in his place. Mr. Drummond survived until recently, and on his death Mr. Smythe of Methven was appointed in his place.

10,393. *The Lord Advocate.*—Do the Sheriffs attend very regularly?—I would suggest that this Commission should call on the Board of Supervision to furnish (which they can easily do) a tabulated list of the attendance of all the classes of members. I know that the attendance of the Sheriffs has far exceeded that of all other classes of members; and I think the tabulated list will show that it has been most creditable to them, considering how they were otherwise employed.

WEDNESDAY, 31st MARCH 1869.

Members Present:—

Lord Colonsay.	James Adam, Esq.
The Lord Justice-Clerk.	James Webster, Esq.
James Campbell, Esq.	J. B. Baxter, Esq.

The Right Hon. LORD COLONSAY in the Chair.

John M'Laren.

John M'Laren, Esq., examined.

10,394. *The Chairman.*—You are a member of the bar?—I am.

10,395. In what year did you come to the bar?—In 1856.

10,396. You are now Sheriff in Chancery?—I am.

10,397. I believe you have had occasion to turn your attention a good deal to the procedure in the Court of Session?—I had occasion to direct my attention to that, in the first place, from preparing an edition of the statutes relating to procedure; and after that I was employed in 1863 by the Lord Advocate and Solicitor-General (the same gentlemen who hold these offices now), to assist them in preparing a bill to consolidate the Acts relating to procedure, and to introduce certain amendments. I was employed in the following year to prepare another bill on the same subject, and last year I was employed by Lord Advocate Gordon to assist him in preparing the Court of Session Act 1868.

10,398. Have you any suggestions to offer to the Commissioners as to the procedure in the Court of Session?—With the permission of the Commissioners I should wish, in the first place, to give a short statement of what has been already done or attempted in the way of legislative improvement of procedure since 1863. I have made some notes from the bills which I have, and from the Act of last session. Lord Advocate Moncreiff's first bill, besides consolidating the existing procedure, in so far as it was to be retained, and making amendments in detail, had for one of its objects to introduce the English system of pleading in actions for money. Prior to that time some dissatisfaction had been felt with the manner in which actions of that kind were disposed of in our courts. This was attributed to the defective procedure of the courts, more especially in regard to the preparation and adjustment of issues, which often consumed much time, and caused unnecessary expense; and an impression prevailed amongst members of the profession, and I think in the public mind, that actions of that kind were more expeditiously and satisfactorily tried in England under the common law system of procedure. Upon considering what could be done to improve our process, Mr. Moncreiff was desirous that we should embody in a bill a system of pleading based upon the English principle, but to be confined to money actions, which are, I believe, the description of actions forming the chief business of the common law courts of England. Accordingly, the bill which was prepared in 1863, and which was brought into the House of Commons by Mr. Moncreiff, was based on the principle of a division of actions for the purposes of pleading, embracing (1) actions containing only money conclusions, and (2) actions of a different nature. In regard to actions containing money conclusions, provision was made for bringing such actions into court upon a writ of summons similar in form to the writ of summons introduced

in England by the Common Law Procedure Act, and it was provided that the pleading in such actions should be of this nature: the pursuer was to furnish a short statement of his ground of action, and the defender was to be obliged to meet that in one of three ways. First, he might demur; or, secondly, he might traverse the statement, that is, deny the whole or a material part of it; or, thirdly, he might meet it by way of confession and avoidance, or, as we should say, by special defence; and in the latter case the pursuer again might either demur, or traverse the defender's statement, or he might meet it by replication. In regard to actions containing conclusions other than pecuniary, the action was to be brought into court by a petition or bill; but in substance this was nothing more than the Scotch form of summons in a new guise. It contained specific conclusions, and the record was to be made up by condescendence and answers, according to the existing practice. I believe that bill was intended to be merely tentative. The Lord Advocate desired to submit it to the profession and the public for their consideration; and, accordingly, the different professional bodies in Edinburgh, and I think in other places, appointed committees to examine the bill and report upon it. I think that, without exception, the reports of all the professional bodies were unfavourable to any radical change in our system of pleading—I mean to the introduction of the issuable or English common law system of pleading; and I believe the Lord Advocate, in consequence of the view taken by the profession, abandoned his intention of proceeding with that part of the bill, and the matter has not since been brought forward in Parliament, or I think in any way. I may just state, before leaving that subject, that my own opinion is in accordance with what I understand to be the general opinion of the profession, that it is undesirable, where a different system of pleading has so long prevailed, to introduce such a radical change. It would be very difficult, I think, to accustom the profession to a new form of pleading, and I think that in practice our system of pleading is found to be well adapted to the trial of all descriptions of actions. Passing from that part of the measure of 1863, it proposed a number of special amendments in the law of procedure, the greater part of which have been embodied in the Court of Session Act of 1868. They were generally approved of, and were adopted by Lord Advocate Gordon in preparing his measure. I have made a note of some of the principal points, and they are as follows: The power of stating a question of law in the form of a special case, for the opinion of the court, in place of condescendence and defences; next, the power given to the court, of amending the pleadings at any stage in the proceedings. In the bill of 1863 that power was to be exercised upon payment of such costs, not exceeding the costs of the discussion, as to the court might seem fit; under the Act of last session the power in relation to costs is absolute. I would suggest, as a further amendment, that the costs in such cases should be limited to the costs of the day, or of the particular discussion at which the amendment is allowed.

10,399. *Mr. Webster.*—What is your reason for that?—I think that it is too severe a penalty in any case, to subject the party making an amendment, to the whole costs of the action, which I know is sometimes done in administering this provision of the Act of last session; and practically, if that were to be adopted as the rule, the right of amendment is nullified, because parties won't amend under such conditions.

10,400. But does it give the opposite party fair protection to give him only the costs of the day? Should he not get at least all the costs that are rendered abortive, or created by the amendment?—I have great difficulty in conceiving a case where the party would not be sufficiently compensated for the inconvenience to which he had been put, by being allowed the expenses of the discussion.

10,401. *The Lord Justice-Clerk.*—You say it is not fair to give the whole costs of the action. Has that been done in any instance to your knowledge?—In one instance. It was done in a case in which I was engaged.

10,402. But not in any other case so far as you know?—Not so far as I know.

10,403. *Mr. Baxter.*—Would it not depend very much upon the nature of the amendment, whether it should be confined to the costs of the day, or how far it should go?—Where it was held that the whole of the litigation had been thrown away, and that therefore the whole of the expenses of the litigation had been needlessly incurred, I think the proper course would be to dismiss the action, and allow a new one to be brought.

10,404. *Mr. Webster.*—But it might be the defender who wants to amend?—There might be a case where he had been put to greater expense than the expense of the discussion.

10,405. *Mr. Baxter.*—Might it not be left safely to the discretion of the court what sum of expenses to give, considering the nature of the amendment, and the time at which it was made?—I think it might; but in that case there should be a regulation by Act of Sederunt, or in some other way the principle should be recognised, that in general the expenses awarded should be limited to the expenses of the day. There might be exceptional cases.

10,406. *The Chairman.*—At present I believe it is entirely in the discretion of the court?—Yes.

10,407. If there is evil arising from it, probably that may lead to a correction by the court itself of the practice of giving large expenses?—I think so. I think the tendency of the opinion of the court now is not to give large expenses.—The next amendment proposed in the bill of 1863, and carried out by the Act of last session, was the power of taking a verdict subject to the opinion of the court upon a reserved point. Then there were the provisions for shortening bills of exceptions, and giving facilities for raising questions of law upon a motion for a new trial; the power of substituting a special case for a special verdict; the power to conjoin a prayer for specific performance, with a prayer for interdict; the prohibition of revised papers, except upon special allowance by the judge; a provision that in actions of multiplepoinding the record is to be closed on the original papers, and that the parties are not to answer each other's papers, except on special cause shown to the judge; the provision for taking the evidence before the Lord Ordinary in person, with the assistance of a shorthand writer,—that was carried into effect by the Evidence Act, and amended by the Act of last session; the provision for obviating objections to deeds arising upon the stamp laws; provisions enabling actions to be wakened and transferred against new parties by minute, in lieu of actions of wakening and transference.

10,408. *Mr. Webster.*—There have been no summonses of that kind since the Court of Session Act of 1850?—The Act of 1850 enabled actions to be wakened by minute, and the Act of 1868 enables them to be transferred as well as wakened, the two things often requiring to be done at the same time. Then it was proposed in the bill of 1863, and carried out in the Act of last session, that a summary form of appeal from inferior courts should be substituted for the process of advocation. By these enactments the means of review of judgments of the inferior courts was materially simplified,—I think simplified as much as it is possible to simplify such proceedings, and it was provided that an appeal should bring up the whole cause as between all the parties. Under the old practice each party must have appealed against so much of the proceedings as he complained of. Then power is now given to four of the Lords Ordinary to sit as a court for hearing appeals, when the state of the business in the Inner House is such as to render their assistance necessary.

10,409. Is that a power which has been found practically to obstruct or to facilitate the work of the court?—It is very difficult to give an opinion on that point. I think the exercise of the power has had a very beneficial effect in reducing the rolls of the Divisions. At the commencement of the last session I think they were nearly a year in arrear, and now the arrears have been entirely wrought off. On the other hand, it has thrown

John M'Laren.

the Outer House business back a little; but the Lords Ordinary, I think, are rapidly making up the arrears, and in the course of next session there will probably be no arrears in any branch of the court.

10,410. *The Chairman.*—Does it occur to you that the working off of the arrears that existed last year will render the resort to that court of four Lords Ordinary less frequent than was necessary in order to get the better of the arrear?—I think so. I think it is an entirely exceptional arrangement, and there is every probability that when the arrears of the Divisions are once brought down, the judges will be able to keep pace with the business coming into their courts.

10,411. *Mr. Webster.*—The clearing off of arrears of business in the Inner House has, to the extent of the cases disposed of by the court of Lords Ordinary, been their work; but has it not also partly arisen from this, that there has practically no business come from the Outer House to the Inner House during this session?—I believe much less business has come from the Outer House to the Inner House. During the times when the Lords Ordinary were engaged in that court, of course there were no decisions in the Outer House, and consequently no appeals from such decisions. I am aware, too, that some of the Lords Ordinary had great difficulty in disposing of their debate rolls during the last session; but I think that has arisen more from a defect in the arrangement of the business than from their being engaged during part of the time in the Court of Appeal. The other legislative amendments which I have noted are,—and one of them is very important,—viz. the provision of the Act of last session enabling a party to reclaim or appeal to the Division, after the whole cause has been decided in the Outer House, and thereby to bring all the previous interlocutors of the Lord Ordinary under review. Under the old process it was necessary, if you wished to appeal against the interlocutor of a Lord Ordinary, to appeal within a limited time,—never in any case exceeding twenty-one days. If an appeal was not taken at the time, that interlocutor became final; and if it were necessary, in order to do justice upon the merits, to review that interlocutor, it could not be done at the end of the case; consequently parties were very often obliged to reclaim more than once, when, if they had had the power which they now have, they would have been content to wait till the whole cause had been decided, before going to the Division. Very frequently there were two successive reclaiming notes, under the old system. I don't think there were often more than two. Then there is a provision enabling the judge to sit in vacation to grant decrees in absence, and to dispose of motions. I think that is a great convenience to the public, particularly the power of obtaining decrees in absence in vacation. In addition to those provisions, which were all contained in Lord Advocate Moncreiff's bill, there are many other useful provisions in the Act of last session, among which I may mention the extension of the time during which the court is to sit, enabling them to get through a greater amount of business; the regulation of inhibitions; the clause allowing summonses to be served by sheriff-officers in districts where there are no messengers-at-arms; the simplification of the mode of bringing actions into court, and obtaining decree in absence without the intervention of counsel; the giving finality to decrees in absence where the defender has been personally served, and has been charged. I would suggest that that power might be extended, and that the decree should be final if he has either been personally served or personally charged,—so that where within the proceedings there is evidence of the action having been brought to the notice of the defender, the decree against him should be final.

10,412. Within what period?—Within a very short time. I would allow a short time, within which the decree might be brought under review by suspension—not longer than is necessary for that purpose.

10,413. Would you make any exceptions for cases of parties under age or incapacitated?—In the case of money actions, to which the clause is at present limited, I would not make that exception. In regard to actions of declarator, the provision of the statute is that they shall be final in twenty years, and I would not propose to make any change on that. Then the statute provides for simplifying the mode of making up a record, which I think is a great improvement. Under the old form, the revisal of pleadings was the rule, and the closing upon summons and defences the exception. In a very large number of cases an order to revise was taken as of course, which necessitated the re-writing of the papers, with such additions as were thought necessary, and that involved a considerable delay in the progress of the cause; there was then a further adjustment by marginal addition, which was competent to each party. Under the Act of last session, the adjustment is made by marginal addition on the original papers, and revised papers are prohibited, excepting upon special cause shown to the Lord Ordinary. In practice, I believe revised papers have been very rarely allowed—almost in no case; and it is found that the case of the parties can be stated quite satisfactorily upon the original papers, with the power of amendment by marginal addition.

10,414. Is there not a want of opportunity given to the pursuer to admit statements in the defence, according to the present practice?—There is not the same facility given for admitting such statements.

10,415. Is there any opportunity?—Perhaps it would require legislative provision or regulation by the court, to enable that to be done by marginal addition. I think it could be quite easily done in that way. But as a general rule, I don't think much is gained by these admissions. Admissions are generally given subject to qualifications which prevent the opposite party from getting the benefit of them. While on the subject of admissions, I may suggest that a provision contained in the Common Law Procedure Act might be advantageously introduced into our practice; which is, the enabling either party, before the trial of the case, to tender a note of admissions which he requires the other party to make. In the event of the facts stated not being admitted, the party asking for the admission would then be entitled to the expense of proving them, irrespective of the result of the trial. There is a similar provision in regard to the production and admission of documents, which I think deserving of consideration.

10,416. *The Chairman.*—That is, to give by legislation an authority to do that which used to be not uncommon in practice, in jury trials?—Yes.

10,417. The one party asked the other for certain admissions, and if he refused them, and there was expense incurred in proving them, that was considered in dealing with the expenses?—Yes; and I think either party might be entitled to call on the other party to produce documents in his possession, without the intervention of the court; and in the event of his refusing to do so, and a diligence being granted, he should be subjected to the expense of the diligence.

10,418. *Mr. Webster.*—If documents were asked for which parties were not bound to give,—such as confidential documents,—what would be the remedy?—If they were confidential, they would not be recovered under the commission, and in that case the party would not be subjected to the expense; on the contrary, he ought to recover his expenses. In short, I think the party should consider the character of the documents, and if there is no substantial reason for refusing them, he should produce them without a diligence.

10,419. That is as between the two parties to the action?—Yes. As regards documents in the hands of third parties, of course there is no way of getting at these except by diligence. Taking the new clauses in the Act of 1868 in their order, I should wish to make a remark upon sec. 28, which regulates the procedure, or rather directs the Lord Ordinary how to regulate the procedure, after the record is closed. It appears to me that the Lord Ordinary is too much tied down by this clause to a series of alternatives, and that it would be better that it should be left entirely to his discretion how to deal with the cause after the record is closed, subject to review by the Inner House. In the intro-

ductory part of the section it is provided that if the parties shall not agree to renounce farther probation, the Lord Ordinary shall appoint the cause to be debated summarily at the end of the motion roll on a day to be then fixed; and according to the result of that debate, certain things may be done. Prior to the passing of the Act of 1868, this matter was regulated by an Act of Sederunt, passed, I think, very recently; and under that Act of Sederunt, at the time the record was closed, the parties were to state to the judge what view they took of the case—whether it required probation or not; and the Lord Ordinary was empowered to dispose of the matter of procedure then and there, but with power to adjourn to a day to be named. This provision was found to work very well in practice. Under the new Act the Lord Ordinary must send every case to a summary debate roll,—at least it has been so interpreted, and a great part of the Lord Ordinaries' time is taken up in hearing causes summarily under this section. These discussions, I think, in the majority of the cases, are entirely thrown away; they just end in the case being remitted to proof.

10,420. And these discussions are always the cause of a great deal of expense as well as a good deal of delay?—Yes; there is the expense of the attendance of counsel and agents at the debate, which might be saved, and there is often a considerable delay in hearing those cases.

10,421. *Mr. Baxter.*—I suppose parties are not very willing to renounce probation generally?—No. I think counsel are generally very averse to sign a minute renouncing probation until a cause has been heard; and for this reason, that the question of proof or no proof depends a good deal upon the view that may be taken of the legal bearings of the case by the judge; and until they have had an opportunity of being heard before the court, they don't feel entitled to renounce probation even upon points which may appear to them to be immaterial, but which the court may think to be material.

10,422. Supposing a party does not renounce probation, is the case sent to proof as a matter of course?—If the party does not renounce probation, it is sent to the summary debate roll, and upon the case being explained, the Judge then, if he thinks proper, appoints the case either to be tried by jury, or before himself.

10,423. *Mr. Webster.*—Counsel are very often agreed as to what the course should be after the record is closed, viz. that there should be a proof or a jury trial; so that practically the summary debate roll is a useless procedure, excepting in a very few cases?—I think so. I would suggest that the provisions of the Act of Sederunt should be re-enacted, and that if the counsel are agreed that a proof is necessary, an order for proof should be pronounced at the closing of the record. If not, the parties should then debate the case in the ordinary debate roll; and I think it is time enough to renounce probation at the close of the debate, and before the case is taken to avizandum. If the Lord Ordinary points out to the parties that there are matters requiring proof, the case may then be dealt with in that way.

10,424. *The Chairman.*—Do you refer to the Act of Sederunt of 1866?—Yes. Reverting to the Court of Session Act, 1868, there is a provision, in section 31, that the motion rolls of the Lords Ordinary should in the first place be called before the depute-clerks of Session, and in the case of such motions being opposed, there is a power to adjourn them to special motion days, not exceeding two a week, when they shall be heard and disposed of by the Lords Ordinary. That clause was introduced with the view of endeavouring to save some part of the time that is consumed in making motions; but I believe that in practice it has not been found to effect any material saving of time, because the motions that are unopposed don't occupy much time, and they are generally made in the intervals between the opposed motions, when the bar is vacant. It appears to me, however, that much time might be saved,—though this is rather a matter to be regulated by Act of Sederunt,—if each Lord Ordinary had only one, or at most two motion days a week, because when the motion roll is long, I think less time is occupied in the discussion of each case. Under the present system, from one to two hours are occupied every day during the greater part of the session in the discussion of motions, and the time for hearing debates is very much abridged by the operation of the present system.

10,425. *Mr. Webster.*—You propose to have only one or two motion days a week. Is not that part of the business that often requires very great rapidity? Are there not commissions to examine witnesses who are dying, or persons who are going abroad, and other matters of urgency which frequently occur in the course of a case?—I think those cases in which the saving of a day is material are of rare occurrence, and might be sufficiently provided for by the power of applying to the judge at chambers. That machinery would not often be put in operation; but where every day is a motion day, the parties put down the motions on any day that may be convenient for themselves. If there were only two regular motion days, I believe that in practice no inconvenience would be felt.

10,426. Is not a great part of the two hours that you allude to as being spent on the motion roll, occupied really in dealing with the fragmentary parts of cases that have to be disposed of, and where the wish is to have them disposed of without the formality of a debate in the debate roll?—I think that is the case; but still I think there would be greater economy in the disposal of the business by arranging it so that motions should be taken on one day and debates on another. For example, I think that if debates were begun at ten o'clock, and proceeded with continuously till three, they would be got through much faster than by being taken up later in the day and adjourned, as they frequently are at present.

10,427. Would you propose to abolish the calling of cases before the depute-clerks of court?—I am not able to speak to that more definitely than I have done, as counsel are not engaged in these motions; but I understand in practice it is not found to save much time.—A very important part of the changes which have been effected in our procedure relates to the mode of taking proof. That is regulated by the Evidence Act, and by sections 32 and 33 of the Act of last session. The nature of the provisions of these statutes is, that the Lord Ordinary appoints the proof to be taken before himself, without the assistance of a jury; the evidence is taken down in shorthand, and is summed up by one counsel on each side at the conclusion of the proof, as in the case of a jury trial. The Lord Ordinary then issues an interlocutor containing specific findings in fact and law, with a note of his opinion; and his judgment is subject to review by the court on the merits of the case. I believe there was a difference of opinion in the profession at the time when these provisions were mooted, as to whether it was a right thing that the Lord Ordinary's judgment upon matter of fact should be subject to review. In the case of a jury trial, the court don't interfere with the verdict of the jury, excepting in so far as it proceeds upon matter of law under the direction of the judge, or unless it be clearly against the weight of the evidence. Now, I cannot contemplate a court setting aside the judgment of a judge of the same jurisdiction, upon the ground that his judgment is clearly against the weight of the evidence. I think that is not a case requiring to be provided for; but the power which the court actually has is larger; it is that of forming an opinion for itself upon the evidence, independently of the opinion of the Lord Ordinary. On the other hand, if the means of review were expressly confined to a power of reviewing the Lord Ordinary's findings in point of law, the difficulty is, that there may be matter of law involved in the findings in fact, which the court, in consequence of such a restriction, would not be able to reach; and I know that that difficulty was experienced in attempting to bring under review judgments of the Lord Ordinary pronounced under the Court of Session Act, 1850. Under that Act his judgment was only appealable upon his findings

John M'Laren.

in point of law. If it be necessary to make any change on this part of our procedure, I would suggest that while the whole proof should be brought up to the court for the purpose of enabling it to review the Lord Ordinary's judgment, his judgment should be reviewable only in so far as it appears to the court to proceed upon matter of law. I think in practice the Act has been so interpreted, and I don't know if there is any case in which the court has reversed a judgment of the Lord Ordinary expressly upon error in matter of fact.

10,428. There are some, but not many such cases?—Well, if review on the facts were excluded by statute or Act of Sederunt, I think it would diminish the number of reclaiming notes on proofs, which are necessarily very expensive, involving the printing of a large mass of evidence, oral and documentary.

10,429. *The Lord Justice-Clerk.*—Do you know that the cases which were tried before the Lord Ordinary, at the time when his findings on fact were final, were very frequently brought under review?—I am not able to answer that question; but the number of such trials was very much smaller.

10,430. Was not a considerable degree of dissatisfaction expressed at the system which precluded the court from looking at the facts otherwise than in the view that the Lord Ordinary had taken of them?—I think there was dissatisfaction.

10,431. When a case is brought under review on matters of fact and law, and giving effect to the feeling that the Lord Ordinary has seen the witnesses, do you not think it is right that the court should have the power of setting right the facts, if they are clear upon them?—I think that probably the object which I had in view in my former answer would be accomplished if the Divisions of the court, in disposing of such cases, gave it clearly to be understood that they were not inclined to entertain reclaiming notes merely upon matters of fact; and I think this to a considerable extent has been done, and that there are not so many reclaiming notes against judgments of Lords Ordinary on proofs as there were when the Evidence Act first came into operation.

10,432. *The Chairman.*—In cases of trial by jury, the tribunal for disposing of the fact is the jury, but their verdict is reviewed by the court if they think it is against the weight of evidence, and although concurrence with them of the judge who tried the case is a most material element for them in the disposal of it, it is not conclusive. There you have an instance of a court reviewing the opinion of the jury, in accordance with that of the judge of co-ordinate jurisdiction, with a power of setting aside what the jury has done?—No doubt there are great difficulties in interfering with the general power of review of the Inner House. I would venture, however, to express a decided opinion, that when a Division of the court disposes of a case of this kind, it should pronounce findings of fact and law in the same manner as in the case of advocations, and that the findings of the Division upon matter of fact should not be subject to appeal to the House of Lords.

10,433. *The Lord Justice-Clerk.*—Has not that been so in point of practice?—I believe there is no statutory restriction. I know that appeals have been taken to the House of Lords in such cases, and some are in dependence at present.

10,434. There has been a difficulty experienced, I believe, in the case where a judge is desirous of taking down the proof himself, in order to save expense to the parties, instead of employing a shorthand writer, arising from the fact that the judge is compelled to read over to the witness his notes taken at the time. Is there any necessity for that being continued?—I think not. I believe that some of the judges would prefer to take the notes in their own hand, and the judge should have the discretion of doing so, in which case I think the evidence should be noted as in the case of a jury trial. The system of taking proofs by the judge, with the aid of a shorthand writer, has worked well, and has given satisfaction to the bar. Upon this subject another suggestion has occurred to me, which is, that it would be desirable that the appointment of the shorthand writer should be in the power either of the court or of the judge taking the evidence. At present the practice is that any person brought up by the agents is accepted; and I believe that some of the judges have complained that the responsibility is thrown upon them of certifying notes of evidence taken by persons who are not selected by themselves, and for whose notes they are not truly responsible.

10,435. Some judges have refused, I understand, to have any shorthand writer except one of their own appointment. Is that not so?—Yes.

10,436. *The Chairman.*—That goes to confirm your suggestion?—Yes. But it appears to me that it is desirable that in every case the appointment should rest either with the court as a body, or with the judge, because the office is a very responsible one; it is similar to that of a commissioner taking proof; the judge has not the means of checking at the time what is taken down, and the party occupying that position should, I think, be entirely independent of the agents.—Then the Act of last session makes several changes in the mode of selecting and summoning juries. Juries now are to consist in every case of eight common and four special jurors. I should hope that would be found an improvement, as securing a certain number of intelligent men on the jury. Under the former practice I think it was entirely a matter of chance what proportion of special jurors there might be on a jury summoned and balloted for.

10,437. *Mr. Webster.*—And there was no certainty that any one of the special jurors would be on the jury trying the cause?—No.

10,438. *The Lord Justice-Clerk.*—With reference to special juries, has your attention been called to the way in which they are struck at present?—Yes. I know that was under the consideration of Lord Advocate Gordon at the time of preparing his bill; but I think he had a difficulty in devising a more convenient method, while aware of the inconvenience and expense caused by the present mode of striking the jury.

10,439. Besides the inconvenience and expense, are there not other objections to the present system, in having the jury fixed a very considerable time before the time of trial?—I believe so. On the other hand, it was thought that there was a hardship in compelling the attendance of a large number of special jurymen, many of whom might be men whose time was valuable, and who might have to be summoned from a distance merely to be balloted for, without any certainty that their services would really be required.

10,440. Supposing that they were to be balloted for without their presence, instead of being struck out by objection, would that not be an improvement?—The names of the jurors being put into a box and balloted for according to the present system, without requiring their presence?

10,441. With a few names in addition, to guard against non-attendance?—Yes; I think that would be an improvement. Then the statute provides for the jurors, in cases tried on Circuit, being taken from the criminal assize, and it enables agents practising in the Circuit town to practise as agents at such trials.

10,442. With regard to the provision for trials at Circuit, I suppose we may anticipate an increase of the number of such trials, in consequence of the facility given to agents there to conduct them?—I think so.

10,443. Would it not be desirable to make provision for the attendance of judges other than the judges at Circuit, by which the civil and criminal business should be kept separate?—I have not considered that point; but as there are two judges attending each Circuit, perhaps the object might be accomplished if one of them was to take the criminal business, and the other to take the civil business, which, I understand, is the practice at the English assizes. My impression is, that there is a provision to that effect in the statute.

10,444. In Glasgow it was found necessary to have two judges sitting in separate courts at the same time for criminal cases?—Therefore my suggestion would not meet the case of Glasgow, where, probably, it would be most important to have jury trials.

10,445. *The Chairman.*—And in other towns another court-room would probably have to be built?—Yes. There is a provision, in section 46, that such trials may proceed at the same time with the sittings of the Circuit Court of Justiciary; and that, notwithstanding the provisions herein contained, it shall be competent for any judge of the Court of Session to preside at the trial of any civil cause which may fall to be tried during the sittings of any Circuit Court of Justiciary.

10,446. *Mr. Webster.*—Unless some provision of that kind were made, there would be great inconvenience, I presume, in the attendance of counsel and witnesses waiting on for the finishing of the criminal business, before the civil trials commenced?—I think so; and that inconvenience has been the chief reason why civil cases have not been tried at Circuit.

10,447. And the cost of taking a staff of counsel there?—Yes. At the same time, I may say on this point, that Scotland, being a much smaller country than England, and the number of jury trials being very small in proportion to the whole number of cases, I don't think the introduction of the system of trying cases at Circuit a point of very great importance. I think also that the power of bringing up witnesses by railway, which we have in modern times, has, to a considerable extent, lessened the inconvenience that would result from bringing the witnesses to Edinburgh. Then, continuing the analysis of the provisions of the Act of last session, there is a provision that in case of an equal division of opinion in the court on any motion for a new trial, the verdict shall not be set aside. Under Mr. Moncreiff's bill it was proposed that in all cases in which the court were equally divided the previous judgment should stand; but I understand the judges of the Inner House, who are probably better informed on that matter than persons outside, think that change not desirable, and that it is better there should be a re-hearing where the difference arises not upon the import of a verdict, but on a question of law coming before them on a reclaiming note; and in practice there are not many re-hearings in consequence of difference of opinion. Then there is the power, at any stage in an action, of stating a special case for the opinion of one of the Divisions of the court. The clause giving this power is an improvement on the clause proposed in Mr. Moncreiff's bill, and I believe has given great satisfaction. A number of cases have been tried during last winter session under the powers of that clause, and the expense is very much less than it was under the old system. It has been found particularly beneficial in cases which used to be tried under an action of multiplepoinding,—questions of disputed succession where there are a great many parties. Under the old form, each party, or at least each group of parties, having separate interests, lodged a condescendence and claim: every claimant answered the claim of every other claimant in a revised paper, and sometimes there were adjusted revised papers; that is, three papers on each side, which had to be copied. Then the record had to be printed, often a very voluminous document, with an appendix of deeds; and there was an argument, first before the Lord Ordinary, and then before the Inner House. Under the provision of section 63, the question or questions may often be stated very shortly in a special case; that goes at once to a Division of the court; and I think that, besides the saving of expense, the parties, and perhaps the judges also, are enabled more clearly to see what the questions are that are brought before them, than under the old system of claims.

10,448. You can now go at once to the court with a special case, without any previous summons?—Yes, that is so; and I have known cases where the parties have begun by an action, and have lodged claims, and these have been superseded by a special case, and even then there has been a considerable saving of expense.

10,449. *The Lord Justice-Clerk.*—Is there any reason why a party who comes before the court with a special case should have a right to have his case taken up and disposed of in the summar roll?—I think not. I should humbly venture to express my disapproval of any statutory provision requiring certain classes of cases to be disposed of in preference to others. The result often is, that cases of very little importance get precedence, while cases involving large sums of money or important questions of right are delayed, to the inconvenience of the public. Then there are the provisions in sections 81 to 88 inclusive, relating to actions of accounting, the object of which is to give an accountant, to whom the case may be referred, greater powers in regard to compelling the attendance of parties, and the recovery of documents, and also to place him in direct communication with the judge. I believe that some of the judges, before this Act was passed, felt a difficulty in giving assistance to accountants to whom cases were remitted, and thought that they would be able to dispose of such cases more rapidly if they were in a position to take the accountant along with them, to receive assistance from him in making the necessary calculations, and at the same time to give him indications as to the principles upon which he ought to proceed. I am not aware, however, whether there has been time to test the value of this provision. The number of such cases is of course comparatively limited, and the Act has not been long in operation.

10,450. Do you not consider that it would be an advantage to have a chief clerk or public official accountant?—Does your Lordship mean that the duties performed by an accountant under the present system should be performed by a chief clerk?

10,451. An official salaried party in constant communication with the judge?—I should be favourable to the appointment of such an officer, upon the general ground that I don't think it right to throw the expense of the decision of a cause upon the parties. Under the present system the accountant is entitled to a fee from the parties, which is often very large, because the investigations in such cases occupy a great deal of time. I see no reason why that charge should be borne by the parties in cases of accounting, any more than the salaries of the judges in other cases should be raised by fees levied from the parties. I think the whole expense of the proper judicial procedure ought to be borne by the public. The chief difficulty in substituting a chief clerk for an accountant acting under a remit, arises from the fluctuating character of the business. Some years there might be very little for such an officer to do, and at other times he would not be able to overtake the business. But it occurs to me that in very heavy cases, such as that of the Western Bank, the parties would be willing to be at the expense of providing assistants, who should perform the calculations under the superintendence of the chief clerk. It has often occurred to me that there is a defect in the machinery of the Court of Session, in the court not having any officers to whom it can depute routine duties of this description. Not only in accountings, but in many other cases, there are matters requiring to be cleared up by inquiry, and yet which are not well fitted either for jury trial, or for a formal proof before the Lord Ordinary. These could be more expeditiously and satisfactorily disposed of by a remit to a chief clerk. I understand that in the Court of Chancery, in that department of its business connected with the distribution of estates and successions, a great deal of assistance is given to the judges by the chief clerks, who call the agents before them, and ascertain in any way they think proper the facts material to the decision of the case, which they then embody in a short certificate; and if the parties are dissatisfied, they may appeal to the judge to vary the findings in the certificate, and he may then direct proof to be taken if necessary. I think the services of an official of that description would be very useful, and would save time. I think these are all the material changes which have been introduced into the procedure by the Act of last session, and it appears to me that our forms of process have been very materially improved by that Act.

10,452. *Mr. Webster.*—Another improvement was allowing the Lords Ordinary to settle issues?—Yes.

10,453. *The Chairman.*—Have you any further suggestion to make?—I have one or two. I wish, in the first place, to state to the Commission a reason why I

John M'Laren.

think it unnecessary that any material change should be made on the forms of pleading. I adverted to that before, but it is one of the points specially mentioned in the memorandum sent me by the secretary of the Commission. The proportion of cases coming into the Court of Session involving merely pecuniary conclusions is very small; and it is only to pecuniary actions that the form of issuable pleading has been applied in England and in those countries which have adopted the English form of procedure. Now the great proportion of actions involving only a pecuniary demand are brought in the Sheriff Courts in Scotland. I looked over the last volume of Macpherson's Court of Session Reports, with the view of seeing what proportion these cases bear to the general mass of litigation, and I find there are 193 cases reported: of those there are 33 originating in summonses containing only petitory conclusions; but out of these 33 there are at least 10 cases involving equitable considerations, which would require something more than a bare statement of the ground of action, and which don't appear to be well adapted for the form of issuable pleading, leaving only 23 cases of money claims, such as would be disposed of by the common law courts of England under their form of process. That is in the proportion of one-eighth of the whole business. I think there is no reason to suppose that the proportion of such cases in the whole business of our court would be different from the proportion which I have found in the reported cases, because the reported cases are just an average of all the cases; and I don't think it is necessary to make such a great change for the sake of disposing, in a way that may be thought a little more convenient, of one-eighth of the business; much the more important class of business being that which is best disposed of under a detailed statement of the ground of action, and a detailed defence. If the system of issuable pleading is to be introduced at all, I think it would be more appropriately introduced into the Sheriff Court practice than into that of the Court of Session. Then I think the objection which was formerly made to our pleadings as being too diffuse cannot fairly be made now. I think there is a great improvement in that respect, and no person now has any interest in long pleadings. Under the former system there were a great many copies of pleadings made. There was the original paper, and the revised paper, and generally five manuscript copies for debate in the Outer House—two for the counsel on each side, and one for the Lord Ordinary. Now, there are only the original pleadings, and they are printed at once. Besides, I think that the power of amendment given by the recent statute has enabled parties to state their case shortly, because they are no longer under any apprehension that their statements may be found irrelevant for want of specification of details. That may now be supplied by amendment at any stage; and in practice the pleadings in the Court of Session are very much shorter and less prolix than those of the Court of Chancery, judging from the specimens of Chancery proceedings which I have seen, where the form of record is similar to our own. Next, with regard to debates upon relevancy before proof, it has occurred to me that the best mode of dealing with that question is, that either party should be entitled to a debate on the relevancy, upon condition of paying the expenses if he is unsuccessful in having the pleading of the other party found to be irrelevant.

10,454. *Mr. Webster.*—Do you think that would be a sufficient protection against undue delay?—There might be cases where a party would be willing to incur the expense merely to have a large claim staved off, but in most cases I think it would be a protection. I think counsel and agents are always very unwilling to enter upon any incidental discussion where they believe that an award of expenses will be given against them, although they might be willing to risk it if the expenses were to be dealt with as part of the general expenses of the cause. They are afraid of giving dissatisfaction to their clients. With regard to the general arrangement of the business of the court, it has occurred to me that it would be an improvement if the Lords Ordinary took a roll of proofs and a roll of debates alternately—that is to say, that for one week, or a longer period, they should hear nothing but proofs, taking them up one after another as they do at sittings in vacation, and then that the debates should be allowed to proceed continuously for another period. Under the operation of the Act of last session, there is very great inconvenience felt by the profession from the hearing of debates in the Outer House. It consists with my knowledge that the same cases which were put out for debate before one of the Lords Ordinary in the week commencing 15th October, are still in the roll undisposed of.

10,455. *Mr. Baxter.*—Not heard?—Not heard.

10,456. What is the cause of that?—And the counsel who are instructed in these debates must attend every day from 10 till 3, upon the chance of one of them being called. The cause of that is, that Lord Manor was occupied fully with summary petition business and Bill Chamber business, and with the taking of proofs; and from the way in which the business is arranged, these matters get precedence of debates. Everything else has precedence of debates; and consequently where the judge has more business than he can dispose of, the debate roll is never heard. The roll which was formerly before Lord Manor has since been transferred to Lord Mure.

10,457. Might the case which was set down on 15th October have come on any day since then?—On any day except the blank day of the Lord Ordinary.

10,458. Then it might have come on suddenly?—Yes, it might have come on upon any one of four days a week during the whole of the winter session. Now I think that inconvenience would be completely remedied by having certain weeks appropriated to debates and others to proofs; if the business were in arrear, the arrear would then be shared equally by the different descriptions of business instead of being all thrown on debates. Many of the cases sent to the debate roll are cases of very great importance as regards their pecuniary value. Then a great deal of the Lord Ordinary's time is now taken up by hearing proofs, and I believe that some of their Lordships have felt that an undue tax upon their time. I think something might be done to relieve them, by appointing examiners or permanent commissioners, who should undertake part of this work. The Lord Ordinary, in reading the records at the time when they are declared closed, would select those cases which he thought most suitable to try personally; and in other cases which he might think suitable for trial by commission, the proof would be taken by a permanent commissioner and reported to the judge. I would suggest this as preferable to restoring the old form of granting commissions to members of the bar, which was found to work badly, for this reason, that the commissioner, not sitting regularly from day to day, was generally willing to accommodate the parties, and to take up the cases at such times as might be convenient for the counsel and agents. They were often taken up at two o'clock in the afternoon, when the Outer House business was over, and heard in fragments extending over weeks and sometimes months. If these proofs were taken by a salaried commissioner, who should sit during the same hours as the court, the parties would require to arrange to take in counsel who were able to attend, and the proofs would go on continuously just as they now do before the Lords Ordinary. Then they would not have to pay the commissioner; and under such a system I think there are a great many cases in which the proof might quite well be taken by a gentleman of less position, and who should be less highly paid than a judge of the Court of Session.

10,459. *The Chairman.*—There was something analogous to that in regard to consistorial cases at one time. After the abolition of the Commissary Court there were certain Sheriffs nominated to take proofs in consistorial cases, and they did so for several years?—I think that was abolished by the Conjugal Rights Act, which introduced the system of the judge taking the proof, with the assistance of a shorthand writer.

10,460. But it is a precedent for what you suggest?—Yes; only the plan which I suggest might be ex-

pected to work better, because these Sheriffs were practising advocates, and could not necessarily give regular attendance.

10,461. You would have these examiners paid so as to remunerate them for giving their whole time to it?—Yes, I think so. Another point which suggests itself to me, is the consolidation of the statutes relating to procedure. Probably that would be best postponed until an Act were passed embodying the recommendations of the Commissioners, and then the whole matter should be consolidated. I think a Consolidation Act should not contain any new matter, and then it is passed without opposition, upon the responsibility of the member of Government introducing it. There is another point which I would like to mention, but I am not sure whether it falls within the scope of the Commission. I think it desirable that something should be done which would offer an inducement to counsel in leading practice to accept seats on the bench. For several years past, it is quite well known, there has been a difficulty in inducing men in the highest walk of practice to go to the bench, unless to one of the chairs of the Divisions; and although sometimes men who are not in large practice make excellent judges, yet, as a rule, I think it desirable that the Government should have it in its power to command the services of the leading men at the bar, if they desire to do so. The only way of accomplishing this result, as it appears to me, is to increase the salaries of the judges; and so far as I can judge, from conversation with people out of the profession, I think there would be no opposition to it. That is not a matter on which the public care for economy. They are willing to pay well to get the highest legal talent. I believe that the salaries of the judges in Scotland are less than those in Ireland, although the wealth of the country and the importance of the interests involved in litigation here are equally great, and from the large commerce of this country, I think I may say probably greater than in Ireland. As regards the importance of the interests, the difficulty of the questions, and their variety, I see no difference between litigation in Scotland and litigation in the most wealthy districts in England; and I think that substantially the administration of the law should be put on the same footing.

10,462. *Mr. Webster.*—In connection with that, have we not also very much too small salaries for all the officials below the judges connected with the Court, for the conducting of the business, as compared with either England or Ireland, or with what is fair professional remuneration?—I believe that is so. There are not so many of them either, I believe. We have no chief clerks or masters who perform the duties performed by such officers in the superior courts of law in England. Practically, our clerks of court do nothing but register the decisions of the judges,—write out the interlocutors. I believe that in the superior courts in England these duties are performed by officers called Registrars, who sit in court, and write out the interlocutors, and that they have a separate class of officials who are called Chief Clerks in Chancery, and Masters in the Common Law Courts, who assist the judges in performing the routine business of the court.

10,463. But we have no such officials in the Court of Session?—We have no such officials in our courts.

10,464. *The Chairman.*—Have you any other observations to make?—No, these are all the points I had noted; but I shall be glad to answer any questions on any other points on which the Commissioners desire my opinion.

10,465. *The Lord Justice-Clerk.*—Has your attention been called to the procedure in teind cases?—In my own practice, I have had very little experience of teind cases, and I would rather not give evidence upon that branch of practice.

10,466. Do you see any propriety in the reservation of a particular day for the teind cases by the Lord Ordinary in the Outer House?—No, except in regard to motions. I think there is the same advantage in having the motions on one day a week, that I expect from having motion days in other causes. As regards debates, I should think they are best taken continuously until they are finished.

10,467. Complaint has been made of the expense of the proceedings in the Court of Session. Have you any suggestion to make on that subject?—Expense is, of course, a relative term. As far as I can judge from anything I have seen of the proceedings of the superior courts in other parts of the kingdom, I don't think those in the Court of Session are more expensive. I think they are lower than those of the superior courts of England. The scale of remuneration for agents is lower. In regard to counsel, I imagine the fees are very much the same, excepting that many of the leading English counsel require a special retainer,—a very large fee, upon being first instructed in a case. We don't have that practice with us. The expense, however, I believe, will be materially lessened by the Act of last session.

10,468. *Mr. Baxter.*—Is not the expense very much increased by the adjournment of debates and the refeeing of counsel?—In debates before the Lord Ordinary, the practice is not to send refreshing fees to counsel when debates are adjourned. In the case of proofs, there are fees sent for each day that the proof continues, because counsel who attend proofs are necessarily occupied during the whole or greater part of the day in conducting the case, and cannot be present elsewhere. In the Inner House there are refreshing fees.

10,469. Then before the Lord Ordinary counsel are not fee'd again if the debate is adjourned?—Not in the debate roll.

10,470. *The Chairman.*—There are refreshing fees which used to be understood to be given at the beginning of session; but there are also now what are called continuation fees in the Inner House?—Yes. In the Inner House continuation fees are allowed to counsel when a case is adjourned from one day to another. If I were asked my opinion, I would say that I think it is a reasonable thing, when professional gentlemen are engaged for more than one day, that they should receive fees according to the length of time that they are occupied; and I may mention that I have known debates in important cases occupying more than the whole of two days,—that is to say, a case is begun on Tuesday, heard during the whole of Wednesday, and again on Thursday; and I cannot see any justice in asking counsel to give their time day after day for one day's fee.

10,471. But supposing you were fee'd to state a case, and it comes on about a quarter before four, and is adjourned at four?—In these cases, of course, the counsel are better paid than where the case lasts the whole time; but they have to give their attendance in court. Very frequently they are occupied during the day, while waiting for the case, in preparing for it. As a general rule, I think it a fair thing to pay continuation fees.

10,472. *The Lord Justice-Clerk.*—New cases are not now called within a quarter to four?—No. Since the hour of meeting of the court has been altered to ten, they don't call a new case shortly before four. If it is to be gone into, it is right, for the information of the public, to say that these continuation fees are very small—generally two guineas or sometimes three to a senior counsel, and two to a junior, and that although the case may last the whole of the second day.

10,473. *Mr. Webster.*—Does it occur to you that expense or delay would be saved by counsel not being taken in at all stages of motions before the Outer House and the Inner House as at present, and having that done, as in chambers, by the agent alone attending?—I thought it would be advantageous to allow of motions being made by agents at chambers; and accordingly, in preparing the bill which became law last session, under the direction of the Lord Advocate, provision was made for the motions being made in the first instance by agents; but I understand that they don't like the system.

10,474. Who don't like it?—The agents themselves.

10,475. But it is not at present permitted for an agent to make a motion before a Lord Ordinary: he is

John M'Laren.

only permitted to do so before the clerk?—Well, I see no objection to agents being allowed to make motions before the Lord Ordinary; but I think that the power, if given, would not be largely used: for this reason, that to a large extent the agents themselves are engaged in carrying on their general business in their offices, and many of them don't come at all, but send clerks to look after the cases in court; and they would dislike being obliged to give personal attendance. Of course there are exceptions, as in your own case, where the court business is large, and requires the attendance of the principal. I think it should be optional to the agent to attend without counsel; but that if he in his discretion thinks proper to instruct counsel, the expense should be a good charge against the opposite party, because sometimes there are very important points of practice decided in the motion roll.

10,476. At present, is it not the rule that reclaiming notes do not require any formal prayer, but merely contain the words, 'which interlocutor is submitted to review?'—It is so.

10,477. Do you see any reason for requiring that the expense of feeing counsel and his clerk, and the agent for getting that paper signed by counsel, should be incurred, or why the agent should not sign a paper in the statutory form without any addition to his fee?—I think the business would be equally well done under the present form of reclaiming note, without the intervention of counsel; but the saving of expense would be very small. I think I might answer the question in this way, viewed as a matter of expense; a party is never advised by his agent to reclaim without consulting counsel, or very seldom; in my experience, it is the practice to consult counsel before reclaiming, and no fee is sent for taking his opinion; but a fee is sent for signing the reclaiming note, which covers the advice given as to the propriety of reclaiming.

10,478. In appeals under the Debts Recovery Act, I think the practice at present is, that a note signed by counsel is presented to the Lord President of the Division, stating that such an appeal has been presented, and asking that it be sent to the roll. Do you see any necessity for having such a note?—In cases of such trifling value, I think it would be desirable to save every expense that could be saved, and therefore to dispense with a note of that kind signed by counsel.

10,479. *The Lord Justice-Clerk.*—In appeals from the Sheriff Courts, which are now very common, there is no such note signed by counsel?—No.

10,480. An enrolling slip is given in by the agent to the clerk, and the case sent to the roll?—I have already said I don't see any necessity for having a note of that kind under the Debts Recovery Act.

10,481. *Mr. Webster.*—In connection with the first step in ordinary actions, the custom at present, and from the origin of the College of Justice, has been to have a summons signeted in the Signet Office?—Yes.

10,482. Is that, in your opinion, a proper requisite for commencing a suit in the Court of Session, where the privilege of acting as agent is not limited to Writers to the Signet?—I don't see that any inconvenience would attend the abolition of that formality, because it is not required in petitions or notes of suspension and interdict, which are modes of commencing a different description of action.

10,483. Do you know any other court which requires that the first writ should pass under a similar ordeal?—I am not quite sure what the practice is in the English common law courts, but my impression is that it is not required. The writ runs in the Queen's name, but is not signeted. There might be a reason for retaining the form of signeting where arrestment was to be used on the dependence of an action. Although the Signet officer does not read the summons, and has no power of preventing an improper writ being issued, still it is a form of authentication which the person in whose hands the arrestment is to be used looks at, to see that it is an authentic document.

10,484. *The Lord Justice-Clerk.*—You mentioned that under the new Act the execution by a messenger-at-arms was dispensed with in a number of cases of citation. That is not applicable, I believe, to diligence?—No; only to summonses.

10,485. Is there any reason why, if there is to be a change as to the execution of summonses, there should not be a similar change as to the execution of diligences?—I think the provision of the statute should be extended to diligences—to all writs passing under the Signet.

10,486. *Mr. Webster.*—What test would you propose for ascertaining whether there was a messenger resident within the district, so as to save the cost of a special application to the court in each case?—Section 19 of the Act says: 'Where any defender called in any summons, or any person upon whom service of any proceeding is ordered by the court, etc., resides within any county or within any district of a county, subject to the jurisdiction of the ordinary court of any Sheriff-substitute of such county, in which county or district of any county there shall not be at the time a resident messenger-at-arms, or within any of the islands of Scotland, it shall be competent for a sheriff-officer of such county or of the sheriffdom within which such island is situated, to serve such summons or to make such service or citation upon such defender or other party,' etc. I think it would be desirable to have an official register of the residences or places of business of messengers-at-arms, so that, in the event of any objection being afterwards taken to the execution, there should be the means of knowing whether it was a case within the section of the statute.

10,487. *The Chairman.*—But if the service by a sheriff-officer is a good service where there is no messenger-at-arms, why should it be a bad service where there is a messenger-at-arms?—I believe the clause was a compromise, having regard to the vested interests of messengers-at-arms. Prior to this statute they had the exclusive right of serving all writs passing under the Signet.

10,488. *The Lord Justice-Clerk.*—Has your attention been called to the possibility of doing away with executions altogether, and substituting citation by way of registered letter?—That was under consideration in preparing the bill of last session, and was applied to the citation of jurors. It has since been applied by an Act of Sederunt, I think, to cases where the citation is edictal. The court have laid down a rule, that in cases of edictal citation there shall also be a notice sent to the known place of residence of the defender by registered post letter.

10,489. *Mr. Webster.*—When in the United Kingdom?—Yes. I do not think that a registered letter could be substituted in the general case of a citation.

10,490. *The Lord Justice-Clerk.*—Citation may be given by knocks upon the door, and by putting a copy in at the keyhole. Why might it not be given by registered letter?—Keyhole citation is certainly an anomalous proceeding. There was a clause in regard to such citations in the Lord Advocate's bill, but I rather think it has been struck out.

10,491. *Mr. Webster.*—It was reported against by the law bodies, was it not?—Yes.

10,492. Does the system of jury trial meet with your approval, for the trial of the classes of cases at present submitted to juries, or is there any other tribunal you would prefer?—I think, on the whole, it is a satisfactory tribunal for trying actions of damages for wrong, especially cases which might be the foundation of criminal proceedings, or analogous cases. But in regard to mercantile cases generally—cases on contracts, to which it was formerly extensively applied—I do not think it a satisfactory tribunal; and, so far as I can judge, it has not the confidence of the mercantile community for that description of cases: in fact, they would prefer almost any tribunal to a jury of men who are not personally conversant with large transactions, and who have not had the means of becoming acquainted with them that judges and counsel have in their professional experience.

10,493. Then you would limit the class of cases which go to juries to the class which you first mentioned?—I would not be understood to say that I

think any statutory limitation is necessary. At present discretion is given to the Lord Ordinary as to fixing the mode of trial. He always consults the wishes of the parties through their counsel; and I observe a growing disinclination to submit mercantile cases involving questions of law to a jury. I think in the meantime it may be safely left to the discretion of the judge.

10,494. For cases of wrong, why would you prefer the verdict of a jury to the decision of the court, or of a single trained judge?—I think, if I were engaged as a party, I should prefer the decision of a judge to that of a jury; but dealing with jury trial as an existing institution, I think the class of cases that I have mentioned are cases within the comprehension of a jury; and if the system is to be retained, that is the class of cases with which a jury is best able to deal. At the same time, personal actions of every description are disposed of by the Sheriffs in their courts without the intervention of a jury, and their decisions are reviewed in the Court of Session upon the facts and upon the law, and this system gives general satisfaction.

10,495. Perhaps much greater satisfaction than is given by the verdicts of juries in the same class of cases?—I think so.

10,496. The cost of jury trial is very much greater than the cost of investigation and decision in any other form, is it not?—I am not aware whether it is much more expensive than a trial before the Lord Ordinary under the present system. I should suppose it was more expensive, in so far as it generally occupies more time. A greater number of witnesses are examined in order, if possible, to impress the mind of the jury upon matters on which a judge accustomed to evidence would be satisfied with what one credible witness says; and from the proceeding being regarded as rather of a speculative kind, it is gone into more elaborately, and at greater length.

10,497. And always with two counsel on each side, whereas in many of the proofs before the Lord Ordinary the rule is one counsel on each side?—Yes, that is so. And even in proofs before the Lord Ordinary without a jury, where two counsel are instructed, they are instructed—at least in the case of seniors—on the footing that they are at liberty to take other business for the day. They are not confined to that case; whereas in jury cases larger fees are given to senior counsel, on the footing that they give up other business for the day, and confine themselves to the trial.

10,498. *Mr. Campbell.*—I am not quite sure whether your general observation as to jury trial applies to a large class of cases, viz. those which relate to the competency of the granting of deeds—to all questions, for instance, involving the question of sanity, imbecility, fraud and circumvention, and matters of that kind, more especially in regard to the reduction of wills. Do you think that such questions can be satisfactorily determined by the verdict of a jury?—With regard to reductions upon fraud, I should say that these were unsuited to jury trial. The decision of what constitutes a fraud is one of the most delicate subjects of judicial investigation, and I think peculiarly fitted for the court as distinguished from a jury. In fact, I think a jury could only dispose of such a case by being guided almost implicitly by the judge trying such a case, and then the jury becomes a mere instrument for carrying out the direction of the judge. I observe also that in the Court of Chancery, which in England alone takes cognizance of these cases, they are never submitted to a jury, but always dealt with by the judge upon the evidence. With reference to questions of the capacity of the party, there might be room for taking a distinction. If the object is to set aside a will or contract, I would deal with the case exactly as I would with a reduction on the ground of fraud, and for the same reason. The question of capacity to make a will is a peculiarly delicate question. Judges of the highest eminence have differed in regard to the *ratio* of decision in such cases. Where, on the other hand, the object is to put the party under personal restraint, there comes in the feeling which I think exists in the minds of the public, and it is a very natural feeling, that a party should not have his liberty taken away without the opportunity of having the case submitted to a jury of indifferent persons taking a rough, common-sense view of the matter. A court of law might pronounce a man insane, and properly so, where a jury, while perhaps thinking him insane, would also think that he might just as well be left at large. I mean a jury is not so bound down to a strictly legal view of the case as a judge would be.

10,499. *The Chairman.*—Cognition by inquest was part of the law of Scotland when jury trial in civil cases was not?—Yes; and in the Act of last session, while the jurisdiction in such cases is taken from the Sheriff and transferred to the Court of Session, it is provided that it should be tried by a jury before one of the judges.

10,500. There are cases in which the court, upon the application of the relatives, and on medical certificates, do put parties under restraint?—No doubt; and I presume that the greater number of persons who are confined in asylums are so confined simply under medical certificates, or by a warrant from the Sheriff. At the same time, if there be a serious question as to the insanity of the person, and he has an opportunity of giving instructions to a solicitor, he has the means under the present practice of having the question of his sanity tried by a jury.

10,501. *Mr. Webster.*—In connection with fixing limits to the right of going from one judge or one court to another, have you considered whether there should be no power of appeal from the Lord Ordinary, where the amount in dispute is below some fixed sum, say £50, and no power of appeal to the House of Lords from an Inner House judgment, where the amount is below some other sum, say £200?—I have not given consideration to that question, but I think there are theoretical objections to it. It is the same jurisdiction. It is a form of procedure in the same court; and I doubt the propriety of having different forms of procedure in the same court applicable to actions of different value. There is also the difficulty of determining the value of the action; for, as I already observed, but a small proportion of cases litigated in the Court of Session are actions involving only pecuniary claims,—so that I don't think that any very great advantage would result from that. As regards appeals to the House of Lords, I should think the House of Lords would probably be against any interference with their jurisdiction, and I don't think there is any demand for it on the part of the public.

10,502. *Mr. Campbell.*—Are you aware that there is an analogy for some such course as has been suggested, in the Sheriff Court, and that judgments of the Sheriff on appeal from the substitute, when the amount is under £25, are not appealable to the Court of Session?—Yes; these are regarded as small causes, which should terminate in the local court in which they are brought. But where a case is fit for consideration by the Court of Session, I would not be disposed to restrict the power of appealing upon matter of law to the House of Lords.

10,503. But don't you think that, where the case is under £250, or some such sum in value, it should be necessary that permission should be granted, with reference to the nature of the case, by the Court of Session, to take an appeal to the House of Lords?—Under the present practice, the certificate of two counsel engaged in the case is required, to the effect that there is reasonable cause of appeal; and I think that it would not be right for the counsel to grant such a certificate where the case was of trifling value, unless there was an important question of principle involved. I have no doubt that in many cases counsel refuse to give such certificates, and that appeals in consequence are not taken.

10,504. *The Chairman.*—Must not one of them have been counsel in the cause?—Yes. There is one point which I had overlooked, not immediately connected with this subject: in a return which I made to the Commission as Sheriff of Chancery, I took the liberty of adding a note, suggesting that, as that court has

John M'Laren.

jurisdiction to some extent in regard to the appointment of guardians and minors, if anything was to be done in the way of relieving the junior Lord Ordinary of part of that description of business, it might be done by allowing the Sheriff of Chancery to appoint factors *loco tutoris* and curators *bonis* upon summary petition, not interfering with the jurisdiction of the junior Lord Ordinary, but giving a co-ordinate jurisdiction. I think, where the estate is of small value, the appointment might be obtained more cheaply in the way I suggest. The petition would not be printed, counsel would not be employed to prepare it or to appear in court; and as the court sits in Edinburgh, there would be no difficulty in bringing that description of business under the supervision of the Accountant of Court. In fact, the Sheriff of Chancery in these matters might be regarded as simply an officer of the Court of Session, carrying out a subordinate branch of its duties. I am aware, however, that evidence has been given recommending that similar jurisdiction should be given to the Sheriffs of counties. If the Commission were to adopt that view, I should not think it necessary or expedient also to give it to the Sheriff of Chancery; but in one way or other, I would submit that some provision should be made for enabling appointments of that kind to be made more cheaply with reference to estates of small value.

10,505. Have you considered the expediency of granting such power to the Sheriff Courts over the country?—I think the power might be given quite well, as far as it depended upon the judge. It is a mere ministerial duty, which the judges in the Sheriff Courts are quite competent to exercise, and in cases of difficulty there is always the power of appealing to the Court of Session. The only objection is, that I think it would be more difficult to bring these appointments under the supervision of the Accountant of Court in Edinburgh, and also, perhaps, that an application might be made in one county unsuccessfully, and might be renewed in another county: in short, that it would be better done by some central court.

10,506. *Mr. Webster.*—In regard to your own Court of Chancery, do you approve of the form of procedure and investigation and of intimation which at present exists?—So far as I have had experience, the form of procedure appears to be quite satisfactory.

10,507. And the mode of obtaining evidence quite satisfactory?—I think so. Considering that it is an *ex parte* proceeding, and may be brought under reduction, I think the mode of taking evidence by affidavits before a magistrate or justice is satisfactory. I have some doubt as to the expediency of the provision contained in the Titles to Lands Consolidation Act of last session, enabling notaries without special commission to take depositions. I don't see the necessity of that, and I would prefer that it should have been left to the Sheriffs and Justices of the Peace, as under the old statute.

10,508. Do you think Justices of Peace are better than notaries for the taking of evidence?—No; I don't think they would necessarily be better qualified. The objection that occurred to me is, that the notary may be mixed up as agent in the case for one of the parties concerned. I found, on entering on my duties in the court, that several depositions were given in, taken by the notary who was himself the agent; and I thought it right to disallow these, and to require them to be taken over again by a neutral party; but where they come from the country, we have no means of knowing whether the gentleman who signs the deposition is himself a partner with the gentleman who signs the petition: he may be, and we have not the means of checking it. With reference to another court with which I am connected as assessor—the Dean of Guild Court of Edinburgh—it has occurred to me that it would be an improvement on the procedure in the Dean of Guild Courts and the Burgh Courts, if the new form of process contained in the Sheriff Court Act were extended to these courts; that is to say, that the record should be made up by summons or petition and minute of defence, or at all events upon the original condescendence and answers. At present, in the Dean of Guild Court, there is generally a petition and answers, then a condescendence and answers, and then a revised condescendence and answers, and a good deal of time is lost in preparing these steps; and the warrants are delayed often to the great inconvenience of the parties, because it is a serious thing, when a person wants to build a house or warehouse, that he may have to wait three or four months before he can get a warrant to do so.

10,509. In adopting the Sheriff Court Act, would the Dean of Guild be qualified to take notes of evidence with his own hand, as the Sheriff does?—At present there are very few cases in which a proof is found to be necessary. The cases requiring proof are cases of disputed possession, where defences are lodged on the ground that the party is not entitled to a possessory judgment; and I think it would be better that the present mode of taking evidence should be continued. My remark had reference chiefly to the record.

THURSDAY, 1st APRIL 1869.

Members Present:—

Lord Colonsay.
The Lord Justice-Clerk.
Lord Barcaple.
A. R. Clark, Esq.
James Campbell, Esq.
George Harrison, Esq.
James Adam, Esq.
A. B. Shand, Esq.
Charles Morton, Esq.
James Webster, Esq.
J. B. Baxter, Esq.

The Right Hon. LORD COLONSAY in the Chair.

John Clerk Brodie.

John Clerk Brodie, Esq., examined.

10,510. *The Chairman.*—You are a member of the Society of Writers to the Signet?—I am.

10,511. How long have you been so?—Since 1836.

10,512. You were for some years Crown agent?—Yes, for more than ten years.

10,513. And you are now Keeper of the Register of Sasines?—I have been so since 1858.

10,514. You and your firm have had a great deal of experience in litigation before the court?—We have.

10,515. Have you any suggestions to make to the Commission in regard to improvement of the procedure in the Court of Session, specially with reference to the diminution of expense and delay?—One most important object connected with the judicial system of Scotland appears to me to be a diminution of the number of courts of appeal.

10,516. Would you explain what you mean by that?—Taking a general view of our judicial system, we have the Sheriffs, with their substitutes, and the Court of Session sitting as Lords Ordinary, with an appeal to the Inner House. In the Sheriff Court, there is an appeal from the Sheriff-substitute to the Sheriff, which may take place several times in the course of a case, and very often does so. The Sheriff-substitute and the Sheriff are frequently both members of the bar. There may be very little in point of qualification between them; indeed, in some cases greater weight may be thought to attach to the judgment of the Sheriff-substitute. It appears to me, that in these circumstances an appeal from one single judge to another single judge is not a desirable appeal. It occasions besides great delay, though the expense may not be considerable.

10,517. *Mr. Baxter.*—Do you think that where the Sheriff alters the Sheriff-substitute's judgment, it is apt to create dissatisfaction?—I think it frequently causes great dissatisfaction.

10,518. *The Chairman.*—Have you any other suggestion?—I am unable to see any advantage in an appeal within the Sheriff Court itself, or other than direct to the Court of Session. If, however, that is to be the only appeal, the expense of proceeding in the Court of Session must be diminished to a very considerable extent. In regard to the Court of Session, I have long been of opinion that the present arrangement of Lords Ordinary, with an appeal from them to the Inner House, is not an expedient arrangement. I think that out of the Lords Ordinary should be formed a third court of four judges, and that there should be no appeal from these courts of four judges, except that which at present exists to the House of Lords; and that appeal, I think, ought to be restrained within some limits.

10,519. Have you considered the mode by which you would limit the expense of the Court of Session otherwise than by forming the Lords Ordinary into a third court?—I think a great deal that is merely formal, at present done through counsel, might be done quite as well, and at much less expense, through the agents and clerks of court.

10,520. Would you explain more fully what that means?—There is, for instance, in the Court of Session a rule which requires all papers to the court to be signed by counsel. That infers very considerable expense. You have the fee to counsel and a high fee to his clerk; and also the agent's fee for attending upon counsel. Then you have attendances of counsel in the course of making up the record. A great many of these are merely formal attendances, and I see no reason why the end should not be accomplished through the agents and the clerks of court, with a reference to the court where necessary.

10,521. Do you mean that all papers should be signed by the agents?—By no means.

10,522. What class of papers do you allude to?—A great many petitions, minutes, and notes—many papers lodged incidentally in the course of a case.

10,523. More formal than anything else?—Yes.

10,524. In regard to the proceedings at making up the record, do you contemplate that the record should be made up by counsel?—I think it would be a great advantage if pleas in law were done away with. They force a resort to counsel, because no agent will undertake the preparation of them; and I do not think there is any advantage in them commensurate with the disadvantage. The summons may be, and is in many cases, prepared by the agent. It would be so more frequently if pleas in law were done away with. In the defence, counsel might be employed or not, according to the judgment and discretion of the agent. I have no idea that agents would resort less frequently than necessary to counsel.

10,525. Would you do away with condescendence and answers?—Not in all cases. A great deal must depend on the importance of the case. In cases coming from Sheriff Courts, which are frequently of no great importance, and in unimportant cases originating in the Court of Session, you might do so. I think, in the manner I have endeavoured to explain, very considerable saving in expense might be obtained. In a large class of cases before the Court of Session, the saving would not be so great. All important cases must substantially be entirely conducted by counsel.

10,526. Do you make any distinction between cases which are mere claims for debt, and cases of another description involving more matter of law, such as declaratory actions and actions of reduction?—In that latter class of cases I think the interposition of counsel is indispensable throughout.

10,527. Would you do away with pleas in law in such cases?—I think so.

10,528. But you would still have the aid of counsel?—Yes.

10,529. Have you formed any estimate of the proportion of cases that are mere claims of debt, as compared with the other class of cases that I have alluded to?—I have not; but I know generally from long experience the class of cases that come from Sheriff Courts.

10,530. But, taking all cases that come into the Court of Session, have you formed any estimate of the proportion of these that are mere claims of debt, as compared with those that involve other kinds of conclusions altogether?—I have not entered minutely into the statistics. I speak from the general impression on my mind, induced by the experience of a great many years.

10,531. *Mr. Adam.*—In the case of agents resorting to counsel, have you considered in what cases that should be done, or who is to be the judge of whether or not that expense is to be allowed against the opposite party?—The auditor must in the first instance judge of it, and the court after the auditor.

10,532. Then you think the agent should run the risk in the first instance of having that expense allowed?—Certainly. The agent must always run the risk of conducting his case with propriety.

10,533. *The Chairman.*—I infer from what you have said, that you think there should be only one Sheriff?—I think there should be only one Sheriff.

10,534. With an appeal direct to the Court of Session?—Yes.

10,535. Would you allow the Sheriff to review his own judgment?—I see no objection to that, provided it be done inexpensively; and he ought certainly to have the power of reviewing it to the extent of correcting any merely clerical or inadvertent error.

10,536. *Mr. Baxter.*—Would you allow him to have an oral hearing against his own judgment, before appeal to the Court of Session?—I see no objection to it.

10,537. *Mr. Adam.*—In the event of its being thought desirable to preserve an appeal in the Sheriff Court itself, would you prefer the present system of one judge, or an appeal to a tribunal of two judges going through the various country towns?—I should prefer an appeal to two judges.

10,538. *Mr. Baxter.*—To deliberate together?—Yes. I think an appeal from one judge to one judge, in the circumstances I have mentioned, most unsatisfactory.

10,539. *The Chairman.*—You mentioned that, under the present system, in the event of the Sheriff altering the judgment of the Sheriff-substitute, that gives dissatisfaction?—I think it gives great dissatisfaction.

10,540. I suppose you mean dissatisfaction to the party against whom the judgment is pronounced?—I mean dissatisfaction to the profession.

10,541. As showing uncertainty of result, or how?—In respect that the profession do not always consider that the judgment of the Sheriff ranks at all higher than that of the Sheriff-substitute, and may sometimes rank the Sheriff-substitute's judgment higher than the Sheriff's.

10,542. *Mr. Baxter.*—Do you think the Sheriff-substitute has some peculiar advantages which the Sheriff has not?—I think he has.

10,543. In the making up of the record, and in the taking of evidence?—Yes.

John Clerk Brodie.

10,544. *The Chairman.*—And, *per contra*, do you think the Sheriff has any advantages that the substitute has not?—It does not seem to me that the Sheriff is in a better position to judge of the case than the Sheriff-substitute.

10,545. *Mr. Webster.*—Is there no advantage from his being non-resident among the parties who are involved in the litigation?—I do not think inconvenience has been experienced from the Sheriff-substitute being resident.

10,546. Nor from the Sheriff practising in the Supreme Court?—A great many of the Sheriffs have no practice in the Supreme Court. I don't think there are above six or seven of them that are in any practice to speak of.

10,547. *Mr. Campbell.*—Your professional practice has given you a pretty considerable familiarity with a great number of the counties of Scotland?—It has.

10,548. Have you ever had occasion to form an opinion that the Sheriff-substitute is in any way, from his association with the county and residence in it, a person suspect, with reference to prejudice or partiality?—By no means.

10,549. Any suspicion of that kind would tend to diminish, as you raise the status of the resident Sheriff, would it not?—Probably; but I don't think the suspicion exists.

10,550. The idea of a division of Scotland into districts, with ambulatory judges, consisting of two for each district, acting as a court of review of the judgment of the resident Sheriff, has been strongly forced on our attention. Do you think there is any superior advantage to be derived from such a scheme over that of a direct appeal to the Court of Session; or do you prefer the latter alternative?—I prefer the latter alternative; but if such an appeal court should be constituted, I think it should be with this quality, that its judgments should be final, and that there be no appeal from it to the Court of Session.

10,551. *Mr. Baxter.*—But I understand you to prefer a direct appeal to the Court of Session, on the condition that the expense should be much lessened?—Certainly.

10,552. *Mr. Campbell.*—Assuming the present constitution of the court to subsist, consisting of Lords Ordinary and an Inner House, do you see any difficulty in the Lords Ordinary discharging those functions in appeals which are now exercised by the Sheriff?—Under the present system, the Lord Ordinary could not do it so inexpensively as the Sheriff does.

10,553. That is to say, when there was an oral hearing; but Sheriffs may be appealed to without any hearing?—I don't think that, under the existing system, you could have an appeal to the Lord Ordinary so inexpensive as the present appeal to the Sheriff.

10,554. But the expense of proceedings like the present might be greatly obviated by assimilating the procedure before the Lord Ordinary to that before the Sheriff, by first prohibiting printing, and second, preventing more than one counsel being heard on a side?—I think, whether you keep the Lords Ordinary as they are, or throw them into a Third Division, new arrangements might be made for the conduct of cases coming into the Court of Session from inferior courts, that would so diminish the expense as to make an appeal from the Sheriff to the Court of Session an inexpensive appeal. I do not say it would be an appeal as inexpensive as the present appeal to the Sheriff; but I am of opinion that the very inexpensiveness of that appeal is to some extent a disadvantage, because it creates delay. It frequently happens that a great object of the defender in a cause is delay; and if you enable him, at several stages of it, to take an appeal to another judge, and make it a very inexpensive appeal, it is sure to be frequently taken, and thus there are disadvantages in its very inexpensiveness. I think the expense of the appeal to the Court of Session might be so diminished, that it should not be more onerous than it ought to be.

10,555. Do you think that the superiority of decision in the altered appellate tribunal would be so great that it would be worth the public's while to pay for it?—I am clearly of that opinion.

10,556. If you were informed that 19-20ths or some such percentage of the judgments of the Sheriff-substitutes were affirmed on appeal by the Sheriffs throughout Scotland generally, and yet that in every final judgment an appeal is taken as a rule, would that tend strongly to confirm your opinion that the appeal is taken merely because it is cheap, and not with any legitimate idea of getting a better decision?—I have no doubt that is the case.

10,557. *Mr. Baxter.*—Would not the evil be greatly mitigated if the number of appeals were lessened, and an appeal made competent only at final judgment?—I am of opinion that, if the present system of Sheriff and Sheriff-substitute is to be maintained, the number of appeals ought to be materially lessened.

10,558. Then you think that, in any event, the number of appeals should be diminished?—I think so.

10,559. *The Chairman.*—Do you mean the number of appeals in the course of the cause, or do you mean that there should be a finality of judgment where that does not exist now?—I mean that the number of appeals in the course of a cause should be diminished.

10,560. *Mr. Baxter.*—And the whole case brought up on an ultimate appeal from the decision on the merits?—I am not prepared to say that I would limit it in every case to the final judgment.

10,561. *The Chairman.*—But there are certain appeals in the course of a case which you would prohibit?—Yes.

10,562. *Mr. Shand.*—Apart from your experience in advocations in the Court of Session, have you any personal experience of the working of the Sheriff Courts?—One sees the working of the Sheriff Courts very clearly, in the causes that come from those courts to the Court of Session.

10,563. Apart, however, from that source of information, have you had any personal experience of the working of the Sheriff Courts?—No, I am not a Sheriff Court practitioner.

10,564. Have you had any connection with the Sheriff Courts, so as to bring you into personal contact with the working of them?—I have had no more personal connection with the Sheriff Courts than agents in the Court of Session usually have.

10,565. *Mr. Campbell.*—You have had constant personal intercourse with practitioners in the Sheriff Court, I suppose?—For a great many years.

10,566. And you have been conversant with the views which they entertain of the working of their own courts?—I have.

10,567. *Mr. Shand.*—Is it the result of your intercourse with agents, that you find they desire that there should be only one local judge?—I don't think that the present system of appeal from Sheriff-substitute to Sheriff gives satisfaction generally to the country practitioners.

10,568. Do you think the country practitioners, as a body, or the majority of them, would approve of what you have proposed,—namely, that there should be no intermediate appeal between the resident Sheriff and the Court of Session?—I have no means of knowing.

10,569. Have you not made that a subject of conversation with country practitioners?—I know a great many are of opinion that a direct appeal to the Court of Session would be advisable; but whether they form a majority or not, I cannot say.

10,570. Can you tell me from what counties you can represent that as an opinion that has been expressed to you?—I cannot say that it applies to one county more than another.

10,571. Could you recall the names of half-a-dozen procurators who so expressed themselves to you?—Really I do not bear that in my mind.

10,572. I am not asking you to give their names, but I merely ask if you can, in your own mind, recall six procurators throughout Scotland who have so expressed themselves to you?—I have no doubt that I could recall a great many more.

10,573. You don't think the absence of expense in an

appeal is a disadvantage to that appeal?—I have stated that, in some respects, I think the inexpensiveness of the appeal is a disadvantage.

10,574. Do you think it is an advantage to have an appeal which is inexpensive in itself?—Certainly.

10,575. What you object to is that it leads to delay?—Yes.

10,576. If that delay can be avoided by any means, would you desire to have an appeal with as little expense as possible?—Yes; but I think that you may have an inexpensive appeal to a court not properly constituted, that is not nearly so advantageous as a more expensive appeal to a court better constituted.

10,577. That objection goes to the constitution of the court, and not to the question of expense?—Of course, abstractly considered, the diminution of expense is a very important object.

10,578. What do you think the expense of an appeal to the Court of Session, in a case upon a concluded proof, must involve as a minimum in ordinary circumstances?—It would be difficult to answer that question.

10,579. You have had a great deal of experience in appeals and advocations from the Sheriff Court to the Court of Session?—I have; but I really could not venture to answer the question.

10,580. Is it not an important element in forming your opinion as to the disadvantage of the existing appeal, as compared with a direct appeal to the Court of Session, which you think should be substituted for it, that you should ascertain what the expense is?—I don't propose that the Court of Session should be the direct court of appeal, unless the expense of procedure in the Court of Session in appeals from Sheriff Courts be materially lessened.

10,581. If matters remained in the Court of Session substantially as they are now, would you retain an appeal in the Sheriff Court?—No; I would not retain an appeal from one judge to one judge, in such circumstances as exist at present.

10,582. Can you form any idea of the expense of the appeal in the Court of Session?—I could easily ascertain it; but I cannot venture to name a sum offhand.

10,583. Suppose it were put at a minimum of £15 a side on an average, would you say that in these circumstances there ought to be no intermediate appeal between the local resident judge and the Court of Session?—I think the appeal to the Court of Session might be, in a very large number of cases, much less than £15 a side.

10,584. But assuming that it were not so, in that case do you think there should be no intermediate appeal?—In that case, I think an intermediate appeal might be desirable, but not the present appeal.

10,585. What appeal do you suggest in that case?—Two judges might be enough.

10,586. How would you constitute the court of appeal in that case?—You must constitute it from the bar.

10,587. Do you mean, then, that judges should be appointed to go circuit, or what do you propose?—The proposal is not mine. I do not think it the best mode of arranging the appeal business of the inferior courts.

10,588. I understood you to say, that if the expense be as I have put it, you would think it desirable still to have an intermediate appeal?—But, being of opinion that the expense need not be so much as you mention, I have not directed my attention to the details of the appeal court which, in such circumstances, it might be best to constitute.

10,589. *The Chairman.*—Would you explain to us what are the arrangements which you would propose, whereby the expense of an appeal to the Court of Session in such cases would be so greatly diminished?—I have alluded to some of them. I think, in a great number of cases coming from inferior courts, the employment of counsel might be very much limited; and that the expense might also be much lessened in the less important procedure, as well as in the making up of records, by entrusting those matters to the agents and the clerks of court.

10,590. *Mr. Webster.*—Have we at present, in the Court of Session, such clerks of court as would meet your views for that kind of preparation?—I cannot say that we have.

10,591. Nor are the salaries at present such as would be adequate for parties qualified for the duty?—In some cases, I doubt if they are.

10,592. *Mr. Shand.*—That suggestion would not apply to cases coming from the Sheriff Courts, in which the record has been already there made up?—Where the record has been made up in the Sheriff Court, it will stand in the Court of Session.

10,593. The cause would come up on the record and the proof taken there?—Yes; if there be a proof.

10,594. *The Chairman.*—Would there be any mode of limiting the expense that you suggest in that case, except holding the record in the court below as the record in the Court of Session?—If there be a Third Division, I think that in many of the smaller class of cases it should not be required to print the papers, and that the court might utilize the process, trusting to the statement they would receive from counsel in regard to what was to be found there.

10,595. But if there was not a Third Division?—The same thing might be done by the Lord Ordinary.

10,596. And what would be the saving of expense in that case?—The saving of copies of the papers for the Lord Ordinary.

10,597. *Mr. Adam.*—In the case of appeals to the Justiciary Court at the present moment, are you aware that they are in many cases disposed of without printing?—Yes; and I think it advisable that that system should be extended as far as possible.

10,598. *Mr. Shand.*—Do you contemplate then, that Sheriff Court cases should come before a Lord Ordinary?—I have stated my opinion that there should be a third court formed out of the Lords Ordinary; and that the Lords Ordinary, as at present constituted, should not remain part of the system.

10,599. *Mr. Webster.*—Do you not find that printing, on the whole, tends very greatly to diminish expense in the way of length of discussion and amount of fees?—I am much in favour of printing; but there is a large class of cases in which it is quite unnecessary, and in these it ought not to be required.

10,600. *Mr. Shand.*—Do you think it would be possible to dispense with printing in the case of advocations from the Sheriff Court where there is a proof, and where the case has to be disposed of on the proof by several judges?—That would depend upon the particular case. There are a great number of cases in which it would be necessary to print the proof, but many in which it might be dispensed with. The dispensing with printing must be left with the court in the particular case, and with the parties.

10,601. In what class of cases, where a proof has been led, do you think the printing of it might be dispensed with?—In cases of little intricacy.

10,602. In that case, how are the court to consider the proof?—They have the proof before them, and the counsel to tell them what is in it.

10,603. Do you think it would be satisfactory that the judges should dispose of the case without each reading the proof?—I think, in the general case, if the judge reads what the counsel on both sides bring before him, he will probably read all that is material.

10,604. Would you be content to have a case of your own disposed of on the partial reading by counsel at the bar, of proof led in the inferior court?—In a large number of cases I should not be content with anything of the kind, but in many cases I should be quite content with it.

10,605. And do you think that litigants generally would?—I think so.

10,606. Do you think that judgments on which reliance could be placed might be expected under such a system?—I am quite of that opinion.

10,607. *Mr. Adam.*—Would you in any case dispense with counsel in debating a case?—No, certainly not. It is only in the more formal matters, of which there are

John Clerk Brodie.

a great number in the court, that I would dispense with counsel.

10,608. *Mr. Shand.*—Would you leave it to the clerk of court, or to whom would you leave it, to settle whether the proof was to be printed in each particular case?—That is matter of detail; but it might perhaps be safely left to the clerk of court.

10,609. It would of course be necessary, in order to determine that, that he should read the proof and judge of the case?—Yes; but a very cursory reading of the proof would be sufficient, and reading it at all would be necessary only where there was a difference of opinion between the agents.

10,610. *Mr. Webster.*—Would the agents judge of that matter for themselves, or would they not resort to counsel, and thereby cause more expense than the whole cost of printing?—I think the agents would judge of it themselves; and, if they resorted to counsel, I think the charge for that should not be sustained by the auditor.

10,611. *The Chairman.*—In regard to dispensing with counsel, I did not understand whether you confined that to the proceedings before the clerks of court which you suggest, or whether you extended it also to certain appearances before the Lord Ordinary or the court itself?—I think, if it is mere formal matter, counsel might be dispensed with.

10,612. *Mr. Webster.*—As is done in the Appeal Committee of the House of Lords?—Yes.

10,613. *The Chairman.*—You have said that you think the Lords Ordinary might be formed into a Third Division, and the Lords Ordinary as such dispensed with. Would you retain any Lord Ordinary as such?—I think the present staff of the Court of Session is not more than sufficient to perform the duties of that court, and that the judge who would not be a member of the Third Division might be a very useful and important member of the court.

10,614. What duties would you assign to him?—There are a great number of petitions which at present come before the court that might be disposed of advantageously by a single judge, saving much of the time of the court, and performing the duties not less satisfactorily than they would be performed by a court of four judges. He would also be useful where the court were divided in opinion. Where there was any appearance of that, he might be called in, and thus the expense of a re-hearing, which is often considerable, might be saved. If the Teind Court be kept up, that duty might perhaps be entrusted to him.

10,615. And those petitions which now go to the junior Lord Ordinary you would send to him?—Yes.

10,616. And the duties of the Teind Lord Ordinary, if that is to be kept up?—I think they might be advantageously sent to him also.

10,617. *Mr. Adam.*—And the Bill Chamber?—I think it doubtful whether the Bill Chamber as a separate court should be maintained; but he might be very useful in granting the first orders in Bill Chamber cases, where these require despatch.

10,618. *The Chairman.*—Would you explain what you mean when you say it is doubtful whether the Bill Chamber should be preserved, and yet that it should be kept up for granting orders of that kind?—At present a case is disposed of first in the Bill Chamber with reference to the merely temporary object, it may be, of interim interdict. From the single judge in the Bill Chamber it goes to the Inner House with reference merely to that temporary object; and afterwards it commences anew in the Court of Session, as if almost a new suit. I think there are inconveniences in that arrangement which it would be desirable to obviate; but there must, of course, be some machinery for meeting the pressing cases which come into the Bill Chamber, and require immediate despatch. I think a single judge would be better for that than a court of four judges.

10,619. *Mr. Shand.*—On the assumption that there shall remain several judges in the Outer House, do you see any reason why applications for interdict and *ad factum præstandum* might not be presented to any Lord Ordinary, just as they are now to the Sheriff?—I see no reason why they should not.

10,620. And if that were so, the principal use of the Bill Chamber would be dispensed with in that way?—Yes.

10,621. You said you thought that having a single Lord Ordinary would save the expense of a re-hearing. In what way do you contemplate that that would be done?—I contemplate that the court, in any case of intricacy, or likely to give rise to difference of opinion on the bench, would call in the assistance of that judge.

10,622. But if that difference does not appear till the argument is almost concluded?—Of course there may be cases in which you will not derive full advantage from the arrangement.

10,623. In that case, if you call in the Lord Ordinary, a re-hearing must take place?—You cannot ask a judge to decide a case which he has not thoroughly heard.

10,624. Do you mean that the re-hearing would only be saved in those cases in which the judges, having read the papers beforehand, anticipated a difference of opinion?—I think it should be competent to call in a judge at any time with consent of parties. I would not call him in, without their consent, during the progress of the case; but I think consent would generally be given, though the case might have been commenced.

10,625. You mean that where, in the course of an argument, it appears likely that there is to be difference of opinion, the Division should send to the Lord Ordinary sitting in the court, and ask him to take part in their deliberations?—I mean that, in such a case, the Division should take the Lord Ordinary's assistance.

10,626. Suppose the Lord Ordinary was engaged with important business at that time?—I don't think it likely that much practical difficulty would be found to exist.

10,627. Suppose the Lord Ordinary to be engaged with business fully more important than that which the Division is engaged in?—I don't know what more important business he could be engaged with.

10,628. If an important interdict was going on before the Lord Ordinary, and the case before the Division was an appeal from the Sheriff Court in a £25 case?—You are assuming a very special case, and the Lord Ordinary to be sent for on the instant. It might, or might not, be possible to get him on the instant.

10,629. If that course is not taken, you would contemplate that the case should be at once adjourned?—I should contemplate the court taking the course which, in the circumstances, it found convenient. It is impossible to anticipate all the circumstances that may occur, in such detail as you are now giving them.

10,630. But they must either have a Lord Ordinary present or adjourn the case, if they require his presence?—If it be necessary to adjourn the case, I see no difficulty in making the adjournment.

10,631. If a Third Division be formed, and you have one Lord Ordinary alone in the Outer House, in what way do you contemplate that inquiry into facts should take place?—The services of the judge who formed a member of none of the three courts might be available in many of the cases remitted to proof. It might also be possible to detach from a court of four, when thought expedient, one of the judges. I think the Court should have that power, and I believe that by means of that kind there would be little difficulty in providing for all the cases you are now contemplating.

10,632. Have you any idea of the proportion of cases in which inquiry into matter of fact occurs, and the time which such inquiries occupy before the Lords Ordinary at present?—I know the inquiry is often very prolonged.

10,633. And that it occupies a very great part of the time of five judges at present?—No doubt that is so, but these are judges having the whole duties of a court to perform.

10,634. I speak of the time occupied in inquiring into matters of fact alone?—It often requires a great deal of time to conduct an inquiry into facts.

10,635. Do you think it would be possible for one

judge, suppose he gave his whole time to inquire into matters of fact, to overtake the business that the Lords Ordinary now do?—I do not propose that there should be only one judge for that business.

10,636. But supposing that one gave his whole time to it?—I don't think it would be expedient to limit yourself to the services of that judge, when there are other judges with whom the work might be shared.

10,637. If you detach a judge from each of the three Divisions to take proof, is that very different from having four Lords Ordinary sitting?—Very different indeed; and I don't contemplate the constant detachment of one judge from each court.

10,638. *The Chairman.*—As there is a large amount of time occupied by the judges at present in taking proofs, it is probable that there would be an equal amount of time occupied in taking proofs, even if your system of three Divisions were adopted. You would have the command of the extra judge, and you would have the power to command the services of three other judges?—Just so.

10,639. It would probably occupy as much of the time of those three as is now occupied by three of the Lords Ordinary taking proofs. Would that not almost practically reduce each court to a court of three instead of four?—I don't think so. The present Lords Ordinary are able to do all the other business of their courts, and to take these proofs. Proofs, though a very important part of their duty, by no means occupy their whole time. I don't think the system I have suggested would infer anything like a continuous detachment of one judge from each of the three courts.

10,640. *Mr. Webster.*—Would you contemplate that the single judge who investigates the facts should hear counsel and dispose of the case at the end of the proof, or that the case should go into the Division to which the judge belongs, to be heard and decided there?—I should contemplate that it might go into the Division.

10,641. In that case would you contemplate that the evidence should all be put before the Division in print, and counsel then heard?—That must depend upon the nature of the case. In a great number of cases it would be necessary, but I think in very many it would be unnecessary.

10,642. How would you ascertain the class of cases in which printing was necessary, and in which it was not necessary? Would you leave it to the judge who has heard the evidence to state at the time whether he thought it should be put before the court in that way, or how would you do?—It might perhaps be left to the judge to state his opinion on that point, leaving the court to dispose of it.

10,643. Then you would have no judgment by a single judge on the merits of a cause in the Court of Session?—I would not; unless where it was thought convenient that the facts of the case should be finally disposed of by a single judge. In those cases the facts would be definitively ascertained at the proof before the single judge. In cases in which it might not be thought expedient to commit to a single judge the final decision of the facts, it would be necessary that the proof should be brought, in some way or other, under the notice of the court.

10,644. That would add greatly to the cost of the decision, in the first instance, in all cases where the proof was to be disposed of by the court. At present the rule is, that the counsel who has taken the proof shall discuss the case then and there before the judge, and the decision is given on that discussion. What would occur in the way you are now proposing would be, that there would be an entirely separate discussion before a different tribunal, involving of course new instructions to counsel?—That is so. In cases that would not have gone to the Inner House, the cost would in the first instance be greater; but in those which were ultimately to go to the Inner House, it would be very much less.

10,645. Would the decision of the Inner House given upon such discussion or proof be more or less satisfactory to you than the decision of the judge who heard the evidence?—I should extend, as far as possible, the finality of the judge who took the proof.

10,646. Do you think that a judge is the best qualified person to ascertain facts upon evidence?—That is, generally, my opinion.

10,647. *The Chairman.*—You said that you would extend the finality of the judge who heard the evidence as far as possible. What limit do you put to that? Is it not possible in every case, if you make the law so?—As far as it is safe to make the judge final on the evidence, I think it would be a great improvement to do so.

10,648. Then you think that should be done in all cases?—I am not disposed to say that it would be safe to make a single judge final in all cases upon the proof.

10,649. *Mr. Clark.*—You mean that he should find the facts on the proof?—Yes.

10,650. *Mr. Shand.*—Then you would not have the proof reported to the Division, and there debated; but you would have the case debated before the judge who took the proof?—Where the judge is to decide on the proof, the debate on the proof must of course take place before him.

10,651. *Mr. Clark.*—How would you apply that in such a case as the Breadalbane case? Would you have made the single judge who took the proof there final upon the question of fact involved in that case?—I have not said that I think a single judge could with safety be entrusted in all cases with finality in matters of fact. I think it desirable that it should be done as far as possible; and in any exceptional case the court might have power to reserve to themselves the adjudication of the facts.

10,652. So that they should be the judges of whether a single judge was to be conclusive in fact, or whether they themselves were to be the judges of the fact?—Yes.

10,653. *Lord Barcaple.*—Do you anticipate that, assuming the court formed in the way you propose, the order for the proof would emanate from the Division?—If the court consists only of three Divisions, it must emanate from a Division.

10,654. And therefore you would assume that the discussion out of which the order for the proof arises, should take place before the Division?—Yes.

10,655. Have you considered whether the desirableness of sending causes at once to a Division of the court, in place of to a Lord Ordinary, is equally strong in regard to all classes of cases; or whether there is a broad distinction between cases which it would be more peculiarly desirable to treat in that way, and cases where there would be strong reason for having the case disposed of in the first instance by a single judge?—I am not in favour of two courts within the Court of Session itself, an appeal lying from the one to the other.

10,656. And you think that applies equally strongly in a general way to all classes of cases?—I think it does.

10,657. In forming that opinion, have you had any regard to what seems to be the practice in the Court of Chancery in England, by which in modern times they have a double judgment of that kind?—That is so in the Court of Chancery, but not in the Courts of Common Law.

10,658. That is the reason why I ask, have you had any regard to the fact that in modern times that practice has been introduced into the Court of Chancery?—Until a comparatively recent period, the judgments of the Court of Chancery were all by single judges. Until the introduction of the Lords Justices of Appeal, there was not, so far as I am aware, any court of two in the Court of Chancery.

10,659. But have you had regard, in forming your opinion upon this matter, to the existence of that practice in the Court of Chancery?—I am aware of the system which prevails in the Court of Chancery, and nothing that I know of that system induces me to think that the arrangement of the Court of Session in three Divisions is not an expedient one.

10,660. And nothing induces you to think that it

John Clerk Brodie.

might with propriety be subject to a limitation in regard to any particular class of cases?—Your question does not make me aware of the class of cases you allude to.

10,661. I allude to that kind of case in Scotland which assimilates to the class of cases which come before the Court of Chancery in England?—No, I am not aware of any class of cases in which a court of first instance, consisting of four judges, and without any appeal except to the House of Lords, would not be a satisfactory court.

10,662. And attained with reasonable ease by a court of four?—I think so.

10,663. Have you any knowledge as to whether that system in Chancery is satisfactory to the profession and the judges, and the public?—I have heard no dissatisfaction expressed in regard to the constitution of the Court of Chancery.

10,664. You spoke of pressing cases in the Bill Chamber. What do you allude to?—I alluded to cases of urgency.

10,665. What class of cases have you in view?—Principally interdicts.

10,666. Do any others occur to you?—No.

10,667. Suspensions?—I include them in interdicts.

10,668. But is not that almost the entire business of the judge in the Bill Chamber?—It is a very large portion of it.

10,669. Is it not almost his entire business? He, being Bill Chamber judge, does a great deal else; but in the Bill Chamber what other business does he do?—It is his chief business. My suggestion was, that the Bill Chamber judge should merely deal with the matter in the first instance.

10,670. You mean that a Bill Chamber judge would be necessary to be kept up for dealing with the first order in an interdict, or in a suspension, because that is urgent?—Yes.

10,671. That being substantially the whole, or very nearly the whole, of the proper Bill Chamber work done in the Bill Chamber, do you think that it would be an advantage to divide that, assuming the Lords Ordinary to remain as they are at present, among five of them, and to divide the office management of it among five different offices?—I would not divide the office management. Though you give a jurisdiction in Bill Chamber matters to each of four or five judges, it is not necessary that you should interfere with the Bill Chamber clerk.

10,672. I thought you proposed to abolish the Bill Chamber?—Not at all.

10,673. Then if the Bill Chamber is not to be abolished——?—Whether the present arrangement of the Bill Chamber be abolished or not, I do not contemplate that the Bill Chamber clerk should be abolished.

10,674. Well, what is the benefit that you would anticipate from dividing the Bill Chamber business among five judges?—I am assuming that you have a judge not a member of any of the three courts; and as the business of the Court of Session is, in my opinion, quite sufficient to occupy the time of these three courts, with all the assistance that an additional judge can give them, I would relieve, as far as possible, the Division judges of whatever work may be safely performed by a single judge.

10,675. But in the event of the Lords Ordinary being retained as they are at present, I understood you to propose that these urgent cases should be divided among the Lords Ordinary, and not confined to one?—The question was not so put to me.

10,676. *Mr. Shand.*—I so put it, and I thought you assented to my view. The question I put was: Supposing there was to be no change, and no Third Division made, was there any reason why the Bill Chamber should be kept up; and might not every Lord Ordinary deal with applications for interdicts and suspensions, just as every Sheriff-substitute is doing daily throughout the country? And might not the clerks attached to these Lords Ordinary deal with these matters as the Sheriff-clerks do throughout the country, as part of their ordinary business?—I see no objection to every Lord Ordinary dealing with suspensions and interdicts as you suggest.

10,677. There is this in its favour, that it abolishes a separate office which appears to be unnecessary?—I don't think the saving of expense of such importance as to make it advisable to abolish the Bill Chamber clerk.

10,678. And in the second place, it removes a sort of outer court which you stated you found objectionable as leading to additional procedure before a party gets into the proper Court of Session?—Yes. I think the present arrangement, by which you commence as it were a new case, after emerging from the Bill Chamber, is not a convenient one.

10,679. That would be obviated under the system suggested by my question?—I think it ought to be obviated.

10,680. *Lord Barcaple.*—How would it be obviated? An interdict is asked. The demand is for interim interdict in the meantime, and for interdict; the interim interdict becomes the subject of discussion, and it may be a great deal more important than all the rest of the case put together. It is either granted or refused, and the note is passed; and then a discussion takes place upon the case generally. In what way is it that the change you propose would in any way diminish the procedure in such a case?—I contemplate a Third Division, and that the case once in the Inner House should remain there, and should not be commenced of new.

10,681. That is simply getting quit of the Lords Ordinary. Whether there be a Lord Ordinary or not, the case must still first of all be heard on the question of interim interdict, and afterwards, if the parties are not satisfied with having that decided, and go further, it must be heard upon the question of permanent interdict. Now, how will the procedure in such a case as that be diminished by the change you propose—I don't mean the change of abolishing the Lords Ordinary, but some change by which you anticipate there shall be less procedure in whatever court?—I see no objection to the alteration Mr. Shand suggests, but it is not the alteration I myself proposed. The only alteration I have proposed is in connection with the institution of a third court in place of the existing courts of the Lords Ordinary.

10,682. And without any intention to have any bearing upon this matter of the amount of procedure in interdict or suspension processes?—No.

10,683. *Mr. Webster.*—I think your view is, that the Lord Ordinary, whoever he may be, that is dealing with the application in the first instance, shall merely pronounce the order for service, with or without granting an interim interdict?—Yes.

10,684. And that after that is served, and after answers have been lodged, the future discussion in the case shall go on in one of the three Divisions?—Precisely.

10,685. And that there is to be no discussion before a single judge upon the note and answers?—That is what I contemplate.

10,686. *Mr. Clark.*—Do you think the three courts would be able to overtake all that work?—I think they would.

10,687. *Mr. Webster.*—In reference to Mr. Shand's question about applying to any of the five Lords Ordinary, would there not be a risk of a party who has experimented on one judge, and found that he would not give the interim interdict, trying another judge who would have less scruples about it?—That system is, I believe, permitted in England, but I do not think it an expedient one. If a party has applied to a judge of his own selection for an interdict, and failed to get it, that ought to terminate the matter.

10,688. What check would you provide against that, unless there was only one clerk to such applications?—I have proposed that there shall be only one clerk. Unless there be only one clerk, I don't see how you could conveniently provide against it.

10,689. *Mr. Shand.*—Does it not occur to you, that even supposing such a thing were competent, a second

judge, on being informed that that course had been taken, and that one judge had refused the interdict, would regard the application as one in which the petitioner had an additional *onus* on him?—Unless you maintain the Bill Chamber clerk, I do not see how he is to be informed of that. He is not likely to be informed by the applicant.

10,690. You take the case of an application in absence?—Such applications are for the most part in absence.

10,691. *The Chairman.*—You said you thought the three Divisions would be able to overtake all the business, without the Lords Ordinary. Have you any estimate of the number of cases decided by the Lords Ordinary that are appealed to the two Divisions?—I have not.

10,692. Have you any estimate of the number of cases in which the judgments of the Lords Ordinary are allowed to become final, without being appealed to the Divisions?—I do not know the precise statistics. I speak from my general knowledge of the court.

10,693. The business that goes into the Divisions at present appears to occupy two Divisions pretty fully, and these are the cases that are decided by four or five different Lords Ordinary, and they may be probably regarded as business sufficient to occupy the two Divisions. There are also cases which are not appealed to the Inner House. Do you think another Division would overtake all these?—I think, if a larger amount of business were thrown upon the court, it would find it necessary to economize its time much more than at present. A good deal of the time of the court is consumed at present, not perhaps in the most beneficial manner, by the practice of each judge stating his own opinion separately, where there is no substantial difference of opinion on the bench. Great saving of time might also be most beneficially attained by the court not allowing to counsel so much latitude as they are in the habit of doing. I think the court might often interpose, and curtail with great advantage the speeches; and probably such a system as I have suggested would make it absolutely necessary for the court to prevent, by these and other methods, the expenditure of time from which no advantage is reaped.

10,694. In regard to the time consumed by the judges in giving their opinions, you think that one judge ought generally to give the opinion of the court?—Whenever that is possible.

10,695. Is there not some risk of the public believing—I don't say rightly—that judges who merely express their concurrence had not taken the trouble to apply their minds thoroughly to the case?—I don't think so.

10,696. *Mr. Webster.*—In suggesting that there should be three courts, is it part of your suggestion that there should be any change in the system of pleading? Are you to suggest a change in the system of pleading as an accompaniment of your proposed change to three courts, or is the system of pleading to continue the same?—I think the system of pleading should be directed to bring cases as simply and speedily as possible under the consideration of the court.

10,697. How is that to be done? Do you mean that that is to be done by any change of the system, or by trying to work the present system better?—I don't propose to introduce any system essentially different from that which now prevails.

10,698. *The Lord Justice-Clerk.*—Do you anticipate that the time of the four judges would be much occupied in the preparation of the causes?—I think it would not.

10,699. You propose, I think, that it should be very much done by utilizing the clerks acting with the agents in the preparation of the cases?—Yes, that the making up of the record should be in great measure performed by means of the clerks of court and the agents, without the intervention of counsel.

10,700. How would you dispose of motions for diligence, and matters of that description?—These, to a very large extent, might be disposed of in the same way.

10,701. Would you give the clerks power of absolute disposal, or would you have an appeal to the court in cases where parties were dissatisfied?—I think there should be a reference to the court or to some member of it.

10,702. There has lately been an introduction of the system of the clerks disposing of motions to a certain extent. Has it been found that that has lessened the expense, or otherwise?—I am not able to answer the question.

10,703. You have said that the present clerks are not fitted to discharge the function which you propose to give them. Do you contemplate having a class of clerks superior in point of position and emolument?—I think to some extent that would be necessary.

10,704. Then, as precedent to the third court, there would be the selection and appointment of these chief clerks, with proper salaries?—Yes.

10,705. With that, and with the constant appeals from clerks, I suppose the expense of preparing the record before four judges would come to be very considerable?—Not if you utilize the clerks of court. Otherwise, I think it would be difficult to conduct the business.

10,706. Have you found that a single judge gives a better and more expeditious disposal of these cases connected with the preparation of records and incident diligences, than when they are brought before four judges?—I do not think there is any difficulty in the preparation of records through the medium of the court, although consisting of four judges; nor that there should be more expense or delay; but it is necessary, if you are to have only three courts, that you should save as much as possible the time of the court, in order to enable it to overtake the business.

10,707. Have you noticed the difference of expense and of speed in the management of cases which have been to a certain extent in preparation in the Divisions, and in preparation before the Lords Ordinary?—At present the preparation of a record before the Division is exceptional; it is usually prepared before the Lord Ordinary; and, as may be expected where it is only done in exceptional cases, the business is not conducted in a satisfactory manner; but I think there is no essential difference in that matter between the Inner House and the Lords Ordinary.

10,708. Is there not the expense of the feeing of counsel at every stage in the Division, and the absence of that in cases of ordinary motions before the Lord Ordinary?—But I do not see why counsel should be fee'd before the Inner House for what they are not fee'd for before the Lords Ordinary; and I am of opinion that, in making up the record, the services of counsel should, as far as possible, be dispensed with.

10,709. And that the conducting of the matter in the Inner House should be left to agents?—Not so.

10,710. Before the clerk?—Yes.

10,711. Suppose there is an appeal from the clerk?—If it take place in open court, it must be done by counsel; but it is not necessary that should be the arrangement. The court may depute to any one of its number the decision of matters of that kind, and it might be done at chambers, not in open court.

10,712. *Mr. Campbell.*—You spoke of the inadequacy of the present staff of clerks to the discharge of the duties which you proposed should be devolved upon them. I presume you don't refer to the principal clerks of Session, but to the depute and assistant clerks?—The present class of clerks has not been selected with any view to the performance of the duties which I am now contemplating should be thrown upon them; and therefore I think it might be necessary to introduce into some of these offices clerks with peculiar aptitude for the work they would have to perform.

10,713. *Lord Barcaple.*—For the new work?—Yes, for the new work.

10,714. *The Chairman.*—And improved emoluments, probably?—In some cases with improved emoluments.

10,715. *Mr. Campbell.*—Don't you think the emoluments of the present first clerks of each Division would be sufficient emoluments for the first clerks of the three courts?—I think they might.

John Clerk Brodie.

10,716. And for such emoluments you might get three gentlemen quite able to discharge the duties you speak of?—Perhaps you would.

10,717. *Lord Barcaple.*—You were asked about the supervision thrown by statute on the Lords Ordinary in regard to the preparation of records. From your experience, does it appear to you that there is any material benefit got from that supervision?—I do not think there is much that would not be got under the new system.

10,718. *Mr. Shand.*—Do you contemplate that the pleadings should be prepared or revised by counsel under the system which you propose?—I have stated that I would propose to abolish pleas in law, that the summons might be prepared as far as possible by agents; and that it should be competent for agents also to prepare the defence, which is often a very simple matter; and that I thought it might be safely left to their discretion whether to employ counsel in these first stages of the case or not, being of opinion that they were not likely to dispense with the services of counsel unless they could safely do so. As regards revisal, I think it should be very much limited; but where it is necessary to revise, it may probably be found necessary to employ counsel.

10,719. *Lord Barcaple.*—Have you observed that in the last session revisal has almost ceased to exist?—I believe that is so.

10,720. *Mr. Shand.*—Then, revisal having ceased to exist practically, do you contemplate that in the great majority of cases the pleadings should be prepared by the agents alone?—I do not say in the great majority of cases, but in a very large class of cases. A large number of cases are so important, that agents will not, nor can they be expected to take responsibility in regard to them; but the saving of expense is not so very material in those cases as in the others which are less important.

10,721. *The Chairman.*—I think you distinguished between mere claims of debt and cases which involved other conclusions, such as declaratory actions or the like?—I did.

10,722. *Mr. Shand.*—Do you not think that with such a system, for which agents have not been trained, the result would be, that after the case advanced to its next stage it would be found that the pleadings in many cases required amendment, and so additional expense would be caused?—I have no fear of that.

10,723. *Lord Barcaple.*—Would you still contemplate, that while pleas in law are abolished, the record should disclose the grounds of action on the one hand, and the grounds of defence on the other?—Yes.

10,724. And that the parties, when they come to proof, shall not be entitled to any proof except with reference to those grounds of action and grounds of defence which are disclosed?—Not unless permitted by the court.

10,725. By an addition probably to the record?—Yes, if the court thought that necessary.

10,726. And possibly a stoppage of the procedure at the proof?—I think matters of that kind should, by the operation of the court itself, be simplified as much as possible, and that the court should direct its attention more to arriving at the justice of the case than the enforcing very stringent and technical rules.

10,727. But is there not a danger, on the other side, that a party—we shall say a pursuer—may come with evidence to prove his case, and to set aside all that he can see disclosed in the defences; but there may be another ground of defence undisclosed, and he has no evidence at all to meet that?—I can very well conceive cases in which it may be proper for the court to interfere, and to visit a party who has not conducted his case properly with censure.

10,728. And with the consequences, as to expense?—Certainly.

10,729. But would you consider it the duty of each party to disclose their grounds of action or defence, as the case might be, upon record?—I think the general rule should be for parties to disclose their case fully on record, but as shortly as possible.

10,730. *The Chairman.*—I think you said, at an early period of your examination, that you thought pleas in law should be dispensed with; and you assigned as a principal reason, that no agent ought to undertake to draw the pleas in law?—I did.

10,731. And that necessitated the employment of counsel, and added to the expense of the procedure?—Yes.

10,732. I rather think you made an exception in reference to actions of declarator and reduction. Did you mean to dispense with pleas in law even in these cases?—I meant to dispense with pleas in law in all cases.

10,733. *Lord Barcaple.*—Do pleas in law do anything else than disclose the grounds of action and of defence, if they are properly framed?—The grounds of action and defence may be stated in the summons and defence without pleas in law.

10,734. That is, the facts upon which they are rested?—Yes.

10,735. But, in the sense in which I use the term 'grounds of action' and 'grounds of defence,' that is not setting forth facts, but the pleadings upon these facts,—the legal grounds of action?—I think these may be safely left to be argued by counsel at the bar.

10,736. And to come out at the proof, without previous notice to the opposite party?—I think so.

10,737. *Mr. Shand.*—Has anything occurred to you as requiring amendment in regard to accountings?—The expense of accountings is often very considerable, and there is no table of fees for accountants, as for other practitioners. I think it would be advisable, if possible, that there should be such a table, but there are difficulties in framing it. I don't know that these difficulties are insuperable, and it would be an important object if it could be attained.

10,738. *The Chairman.*—What do you think are the chief difficulties?—I think the chief difficulty is, that the time employed in arithmetical calculation is very difficult to be judged of.

10,739. And there is no check upon it?—There is no check.

10,740. Does it occur to you that there might be an advantage in having one or more officials to do that duty under the control of the court?—I think it is a suggestion well worth considering.

10,741. *Mr. Webster.*—At present, the cost of investigation by accountants is borne by the litigants?—It is.

10,742. In place of being borne by the public, like other judicial expenses?—Yes.

10,743. *Lord Barcaple.*—Is there not a very large number of accountings in which private parties, very much apart from any question of litigation, get the benefit of having trust accounts, family accounts, or copartnery accounts, arranged and brought into proper order by the accountant to whom a remit is made?—There is.

10,744. Would it not be difficult to fix on any principle that should mediate equally between the public and those private parties, if they were as matter of course to get the benefit of those officials whom you propose?—It might be very just in such cases as you allude to, that the court should have power to throw on the private party a certain portion of the expense, or the whole, if it thought fit, and that that amount should go into the public exchequer.

10,745. *The Lord Justice-Clerk.*—Do you know how the Court of Chancery deals with parties in that matter? Are not accounts there considered by an officer salaried by the State?—In some cases I believe they are.

10,746. Without any expense to the party?—I think so. I think there is no expense paid by the suitor to a public officer, but I am not well informed as to that.

10,747. Does it occur to you that there ought to be any distinction between the course here and the course in England in that respect?—I don't see why there should.

10,748. *Lord Barcaple.*—It is a common thing, I believe, in England for a partner to make application against his copartners, to have the accounts of the copartnery stated. Do you understand that that is done

at the public expense, where he is successful in obtaining an accounting?—I should think not, but I really have no information to enable me to answer the question.

10,749. *The Lord Justice-Clerk.*—Does anything occur to you in reference to processes in connection with teinds?—It is a difficult subject, but I think it would be a great advantage if the duties which the Court of Teinds now performs could be thrown into the ordinary duties of the Court of Session. Perhaps one of the things that would most facilitate the perfecting such an arrangement, would be the providing in some different manner for augmentations. If a satisfactory enactment could be framed establishing a proper principle on which augmentations should proceed, having reference to the various matters which influence the court in determining their amount, and fixing the periods at which a change might be made, I think it would be very desirable.

10,750. And with reference to other cases, you would have them introduced in the regular order of procedure in court—not distinguishing them?—I would.

10,751. I believe complaints are made of the delays in the Outer House in the disposal of the teind cases?—I would not propose to discontinue the institution of the Teind Office.

10,752. But you would allow the debates to be heard and the motions made in the ordinary rolls?—Yes.

10,753. And to be disposed of in the ordinary process of review?—Yes.

10,754. *Lord Barcaple.*—When you speak of its being desirable to have some definite principle fixed for the granting of augmentations, have you it in view to leave the granting of augmentations to the Teind Court, as at present constituted; or would you propose that if a legislative change were made, that also should go before one of the Divisions?—I should see no objection if definitive rules could be established by Act of Parliament, on which the court were to proceed, to committing the decision of the questions of augmentation to more than one court. Unless such rules were laid down, it might give rise to dissatisfaction, by reason of the supposed greater liberality of one court than another; and I think all that element should be excluded as much as possible, and that, as far as it could be accomplished, the duty to be performed by the court should be merely ministerial. If it were so limited, I should see no objection to all the three courts being open to any clergyman pursuing an augmentation.

10,755. Each of them?—Yes.

10,756. Do you see no objection to a function of that sort, which you say very truly is a ministerial function, and necessitating to some extent discretion, being performed by so small a body as four?—Not under such an arrangement as I am contemplating; but I am afraid that if the matter be left on its present footing, and the question of augmentation be so arbitrary as it is at this moment, it would scarcely be satisfactory to have more than one court open for the determination of such questions.

10,757. Do you think, in any view, it would be satisfactory to have so small a body as four persons disposing of that ministerial duty?—If it be simply ministerial, I don't see any objection to it.

10,758. Is it not very common, that a ministerial and discretionary duty committed to commissioners is performed by a body rather larger than that?—I am not aware.

10,759. Do you conceive the duty to be in any proper sense of the word judicial?—I don't think that at present it is in any proper sense judicial; but if principles were laid down upon which the court should proceed, so as to reduce it to a mere legal question, so to speak, whether a minister was entitled to an augmentation, I think it might very fairly be left to be determined by any one of three courts, the minister having his choice of any one of them.

10,760. Can you give us any suggestion generally as to what the nature of the principles to be fixed should be?—I have already said it is a matter of much difficulty. Various interests enter into it which it would be very difficult to deal with; but perhaps a commission might settle in each parish the state of the teinds and the fund available for the minister, and that fund might be operated upon in fixed cycles of years, as at present, giving determinate weight to the elements of the population and extent of the parish, and those other elements which now in a general way enter into the consideration of the question.

10,761. Would that be discretionary to any extent?—I should endeavour to limit the discretion as far as possible.

10,762. But in so far as it would be discretionary, do you think it is right to commit such a duty to one of the ordinary courts of law?—It may be possible a better tribunal might be found.

10,763. Are you at all aware what amount of time prior to this last session, when a change was made, had for some years back been employed in the sittings of the Teind Court?—I don't know the statistics, but I know that a large portion of time is expended by the court on these matters, and to the great inconvenience of its ordinary business.

10,764. You mean by the full Teind Commission sitting?—Until very recently it was necessary that the full Teind Commission should sit.

10,765. And what you mean is, that a large amount of time was expended, to the inconvenience of the other suitors, by the full Teind Commission sitting?—Yes.

10,766. It sat once a fortnight: have you any idea how long they sat upon an average?—I cannot speak with accuracy.

10,767. What would you call a large amount of time?—With the whole court sitting together, and thereby entirely obstructing the ordinary and proper business of the court, I should think one hour a large amount of time.

10,768. *The Chairman.*—One hour a fortnight?—I consider even one hour a fortnight a large amount of time to be taken up from the ordinary business of the court.

10,769. *Lord Barcaple.*—You mean with the nine judges sitting?—Yes.

10,770. *Mr. Shand.*—In point of fact, do you know that it was a considerable obstruction to business?—There can be no doubt of it.

10,771. *The Lord Justice-Clerk.* — That has now ceased?—It has now in great measure ceased.

10,772. *Mr. Webster.* — I think you made it an element in what you said, that there should be an ascertainment by a commission of the state of the teinds of each parish?—Yes.

10,773. Is not that a matter which is found to be attended with very great difficulty, and to lead to a very great deal of litigation with individual heritors?—It is, when judicially inquired into by a court of law; and one of the main objects I should have in view would be to render such inquiry unnecessary.

10,774. *Lord Barcaple.*—How would you expect to get quit of the questions that are arising as to valuations of teinds,—whether they are good or bad, and whether they apply to the particular lands? Would these things be inquired into by the commission you suggest, or would a report of that commission, once for all, shut the mouths of everybody on that subject?—I think the report of the commission should finally determine it.

10,775. Do you understand, however, that the commission should have inquired into that matter, or that they should determine it from such investigations as they made themselves?—I think it a great discredit on our system, that we have questions of the kind now alluded to depending on what has taken place more than two centuries ago, and ending, as they not unfrequently end, in the inversion of a possession which has existed during all that period. I think it a great public object to put an end to that state of things, and that it would be very advisable to have that inquired into by a properly constituted commission, who should have power to determine what, according to their view, was the state of the teinds in the parish, and the state of the rights of the parties.

John Clerk Brodie.

10,776. Then you would anticipate that the commission would call for production of valuations and other rights?—I should.

10,777. And that they should adjudicate upon them?—Yes.

10,778. And that they should allow the parties to state their views, and be heard by counsel?—If they thought fit.

10,779. Would that not be equivalent, or nearly so, to a locality in every parish in Scotland?—I think not.

10,780. To all the questions about a locality, short of the formal matter discharged by the Teind clerk, when he simply performs an arithmetical operation after the principles are investigated?—I believe there would not be so much contention in a matter that did not immediately affect the purses of individuals, but might only possibly do so at a long distance of years. I think the contention would not be nearly so great as it is in localities.

10,781. You would probably be prepared strongly to recommend some such proceeding, altogether apart from any question about the constitution of the Teind Court?—I should.

10,782. As a matter of public policy?—As a matter of public policy.

10,783. *Mr. Webster.*—Would you favour us with your view in regard to the system of trial by jury in civil cases?—Jury trial in civil cases has never properly taken root in this country. I don't think there is a great amount of confidence in the verdicts of juries; and my belief is, that the public at large have much more confidence in the judgments of our courts of law upon proofs led before them, than they have in the verdicts of juries in cases remitted for jury trial.

10,784. The system is attended with great uncertainty, and I believe with very great expense?—With very great expense, and much uncertainty.

10,785. Have you not in practice frequently advised clients rather to abandon claims, or to make great concessions, than to hazard a trial by jury?—I have frequently done so.

10,786. *Mr. Shand.*—Would you propose, then, to abolish jury trials in civil cases?—There is a class of cases which I think it may be hardly fair to throw on our courts of law for decision—cases in which the question is really not so much for a lawyer on the evidence, as for a sensible man of affairs. In that class of cases I am afraid that it would not be possible to dispense with jury trial; but I think that in a very large class of cases—perhaps all except those that come under that category—it would be for the benefit of the public at large that jury trial should be dispensed with.

10,787. *Mr. Campbell.*—Would you give us some illustrations of the category to which you refer?—Actions of damages, for instance, where you have to fix the amount of damages, but have nothing to go upon except an arbitrary view, and where a jury might give £200 or £1000.

10,788. You think that would be much better left to a jury?—I think so. I don't think it fair to throw cases of that kind upon the court.

10,789. You are aware that in the Sheriff Court such cases are constantly disposed of without a jury?—I am aware that they are.

10,790. Don't you think that the decisions of the Sheriff are usually more reasonable than those of juries?—In the Sheriff Court the amount is, generally speaking, extremely limited, and there it might not be necessary to make any alteration. I would not contemplate doing so.

10,791. *The Chairman.*—You spoke of questions of damage. Are not these a very large class of cases? Did you mean certain cases of damage?—I meant certain cases.

10,792. You don't mean cases of breach of contract?—No.

10,793. You mean cases of personal injury, or cases of slander?—Yes, that is the class of cases to which I particularly allude.

10,794. What do you say to cases of reduction on the ground of fraud?—I would entrust these to the court.

10,795. *Mr. Webster.*—Where, besides the question of the amount of damage, there was also involved the legal question of liability as between master and servant, or the like, would you send that class of cases in both branches to the jury, or would you have it disposed of by the court?—I think, in the case of master and servant, it would be best disposed of by the court.

10,796. *Lord Barcaple.*—On what ground do you say that you would not send actions of damages for breach of contract to a jury, while you would send other actions of damages to them?—Where there is a legal question in regard to the contract, and the legal question and the matter of damage are much mixed up together, I think the case is more proper for a court of law than a jury.

10,797. That is, in consequence of the legal element?—Yes.

10,798. Does not the legal element exist very generally in all actions that go to a jury?—Yes, to some extent.

10,799. *Mr. Webster.*—In cases of breach of contract there may not be the difficulty in proving actual damage which exists in cases of slander and the like?—In cases of that kind you have generally much less for arbitrary determination than in the others.

10,800. *Lord Barcaple.*—But you have not necessarily any actual measure of damage from the statement of the case upon the issue?—You may not; but it is not a matter so widely discretionary as in other cases.

10,801. You say that jury trial is thought to be extremely uncertain. In what sense is it uncertain, more than all other results of litigation?—I wish it could be said that the result of a jury trial was equally certain with the result of a case in a court of law.

10,802. In what sense do you say it is uncertain?—That there is no knowing what a jury may do.

10,803. And probably each party has an opposite opinion from that of the other as to what the jury will do?—There are a good many cases in which an opinion may be formed with some satisfaction as to what a jury ought to do, but whether that will be done or not is very problematical.

10,804. Have you found that experienced counsel have had much difficulty in giving you advice as to what was likely to be the result of an action which must be sent to a jury?—Counsel will give you an opinion, but you cannot always rely on that opinion being justified by the result.

10,805. Have you found that they have been more generally mistaken in that matter, than in advising you about the probable result of an action which would be decided without the intervention of a jury?—I think counsel are very chary of stating the probable result of a jury trial.

10,806. Have you found that their opinion, when given, was less generally correct in regard to the probable result of an action which would go to a jury, than when given with reference to an action which would be decided without a jury?—I think so.

10,807. *Mr. Webster.*—Even taking into view the element, that wherever there was anything like sympathy that could be excited, there would be greater chance of the jury giving effect to that feeling?—When feelings of that kind operate, it is really quite impossible to tell what may be the result of a jury trial.

10,808. *Lord Barcaple.*—It may be impossible to put a precise figure on the amount of damages to be given; but have you not found that experienced counsel and experienced agents, relying upon their knowledge of men, can form a pretty good idea of the prospects of a case before a jury?—I think counsel are very frequently mistaken, and agents also, in regard to the results of jury trial.

10,809. You say you have very often advised your clients rather to give up their case than go before a jury. Have you not very often advised your clients

not to prosecute a case at all, even when there was no risk of its going before a jury?—The question whether the client should prosecute his case or not, depends very much on the extent of his interest. Unless the stake is something considerable, it is often better to endeavour to settle the question, than to enter upon litigation in a court of law; but the chances are much less easily calculated in jury trial than in ordinary cases before the law courts.

10,810. Has the expense of jury trial been an element with you in advising your clients?—Yes, a very considerable element.

10,811. Do you think that the juries have been properly selected? Has there been a proper representation, do you think, of different classes of people upon the juries?—Juries certainly vary very much, owing to the manner in which they are chosen. You may get a more or less intelligent jury.

10,812. But, as a general rule, do you think that juries are sufficiently carefully selected, so as to give a fair proportion of persons of intelligence and knowledge of the world?—I think it would often be of advantage to have a higher grade of jurymen than you have.

10,813. *Mr. Shand.*—Do you see any objection to leaving matters on the footing on which they now stand—leaving it to the court to determine in each case according to their view, whether it should or should not go to a jury for investigation of the facts?—I think that duty should not be thrown unqualifiedly upon the court.

10,814. Do you propose, by Act of Parliament, that jury trials should be limited to certain cases, and that it should not be competent in any other?—You must carry out the object by Act of Parliament; there is no other mode by which you can do it.

10,815. *Lord Barcaple.*—Have you had much experience of the proofs which have been recently substituted for jury trials?—No; not personally.

10,816. Do you know whether it has been proved satisfactory to your branch of the profession?—I think it has.

10,817. Do you know what their experience has been in regard to the expense?—My impression is, it is considered an improvement upon the old system.

10,818. You mean upon jury trial?—Yes.

10,819. Do you mean that they have found it to be much less expensive than jury trial?—I think so.

10,820. But you have not personally had much experience of it?—I have not. I am speaking from impression.

10,821. Do you say the same in regard to the time occupied?—Yes.

10,822. You have not been present at any such proofs?—I have not.

10,823. I think you put value on what you said as to the judge having seen the witnesses. What is the ground on which you particularly put value on the judge having seen the witnesses?—I think a judge, having the witness before him, can form a better estimate of the person he has to deal with, and of the value of his evidence.

10,824. Of his credibility?—Of his credibility.

10,825. Do you think that, in a very large proportion of cases, there is really a serious question about the credibility of witnesses?—It is not merely as to credibility, but mistake. A person may be perfectly honest in telling you what he himself believes; but you may see, from his exhibition in the witness-box, that he is very liable to be mistaken.

10,826. That is credibility; but do you think there is a large proportion of cases in which credibility, including that, is a serious question?—I think there is a great number of cases in which the value you can attach to the evidence of a particular witness depends to a considerable extent upon his appearance in the witness-box.

10,827. If there is a doubt about his credibility, either from his having given wilfully or innocently false evidence, but not otherwise. But do you think that in the class of cases that are the subject of proof in the Court of Session, there is a large majority of them where the question of credibility of witnesses, in the sense you have explained, enters materially into the decision of the causes?—No; I don't think that in the great majority of causes that is so. But I think there are a great many cases in which it is true; and that the judge who tries the case has to that extent considerable advantage over any one who has merely the written proof upon which to form an opinion.

10,828. Do you think that, as a general rule, one judge sitting alone, and without an opportunity of communicating with any person on the subject, is a better judge of the credibility of evidence than twelve reasonably well-selected persons, who have an opportunity of talking about it among themselves?—I think the education and training of the one man, and the liability to sympathetic feelings, and a number of other influences which frequently prevail in the twelve, render the one man a tribunal superior to the twelve.

10,829. A superior tribunal for judging of the credibility of the witnesses, do you mean?—A superior tribunal for judging of the effect of the evidence generally.

10,830. But my question, in the first instance, referred to judging of the credibility of the witnesses?—I think the one man is often the best judge of the credibility of the witness.

10,831. Do you mean better than any one of the twelve, or better than the whole twelve?—Better than the whole twelve.

10,832. *The Chairman.*—Have you any suggestion to make about criminal business?—I think every judge of the Court of Session should be a judge of Justiciary.

10,833. *Lord Barcaple.*—Do you see any benefit that would arise from the change?—It would more equally distribute the business.

10,834. *Mr. Webster.*—The Justiciary judges do not take Bill Chamber work, and those who are not Justiciary judges take the Bill Chamber?—I see no reason for these distinctions. I think all the judges in the Court of Session should perform the same class of duties.

10,835. *Mr. Shand.*—But the present system has been found to work very well?—I am making no complaint of the manner in which the business of the Court of Justiciary is conducted. My experience of it, during the long time I was connected with it, left on my mind the impression that the business was extremely well conducted.

10,836. *Lord Barcaple.*—You must keep in view that there are three circuits, none of them very extensive, and apparently that may have entered a little into the reason for limiting the number of Justiciary judges?—Originally there was a separate salary attached to the office of Justiciary judge. I believe that to have been the origin of the distinction between Justiciary and Court of Session judges. But that distinction no longer exists. There is another matter connected with criminal business. It is a question whether the jurisdiction of the Sheriff in criminal matters should be extended; and there is a class of cases in which it might be advisable that such extension should take place. For instance, in cases of robbery, it is often a question whether the case really amounts to robbery, or is simply theft; and at present the Sheriff has power to award a punishment which is apt for the one, and has not power to award the punishment that may be apt for the other. I think the jurisdiction of the Sheriff might be beneficially extended to enable him to inflict penal servitude in cases of that description; but I see no occasion to extend his jurisdiction generally to cases in which penal servitude is usually inflicted.

10,837. *Mr. Baxter.*—Cases of robbery, and thefts with many previous convictions—you would extend the Sheriff's jurisdiction to these?—I think not. Robbery, where there have been many convictions, is a very serious offence.

10,838. But I mean theft, where there have been many convictions?—Theft, where there have been many convictions, I should be inclined to say might be dealt with by the Sheriff, with power, in those cases, to inflict penal servitude.

10,839. *Mr. Webster.*—We have had a great deal of evidence about extending the jurisdiction of the Sheriff

John Clerk Brodie.

to cases which are at present competent only in the Court of Session; would you give us your view as to any change of that kind which you think might be desirable?—One matter which has been very much mooted is the giving Sheriffs a jurisdiction in matters affecting heritable rights. I think, within proper limits, such a jurisdiction might be advantageously given them; for in regard to subjects of very small value, the limitation of jurisdiction absolutely to the Court of Session amounts almost to a denial of justice, and the decision in these cases would not tend to unsettle the law of heritable rights. But it would seem to me a very unwise thing to give Sheriffs jurisdiction generally in heritable rights, which would probably have the effect of introducing conflicting decisions, and unsettling the law. I think that is a department of the law in which it is peculiarly advisable to have certainty as far as that can be obtained; and I see no expediency in giving more than a very limited jurisdiction to Sheriffs in matters of heritable right.

10,840. In regard to the appointment of judicial factors, factors *loco tutoris*, and curators *bonis*, would you approve of the Sheriff having jurisdiction?—Where an estate is of very trifling value, it might perhaps be given; but I would not give a general jurisdiction to the Sheriff in all such cases. It might be limited, as in suspensions, to a particular amount. There is no complaint of the mode in which the jurisdiction of the Court of Session has been exercised in these matters, and I believe it has been exercised with perfect satisfaction to the community. In regard to suspensions, which are limited at present to £25, I think the jurisdiction of the Sheriff might with advantage be extended, and probably doubled.

10,841. *The Lord Justice-Clerk.*—If power were given to the Sheriff to appoint tutors, would the estate be brought under the surveillance of the officer of the Court of Session?—I think it ought to be so.

10,842. Do you think much advantage would be gained by going to the Sheriff Court for the appointment, and coming to the officer of the Court of Session for his superintendence?—There might be some saving of expense in carrying through the original application, which would be an advantage in such cases as I have in view.

10,843. *The Chairman.*—It has been suggested that that expense might be considerably lessened by giving a jurisdiction to the Sheriff in Chancery to make these appointments, where the parties choose to apply to him?—I don't think that would be so satisfactory as the present system. I believe the jurisdiction of the Court of Session in that matter is exercised with perfect satisfaction to the public at large.

10,844. *Mr. Shand.*—Do you see any reason why such appointments should not be made in the Court of Session, by manuscript applications, at considerably less expense than is now incurred?—I think that would be very proper.

10,845. Such applications, until within recent years, were made to the Divisions of the court, and printing and boxing of the applications was necessary. Is there any reason whatever now for maintaining the system of printing and boxing a number of petitions in an application of that kind, any more than printing and boxing a summons presented to the court?—I think not.

10,846. *Lord Barcaple.*—I suppose printing sometimes is not a cause of additional expense, where copies can be used for service?—Printing is a saving of expense if you have several copies to make. If you require three, or certainly four copies, printing is not an additional expense.

10,847. *Mr. Webster.*—What is your opinion as to extending the jurisdiction of the Sheriff to cases of declarator of marriage, divorce, legitimacy, and separation and aliment?—These cases do not all fall under the same category. In regard to cases of aliment, I see no objection to the Sheriff having jurisdiction. But in regard to cases of declarator of marriage or divorce, I think there is grave objection to any such jurisdiction being conferred on the Sheriff.

10,848. In regard to the privileges of agents, a suggestion has been made that every agent should have the privilege of practising in every court; and another suggestion has been made, that agents before one Sheriff Court should have the right to practise before every other Sheriff Court. If you have considered the subject of the privileges of agents in connection with these matters, would you give us your view upon it?—I see no objection to the whole inferior court procurators of Scotland, especially those who pass under the Procurators Act, being allowed to practise not only in all the Sheriff Courts, but in the Court of Session. I don't know that they would largely take advantage of that privilege; but if there be any desire on the part of the procurators in Scotland for such a system, it does not appear to me that there is any objection to it.

10,849. If that were adopted, how would you manage the system of borrowing processes, so as to enable the adverse party to get the papers when really wanted?—The country practitioner must not carry off to the country the papers of the Court of Session. He must be dealt with as any other agent in the Court of Session, and be responsible to the clerk of court in the first instance, and then to the court itself.

10,850. *Lord Barcaple.*—But assume that he has carried them off?—Then he must be responsible, as any one else, to the court.

10,851. Are you confident that at present processes are not transmitted to the country?—They may be transmitted at present to the country on the responsibility of the agent, who is aware of the state of the case, and the possibility there may be of the document being required. The same thing would hold as regards the country practitioner.

10,852. *Mr. Webster.*—You would have no one in the immediate vicinity who might be taken up on caption?—The caption of the court is sufficient to reach the agent in any part of Scotland.

10,853. *The Chairman.*—Perhaps not within the time that you want the process?—That might occasionally be an inconvenience.

10,854. But would there be any difficulty in country agents having an arrangement by which somebody in Edinburgh might be responsible, and represent them for the borrowing?—I think none. Such a system might possibly introduce this state of things, that a country agent who has conducted a lengthy case in the inferior court, and is thoroughly conversant with it, sending it up to the Court of Session, might take a considerable charge of it in that court. In that event, without increased expense to the client, there might be reasonable distribution of the ordinary costs between the country practitioner and the Edinburgh agent. If the inferior court practitioners have any desire for that state of things, I see no objection to it.

10,855. Do you see any objection to doing away with what is understood to be *pactum illicitum* as between agents—namely, participation in the profits?—I see no objection to it.

10,856. *Mr. Webster.*—Is it your view, that exclusive privileges of practising in courts of law should be abolished? Take such as exist in Glasgow, with the Faculty of Procurators before the Sheriff Courts there; in Aberdeen, with the advocates; in Edinburgh, with the solicitors-at-law. Is it your view that all such exclusive privileges should be abolished?—It is.

10,857. As to writers to the signet, do you see any necessity or reason for keeping up the system of signeting summonses, as distinguished from any other mode of authenticating them,—a large part of the business of the court being done not by writers to the signet, but by solicitors?—I myself put no value upon it whatever.

10,858. In regard to counsel, we have had some suggestions made about having a table of fees. Would you favour us with your views as to the expediency or possibility of constructing a table that would really operate suitably for conducting the business of the court as to fees of counsel?—I think you cannot have a table of fees for counsel. The remuneration to counsel should always depend on the estimate which the agent

may form of the trouble counsel will have in the case; for I believe that to be the best security for all concerned. One exception to this has grown up recently in what are known as continuation fees, which are based upon a supposed etiquette that an additional fee should be sent to counsel for every day the case may be in the roll.

10,859. *Mr. Webster.*—Where anything has been done, however little?—Yes. I have some reason to believe that that practice may be found not to have the sanction of the Faculty of Advocates; and, at all events, I think it should be done away with. In many cases it considerably increases the expense; and it is an exception, and I think an unnecessary and improper one, to the ordinary rule, that the solicitor judges in each case what is the proper fee.

10,860. *Mr. Campbell.*—And it would not interfere with his discretion in sending an additional fee, if the case turned out to be more protracted than he anticipated?—Certainly not; it has always been the custom to send an additional fee to counsel where there has been greater trouble than was anticipated.

10,861. *Mr. Shand.*—Do you not think that many of the adjournments which take place might be very advantageously avoided by a case which is partly heard, it may be to-day, being taken on at a much earlier period on the following day than it often is?—I think the more continuity can be observed in the discussion of a case the better.

10,862. Do you not think that, according to the existing practice, there is a good deal of interruption to continuity of cases, by beginning new work in the early part of the day, and then taking up a partly heard case of the day before?—I have heard frequent complaints of it.

10,863. Have you any suggestion to make about costs?—I think it inexpedient that the rule should exist, that two counsel are necessary in a case; so that if a party has only one counsel, and he happens to be engaged for the moment in another Division, the agent should be complained of that he has not employed two counsel. That system necessitates in all cases the employment of two counsel, and adds very much to the expense. It is a matter which can only be modified by the court itself; but I don't know that it is out of place to mention it here, for it would be very expedient that some different arrangement should be made. I am sure an alteration in the practice of the court would be very satisfactory to the profession; for I know that very great objection is made.

10,864. Would you make that a rule that should be applied in every case, or only in cases of a particular class? Suppose a case to involve a considerable stake, do you not think it is reasonable to enforce the rule?—In any case in which the court intimated that it thought a second counsel necessary, a second counsel would be at once employed, and it could enforce that if necessary; but I think the general rule should be, that only one counsel need be employed.

10,865. *The Lord Justice-Clerk.*—Unless the cases where single counsel are retained were considered exceptional, might it not lead to great disturbance of the rolls, and to putting off cases, and interfering with other arrangements?—I don't think so. I am old enough to recollect when a very distinguished member of the bar, ultimately on the bench—I mean Mr. Adam Anderson, afterwards Lord Anderson—had a very large practice as single counsel; and no business was better performed than that which he conducted as single counsel. But it would be perfectly impossible, according to the rules of court as at present understood by the profession, that any such business could now be conducted.

10,866. *Lord Barcaple.*—You mean in the Inner House?—I am speaking of the Inner House.

10,867. Do you understand that there has been a change of rule since that time?—Yes. I have frequently heard very great complaints on the subject.

10,868. *Mr. Shand.*—Mr. Anderson was in very large practice. What occurred when cases in which he was alone were called while he was engaged elsewhere?—They were put off for him, and no inconvenience was experienced.

10,869. Would it not occasion frequent inconvenience where case after case was put off in that way, and other cases brought on unexpectedly?—It was not found to do so.

10,870. *The Chairman.*—In regard to Mr. Anderson, were the court always in use to put off all the cases in which he was single counsel?—I think no material inconvenience was found to arise from the court putting them off.

10,871. But was it their use to put off the cases in which he was counsel, and not to put off cases in which other parties were counsel?—It was the practice to put them off not only for Mr. Anderson, but for any counsel similarly situated.

10,872. But it would be a very considerable interruption of the business of the court in many cases, if by the mere non-employment of a second counsel a case was to be stopped, that had been put out for hearing for the day; and the inconvenience might be materially increased if the court were to sit in three Divisions?—It has been often suggested that there should be a division of the bar between the Divisions; and if the consequence of having no such division be to render it necessary to have two counsel in every case, and so to infer much additional expense, it seems a considerable argument in favour of that division.

10,873. Do you think the business of the Court of Session is such as would induce counsel of eminence to confine themselves to one Division? Would it not be accompanied perhaps with this, that if you wished the services of that counsel in another Division, you would have to give him a special retainer?—I don't think it advisable, if it can be avoided, to have any such division of counsel; but the circumstance that we have no such division, renders it highly desirable that the court, so far as it can, should make such arrangements as will not deprive the public of the means of conducting their cases at the least possible expense.

10,874. Would this meet your view, that the court should exercise its discretion in regard to the matter in the particular case? If you make it the general rule, that one counsel should be sufficient, then generally there would only be one counsel in each case?—Of course it would always be open to the court, if in any case they thought fit, to direct that another counsel should be employed.

10,875. But in the meantime the case would stop. The case is called, and counsel is in another Division. You cannot conjure up a counsel on the spot?—That has often occurred in my experience; and I don't recollect of any material inconvenience arising from it.

10,876. What was done?—The case was delayed.

10,877. When was it taken again?—If counsel could not come, the agent took notes, and handed them to him when he came; but if it was necessary that he should speak, the case was delayed for him.

10,878. When was it taken again?—The court generally fixed a time for that.

10,879. *Mr. Baxter.*—At present, have you often to go on in the absence of senior counsel?—In the Outer House you have frequently to go on without senior counsel. It often happens that very little is obtained for the fees given to senior counsel.

10,880. *Lord Barcaple.*—Do you know whether there has been a considerable change in that respect in the Outer House since the passing of the Act of Sederunt in 1866, making the procedure much more peremptory?—I understand it is often the case that the services of the senior counsel employed are not obtained before the Lord Ordinary at all.

10,881. Do you know that it frequently happens that the senior counsel in the Outer House have to take the whole burden of the case if the junior counsel is engaged elsewhere?—Yes; but I think that duty is seldom thrown on senior counsel.

10,882. It happens universally, if the junior counsel is elsewhere?—If the senior be present, and the junior not present, the senior must of course take the case.

10,883. And that was not so before 1866?—But it

John Clerk Brodie.

rarely happens that the senior is present and the junior absent. The common case is, that the senior is absent and the junior present.

10,884. It can hardly be said that it very rarely happens that the junior is absent. Juniors are very frequently absent, and very frequently the seniors have to speak?—I think that is not the view of the profession.

10,885. *The Chairman.*—I daresay you recollect the time when in the Inner House a junior counsel seldom spoke at all?—Perfectly.

10,886. Have you any other suggestion to make?—The fees of counsel have very largely increased in my time, and great complaint is made of their amount. It is not easy to apply a check, but it would seem to me of great importance that the court should support the auditor, in taxing fees of counsel, more than they have been in the habit of doing. It is the only check that exists in regard to counsel's fees; and if it be withdrawn, or not applied, the grievance may come to be very serious. It is already considered extremely oppressive.

10,887. Is there not a certain amount of check in the hands of the agents?—Undoubtedly there is, inasmuch as the agent is the person by whom the fee is sent; but I believe there is no effectual check on counsel's fees except the one I have adverted to—namely, an application of the rule of audit when the account comes before the auditor for taxation. If counsel's fees were allowed to be regulated by the auditor in taxation, I believe there would come to be something like rules which would be followed; but unless in some such way, I fear the evil, which is considerable, will not be abated.

10,888. There was a time when the discretion or liberality of agents was exceedingly various; but I suppose the greatest expense in that way arises in jury trials?—Not exclusively in jury trials; but jury trials are a very prominent instance.

10,889. Are you aware that three or four years ago the court made a very considerable reduction of counsel's fees, and gave a sort of indication that that was the utmost that would be allowed, excepting in very rare cases?—I am aware that sometimes the court have to a certain extent interfered: but it is very important that they should do so efficiently; because there can be no doubt that a great deal of the expense that is so much complained of arises from the very much larger fees now paid to counsel than used to be paid to them in former days.

10,890. *The Lord Justice-Clerk.*—Are you aware of any case recently in which the auditor disallowed a portion of counsel's fees, which was restored by the court?—I am not; but the impression is, that the auditor has very limited authority in that matter.

10,891. *The Chairman.*—I think the auditor was deterred a good deal at one time by such expressions as this, that the agent was the best judge of the fees, and that his discretion ought not to be interfered with; but that has not been a rule. The auditor has been sustained several times in dealing with fees; but you think he ought to be more uniformly sustained?—I think so. The auditor has no interest whatever except to do his public duty, and to allow such an amount of fees as may seem to be reasonable. The whole case is before him in the account, and the parties on each side state their views; and I think there can be no better judge as to what is a fair and reasonable fee to give to counsel in the circumstances. If confidence were reposed in him, and he were allowed to judge without much check of that matter, I think it would allay much of the discontent which pervades the profession in regard to the expense occasioned by large fees to counsel.

10,892. *Lord Barcaple.*—Any portion of the counsel's fees which the auditor taxes off, I presume, is made by the agent a charge against his own client?—No doubt it may.

10,893. Do you know how the auditor deals with such an account between agent and client in regard to that surplus fee which he has taxed off in his account against the opposite party?—I don't know how the auditor deals with it; but the taxation of accounts between agent and client is much more rare than between party and party. The auditor may allow a somewhat higher fee in those cases; but in that case also, I think he ought to have power to use the pruning-knife when he thinks fit.

10,894. *The Chairman.*—The agent may consider it, in the exercise of a sound discretion, right to give a somewhat larger fee than the court may sustain as a good charge against the opposite party?—He may.

10,895. *Mr. Webster.*—But giving it only in the interest of his client, would you permit the auditor to interfere with what the agent in his discretion had done?—I would. If the auditor thought the fee far too much to be sent by the agent in such circumstances, I think he ought to have a power of curtailing it. It may happen that the agent, in the performance of his duty to his client, thinks it necessary to secure the services of a particular counsel, and cannot obtain these services except by giving him a certain fee; and discretion should in such a case be allowed him; but I think the discretion should be always subject to the supervision of the auditor, who should have authority to deal with agents' accounts whether taxed as between party and party, or between agent and client. I have not the least fear that he would perform that duty otherwise than justly and satisfactorily.

10,896. *The Chairman.*—Is it now the case that counsel estimate their own value in that way, and do not leave it to the agent?—Sometimes I believe it practically is so; counsel may not do it themselves, but their clerks sometimes do it for them.

FRIDAY, 2D APRIL 1869.

Members Present:—

LORD COLONSAY.
THE LORD JUSTICE-GENERAL.
THE LORD JUSTICE-CLERK.
JAMES CAMPBELL, Esq.
GEORGE HARRISON, Esq.
JAMES ADAM, Esq.
A. B. SHAND, Esq.
JAMES WEBSTER, Esq.
J. B. BAXTER, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

Patrick Fraser.

PATRICK FRASER, Esq., examined.

10,897. *The Chairman.*—You are a member of the bar?—I am.

10,898. In what year did you come to the bar?—1843.

10,899. You are Sheriff of Renfrewshire?—Yes.

10,900. You have been so for several years?—I have been so since January 1862.

10,901. You have two seats of court in Renfrewshire—one at Greenock, and one at Paisley?—Yes.

10,902. And a substitute at each place?—Yes.

10,903. In Greenock, I suppose, there is a good deal of occasion for the exercise of the maritime jurisdiction of the Sheriff?—A very great deal,—perhaps as much as at any other port in Scotland. In reference to that, I may say that I have had frequent complaints made as to the necessity of having two arrestments—an arrestment to found jurisdiction, and an arrestment upon the dependence. Unless the arrestment upon the dependence is used at once, and the ship dismantled, the captain is off next morning.

10,904. *Mr. Baxter.*—Have you any complaints of this kind: A great many foreign vessels come to our ports, and disputes arise about freights; the foreign captain is obliged to sail with his ship, and cannot get a settlement of his freight, and there is no summary process by which he can compel it?—A very great number. That is a great hardship. The ordinary process of the Sheriff Court does not meet that case at all. The captain must take the terms of the consignee, whatever these may be.

10,905. Do you think it would be an advantage to have some summary process for adjudicating between the captain and the consignee, before the Sheriff-substitute or otherwise; or can you devise any remedy for that?—It is very difficult to devise a remedy, because the consignee might wish an appeal; and unless you made the judgment final, the remedy would be imperfect.

10,906. It is almost coercion by the one party, for the other cannot stop?—That is quite true. I have thought that the Sheriff with two experts—merchants—might constitute a court. The Sheriff might not be bound to follow their opinion, but I think a court like that might satisfy mercantile men in Greenock, and meet the occasion.

10,907. *The Chairman.*—Have you considered generally the remedies you would apply to the imperfection of the maritime jurisdiction?—I don't know any clamant grievances except that. It works very smoothly. The remedies under the Mercantile Shipping Act are very summary, and the ordinary Admiralty jurisdiction is very good. We grant warrants for unlading vessels, and there is no difficulty in doing that; the only difficulty arises when there is a quarrel between the foreign captain and the merchant, and sometimes when there is a quarrel between the foreign captain and his sailors.

10,908. *Mr. Webster.*—And between claimants on the foreign captain?—Yes; they arrest him as *in meditatione fugæ*, and in order to get loosed he must simply submit; but otherwise, from all my experience of Admiralty jurisdiction, I think it is very good, and I have no alteration to suggest.

10,909. You would keep up the power of arresting vessels?—Certainly. You arrest to found jurisdiction, but that don't dismantle the vessel; and unless you go *vi et armis* and seize hold of the vessel itself, the captain is away before any effectual diligence can be done against him. He does not care for an interdict. Now the one arrestment should be sufficient, and it should authorize the immediate seizing of the vessel and putting a man on board.

10,910. *Mr. Baxter.*—Then you think the arrestment *jurisdictionis* should have that effect?—Yes. I don't see any meaning in an arrestment *jurisdictionis* unless it imposes some *nexus* upon the thing arrested.

10,911. *The Lord Justice-Clerk.*—Has it not been found very hard that damages are not obtainable when a vessel has been dismantled and detained on a false ground, unless in the special case of malice?—It has been decided that if you dismantle a vessel, damages are due; but in the case of an ordinary arrestment, it has been decided that damages are not due unless there is malice.

10,912. The effect of an arrestment of a vessel is not merely to found jurisdiction, but the arrestment detains it in port?—But damages are due for that, and it has been so decided.

10,913. Without malice?—Yes.

10,914. From the mere fact of the arrestment?—From the mere fact of detaining the vessel. If damage results from that, damages are claimable; but where you arrest a sum of money in a bank, it has been decided that without malice no damages are due.

10,915. *Mr. Baxter.*—Would you have the arrestment just to proceed on the summons?—Yes.

10,916. You would have some time within which to call the summons?—I would make it as summary as possible.

10,917. *Mr. Webster.*—The service and the calling?—Yes.

10,918. *Mr. Baxter.*—Would you have the summons competent in the Sheriff Court?—Yes.

10,919. At present the arrestment is competent in the Sheriff Court, but the summons is not?—Yes.

10,920. *Mr. Webster.*—Then you would subject foreigners to the jurisdiction of the Sheriff?—Yes; foreigners are subjected to the jurisdiction of the Sheriff at present. That is my construction of the statutes. The admiral-deputes had jurisdiction over foreign captains, and the whole of their jurisdiction was transferred to the Sheriff by the Act 1 and 2 Will. iv. c. 69; and Lord Barcaple so decided in a case before him.

10,921. Was that not decided in a case of Warden and Pirie by the First Division?—In the case of *Price* v. *Owen*, Lord Barcaple said in his note: 'The Lord Ordinary thinks that section 22 of 1 Will. iv. cap. 69, having in express terms given jurisdiction to the Sheriff in maritime causes against persons residing furth of Scotland, the subsequent declaratory enactment in section 21 of 1 and 2 Vict. cap. 119, cannot be held to take away that jurisdiction, but only to regulate it. The former enactment gave the Sheriff generally jurisdiction in maritime causes against foreigners which he has not in other cases, thus putting him in this class of cases on the same footing as to jurisdiction with the Court of Session. The principle of the *commune forum* having been thus done away with in maritime cases, and it being on that principle that effect is in general refused to arrestment *jurisdictionis fundandæ causa*, as making a foreigner amenable to the jurisdiction of the Sheriff, such an arrestment should in that class of cases constitute a legal ground of jurisdiction in the Sheriff Court against a foreigner, just as it does in the Court of Session. Thus the effect of the explanatory enactment of the 21st section of 1 and 2 Vict. cap. 119, in the case of foreigners, is merely that the jurisdiction conferred upon the Sheriff by the previous statutes shall not be exercised against them, unless they are made amenable to it by arrestment used for that purpose.'

10,922. *Mr. Baxter.*—Is that the practice in your court?—It is.

10,923. *Mr. Webster.*—Was that judgment brought under review?—No. I think that is a sound construction of the statute.

10,924. *The Chairman.*—Then your view would be, that the first arrestment should have a double effect—to found jurisdiction, and to be an arrestment on the dependence?—Yes.

10,925. Equivalent to both?—Yes.

10,926. *Mr. Shand.*—And to give the power to dismantle?—To give power to put a man in possession till the question is disposed of.

10,927. *Mr. Webster.*—Would you insert the warrant at once in the summons for the combined arrestment, or would you keep up the present system: first, the form of arresting; and second, the form of raising a summons founding on the arrestment?—I think the whole might be put into the will of the summons.

10,928. *Mr. Shand.*—Do you not think that is a great power to give to a person merely claiming to be a creditor? Is it not a power liable to great abuse, and would it not be desirable that before the warrant to arrest, which may have the effect of detaining a ship, is given, the party should present a *prima facie* case for the consideration of the Sheriff, and that such a warrant should only be given if the Sheriff thinks such a *prima facie* case exists?—He makes out a *prima facie* case when he makes the statement in the summons. What is the hardship in that? The foreign captain is away the moment the arrestment is served on him. You put a man on board, and you detain the vessel two or three days. You detain it at your peril, and that without malice. It is a great power, no doubt, but there is a great evil to be remedied.

Patrick Fraser.

10,929. Suppose that is done at the instance of a man of straw, or at the instance of two or three workmen with reference to a claim of wages, and thereby a vessel with a valuable cargo on board is detained for several days, is not the hardship much greater than the evil?—That is putting an exceptional case. Everything may be abused, and that is an example of the abuse of it. But that is not the ordinary case. A captain contracts with a merchant in Greenock: he incurs a large debt, and won't settle, and won't give good bills on any person here. He is a Spaniard, and he is off, and you must have some detaining power over him.

10,930. *Mr. Baxter.*—The ordinary representation made to the Sheriff is the claim of debt, and the averment that the captain is about to sail, and claiming the arrestment?—Yes.

10,931. *Mr. Shand.*—At present the arrestment is given on application, as a mere matter of course?—Yes.

10,932. Do you not think that there should be so much protection against abuse, as that where such a warrant is required, the Sheriff should apply his mind to the question whether he will grant it?—I see no harm in that. I see no harm in requiring the affidavit of the pursuer that he believes the statement in the summons to be true.

10,933. In short, that it should be a matter disposed of after some consideration by the judge, and not a mere formal warrant granted as matter of course by the Sheriff-clerk?—Well, I don't see any harm in that. It would not take much time, and the Sheriff is always there.

10,934. And it would give protection against such an abuse as I have suggested?—Yes.

10,935. *The Chairman.*—You spoke of putting a man on board. Is there no practical dismantling of the vessel?—There is; but I would not proceed to that at the outset. I would put a man on board, just to give warning if the captain was about to sail during the night.

10,936. But suppose the captain sails with the man on board?—Then the man makes an uproar, and there are the harbour police to come to his assistance.

10,937. In regard to the constitution of the Sheriff Court, and the power of review, have you any suggestion to make?—My opinion upon that subject is, that the present system is the best that I have ever heard suggested. I think that there is a general opinion to the effect that there shall be some review other than the Court of Session. You cannot get a review in the Court of Session without paying a large sum of money for it; and all the procurators with whom I have come in contact are of opinion that they must have some kind of review within the Sheriff Court itself. I have heard one scheme suggested of mapping out Scotland into districts, and appointing two Sheriffs of review for each district. That seems to me to be quite visionary; I think it would be very unsatisfactory, and would just be another Court of Session. You might have a strong mind and a less strong mind together, and there would be divided responsibility. I don't think there would be additional authority conferred by the two. And where are they to deliver judgment? Is it to be a written judgment, and appealable to the Court of Session? Where are they to consult, and at what time? Then, if you give them a very large district, you create this evil, that they cannot practise as advocates; and I think the chief advantage of the present system is, that you have as judges men who are actively engaged in the competition of advocacy, and who are constantly studying law. If you send a man away to the country, he won't study law. A man is a worse lawyer at the end of the long vacation than he is on the 20th of July. Law is entirely a matter of memory; and if you send a judge away to the country, which you must do if you give him a large district of Scotland to travel over, law will fade away from his mind, just as a man will forget his native language after a time. Another suggestion is to keep up the present system, but to join two or more sheriffdoms together. What practical advantage would the public get from that? You give one man more work. Of course you will give him more pay; at any rate, I assume that. Therefore the country saves nothing in point of money; and if you give him more work, he must just go to the country with all the disadvantages I have pointed out. It seems to me that this outcry which has been got up is very partial, arising from two or three of one's own friends who have been appointed Sheriff-substitutes, and who very naturally cannot bear the idea of being reviewed by one man who is an advocate as they are themselves; and from a few junior counsel, who seem to think that if the office of Sheriff is abolished, a great deal of business will flow into the Court of Session from the Sheriff Courts, in the shape of advocations. That notion of a great increase of business in the Court of Session seems to me also to be the statement of a hope not destined to be realized. There is no doubt that, when a man gets two judgments against him,—from the substitute and the Sheriff,—it makes him pause before he goes further, and that is one of the advantages of the system; and he gets the judgment at as cheap a rate as it is possible to be got.

10,938. *Mr. Baxter.*—I think you are under a wrong impression in imputing it to the Sheriff-substitutes, for I know it to be a very widespread opinion among the procurators in the country generally?—It must be admitted that among the procurators generally there is a very great desire that there shall be an appeal within the Sheriff Court.

10,939. We admit that; but our opinion is that the Sheriff-substitutes are very much improved, compared with what they used to be; and we feel the appeal from most of the Sheriff-substitutes to the Sheriffs to be a very weak appeal,—an appeal from one judge to another judge of the same character and standing; and as to the Sheriffs being actively engaged in practice, I suppose you know many of them that are not so?—There are not many of them that are not so, and at all events they walk the Parliament House every day; and if they are in difficulty, they know where to apply for information.

10,940. *The Lord Justice-Clerk.*—And they do so in point of fact?—Yes.

10,941. *Mr. Baxter.*—These are mere desultory conversations?—They are not desultory conversations. They are sometimes very protracted. I have often spent hours with my brethren in considering their cases.

10,942. Don't you think that two judges, with the record and pleadings before them, are far better than one judge holding consultations in the Parliament House with other Sheriffs who have not heard the case?—Where are the two judges to consult? In the inn of the town where they have heard the case?

10,943. No. It is proposed that they should be resident in Edinburgh?—Then they are to make a vizandum with every case, and go back to the country town next month.

10,944. They can go to Edinburgh and decide the case there?—By a written opinion?

10,945. Of course?—That seems to me to be open to the objection I have stated, that there is a divided responsibility. There is no increase of authority, for practically the judgment of every Sheriff in Scotland is arrived at after consultation with his brethren in the Parliament House, if there is any difficulty.

10,946. Do you think that a good system?—I do think it a good system. He has all the responsibility of it, and he gets the aid of all the learning of his brethren.

10,947. Don't you think it would be better for him to consult with a man who has heard the case along with him?—That may be; it depends on the man.

10,948. Suppose a client to get the judgment of the Sheriff-substitute for him, and the judgment of the Sheriff against him?—That is the very case to come to the Court of Session, provided they are equal men.

10,949. *The Chairman.*—If the Sheriff Court was reduced to one resident judge, without another Sheriff, such as now exists in the Sheriff-principal, and the appeal were to be direct to the Court of Session, that would be attended with considerable expense, I suppose and parties would not in many cases have their eyes so open to the weakness of their cause as if they had

appealed to a single judge, viz. the Sheriff, who had affirmed the judgment of the Sheriff-substitute?—Certainly not. It seems to me that it would be a piece of great oppression if, in order to correct a mistake, you must come to the Court of Session and pay £50 or £60. And if you must have an appeal within the Sheriff Court itself, I think all men are agreed as to what should be done, except a few of the Sheriff-substitutes.

10,950. *The Lord Justice-Clerk.*—Do you consider that an intermediate appellate court would increase or diminish the expense of review?—It would increase the expense. It would be a second Court of Session. You would have counsel coming down to plead before these judges in the country towns, and every case would then be appealed.

10,951. Do you think it would abridge the time within which judgment is given, or the reverse?—It would depend on the convenience of two men, and must necessarily increase the time. At the present moment, an appeal can be had at any time. If it is an urgent case, I go down to Greenock and hear it there, or the parties come to me in Edinburgh, and the matter may be disposed of in forty-eight hours.

10,952. That would be quite impossible under the system of itinerating judges?—Quite impossible.

10,953. *Mr. Webster.*—Do such cases of urgency frequently occur?—Not frequently; but there do occur now and then important cases of interdict, and the like, which require immediate despatch.

10,954. *Mr. Baxter.*—It has been proposed that the appellate judges should devote their whole time to their appeal duties, so that they could go down to the country when required?—Then they cannot practise as advocates; and the result of that is, that you will have unlearned men. They will not learn law through their procurators, who have no proper law libraries, and who have other business to attend to. The result would be, that these men would have to listen to debates in which the record was read to them, and a piece from the proof; and then they would 'submit to your Lordship' that the judgment is erroneous, or that it is quite right. In that way you would practically cease to have proper judges after a few years.

10,955. *The Lord Justice-Clerk.*—Do you think that constant access to the current decisions is an advantage which the present system possesses, which could not be had under the proposed system?—Yes.

10,956. *Mr. Baxter.*—If the appellate Sheriffs lived in Edinburgh, they would have that advantage?—If they did not practise, they would not read law either in Edinburgh or in the country.

10,957. *The Lord Justice-Clerk.*—Or attend the court?—Or attend the court.

10,958. *Mr. Baxter.*—You are aware that many of the Sheriffs do not practise?—But they are bound to attend the Court of Session; and it is a fact that any one of the Sheriffs who is not in very active practice, if he has a difficulty, has his consultation with two or three of the best lawyers at the bar. I know that that is the practical working of the present system.

10,959. We don't like it?—That may be, but in the end it tends to good.

10,960. *The Chairman.*—When they attend the Court of Session, they have the opportunity of hearing the discussions in the court, and the opinions of the judges delivered?—They have.

10,961. And of hearing the views which the profession take of the current decisions of the court?—Certainly.

10,962. *The Lord Justice-Clerk.*—Are there many judgments of the Sheriff-substitute which are acquiesced in without appeal to the Sheriff?—I don't believe that in my own county there is a single judgment acquiesced in. I am not informed as to the practice in other counties, so as to enable me to give a decided answer as to them.

10,963. Would you say that it is a fair test of the popularity of a system of appeal, that it is universally resorted to?—It has been universally resorted to in Renfrewshire.

10,964. It has been said that there are too many appeals during the progress of a cause before the Sheriff at present, and that delay is occasioned by the very economical mode in which the review of the Sheriff is obtained, inducing appeals for the purpose of delay. Do you think that any change should be made in regard to that matter?—I think that there are only four or five appeals competent before the disposal of the case on the merits.

10,965. Do you think that some of these might be dispensed with, or reserved to a future stage?—It is very difficult to say; but I think not.

10,966. *Mr. Shand.*—Perhaps you have not considered that point specially?—No; I have not thought on that subject. These are cases that I always deal with in this way: an appeal is entered on a preliminary defence, and notice for an oral hearing is given at my next sittings; I pronounce an interlocutor, 'refuse the crave for oral hearing, and appoint the appellant to give in a reclaiming petition within four days,' and the whole thing is disposed of. They get no delay, and I am not tormented with these intermediate appeals.

10,967. *The Lord Justice-Clerk.*—You have not found that delay really takes place in that way?—No; all that has to be done is to refuse the crave for an oral hearing.

10,968. *Mr. Shand.*—In that class of cases I believe that practice is general among the Sheriffs?—I believe it is. At all events, I have urged a number of them to follow it, and they have done it. I think it is done in Forfarshire.

10,969. *Mr. Baxter.*—The necessary appeals are on preliminary defences and on the merits; a preliminary defence might exclude the action altogether?—Yes; or without that appeal an unnecessary proof might have to be taken at great expense. In the same way, interim execution might be prevented by an appeal. An interim decree for a sum of money is a fair ground of appeal.

10,970. *Mr. Webster.*—In reviewing interlocutors on the merits, do you follow the system of an oral hearing, or of having reclaiming petition and answers?—On the merits I let the parties choose their own way. I confess I like an oral hearing better than reclaiming petition. If there is a good debate, though one seldom gets it, you come to the points more quickly than by reading a long, rambling reclaiming petition with a number of quotations in it. But I allow parties to take their own course in regard to that.

10,971. Do you find that the expense is much greater when written pleadings are adopted, than oral pleadings?—It is. There is a fixed fee of two guineas for an oral debate; and I believe, though I am speaking without any definite information, that a reclaiming petition is paid according to length.

10,972. *The Chairman.*—Might it not be practicable to fix some tariff which would make it not more profitable than an oral hearing?—That is perfectly practicable, and I have done it. I have decerned in favour of a pursuer who has given in a reclaiming petition of fifty or sixty pages, and directed the auditor only to allow ten.

10,973. *Mr. Webster.*—Would the necessity for written pleadings be obviated, and the procedure improved, by the principal Sheriff visiting his county and hearing cases there more frequently than he does at present?—No doubt it would. I think it would be highly expedient that the Sheriffs should go oftener. A number of them cannot, however, do that, from the long distances—the Sheriffs of Ross and Inverness, and others.

10,974. The small amount of business in these counties makes that less necessary?—That is quite true. I am in my county, I think, about once a month, but oftener when occasion requires.

10,975. *The Chairman.*—There are certain ministerial and magisterial duties performed by the Sheriff. Do you think there is an advantage in having a person who is not constantly resident in the county going down to it to discharge these duties on occasions?—I think it is. I was specially asked the other day to go down and stake off a special water supply district under the Public Health Act. There was a great deal of local prejudice existing, and they wished me to do it. I went over the

Patrick Fraser.

ground with them; I did it, I think, to their satisfaction. I have found other occasions of the same kind. For example, in Paisley, they wanted to adopt the General Police Act, and they asked me to come down and do that ministerial duty, and I went.

10,976. On occasions of a breach of the peace or disturbance having arisen, or being anticipated, does the arrival of the Sheriff from Edinburgh produce a good effect?—I think it does.

10,977. It inspires confidence?—I think so.

10,978. *The Lord Justice-Clerk.*—Have you repeatedly gone on such occasions to your county?—I have gone two or three times a year—always on the anniversary of the battle of the Boyne, and on other occasions of that sort.

10,979. And your predecessors did the same?—They did. And I have often gone down and had interviews with the Orangemen, against whom I had issued proclamations on account of processions by them tending to disturbance of the peace. I remember one interview I had with them, at which they begged me not to issue the proclamation, as they said it would hurt their feelings. I reasoned with them, and warned them against their processions. They gave me their word of honour that they would not process any more if they were allowed to meet in their hall and have a soiree. I had no objection to that. And since then there have been no processions in the county.

10,980. *The Chairman.*—In reference to the magisterial duties which you perform, do you find it a matter of convenience to be in Edinburgh, having the opportunity of holding communication with the Lord Advocate and Crown counsel?—I have found that practically a great convenience. At the last Greenock election, I had occasion to arrange about getting out the military, and I was in communication very often with the Lord Advocate here on the subject.

10,981. *The Lord Justice-Clerk.*—In criminal cases, do you think there is any advantage in the Sheriff going to his county?—It is so; and in these cases I have gone to my county.

10,982. As Sheriff of Renfrew, you belong *ex officio* to certain boards?—Yes, I am a member of the Board of Supervision, and that gives me almost as much labour as the whole of the rest of my Sheriffship.

10,983. There are very important questions put to the judicial members of the Board, in connection with the law of the cases that come before it?—I write, I think, about 150 opinions upon legal points in the year for that Board; and since the death of Mr. Cook, my labour has been doubled; because, being senior Sheriff, I have to write the first opinion. Almost the whole of the parochial boards and the local authorities now apply to us for legal opinions, and we give them. Where we differ, the opinion of counsel is taken.

10,984. Is there a considerable portion of your time consumed by the business of that Board?—When I had a large junior practice, I always had the Saturday afternoons to myself; but now I never have, in consequence of having to write these opinions for the Board of Supervision.

10,985. And the other members of the Board, who are Sheriffs, devote themselves in the same way to this business?—In the same way.

10,986. *The Chairman.*—But your labours are a little heavier, as the cases come to you first?—Yes, I have to reduce the mass into something like shape.

10,987. You are in use to attend the meetings of the Board?—Yes.

10,988. And your brother Sheriffs are in use to attend, more constantly perhaps than other members of the Board?—We always attend every meeting of the Board, unless actually speaking in court when the meeting is held, or unless away on official duties in our counties.

10,989. At these meetings of the Board, are there occasionally questions started involving legal matters which you can dispose of offhand from your legal knowledge?—One half of our business consists of legal matters; the other half is disposing of applications complaining of inadequate relief; but all the rest is matter of law arising under the Poor Law or the Public Health Acts, or other matters belonging to our jurisdiction.

10,990. *The Lord Justice-General.*—How often does the Board meet?—At least once a week. We have extra meetings now and then. We had two meetings last week.

10,991. *Mr. Baxter.*—I suppose it is the Sheriffs that make up the attendance usually?—Mr. Smythe of Methven is present now and then, and the late Solicitor-General, Mr. Millar, attended the meetings; but it is the chairman and the Sheriffs that generally constitute the Board.

10,992. *The Lord Justice-Clerk.*—You are *ex officio* a member of the Board of Commissioners of Northern Lights?—I am.

10,993. The other maritime Sheriffs are so also?—Yes.

10,994. Is the business of that Board substantially carried through by them?—It is done almost entirely by the Sheriffs; and the Provost of Leith and an Edinburgh bailie now and then attend.

10,995. Are there meetings of that Board frequently?—Once a week, except in autumn.

10,996. And the Commissioners are sometimes away on duty?—Yes, we always make a visit of the lighthouses once a year.

10,997. The meetings are held in Edinburgh?—They are. We have committees of that Board too.

10,998. Then substantially the business of the Northern Lights Commissioners is conducted by the Sheriffs?—It is.

10,999. *The Lord Justice-General.*—And they receive no remuneration for that?—No, I have received no remuneration. I understand that a proposal has been made to confer on the Sheriffs jurisdiction in cases of divorce and of separation. I hope that the Commission will pause before recommending that, for I think that is a very delicate class of actions, in which are mingled very frequently noxious passions, and where the witnesses are relative against relative. These are cases in which I think a judge of the Supreme Court should see the witnesses. In cases of separation especially I would object to the Sheriff having jurisdiction; otherwise the Sheriff Courts would be flooded with that class of cases. A drunken husband comes home and thrashes his wife; and if she had the remedy of separation in the local courts, she would immediately proceed there. I understand that there is a system of getting practically separation, by bringing an action for aliment, and craving interim aliment till the rights of parties shall be settled on a more permanent footing, thereby saying that these persons shall be separated unless the husband comes to the Court of Session, and brings an action of adherence. Now I humbly think that is erroneous, and that the Sheriff has no jurisdiction whatever in cases of aliment founded on *sævitia* as against husband and wife; at all events, I hope that point will be cleared up, as there is a good deal of diversity of practice on the subject in Sheriff Courts. Aliment might be given to a wife against a husband where the husband has deserted her, but where *sævitia* is to be proved the consequence is this: The wife comes into court, tells in an exaggerated form all her wrongs, and she and her husband are never reconciled afterwards. Practically every impediment should be put in the way of parties bringing actions like these.

11,000. *Mr. Shand.*—Divorce is a very expensive proceeding at present in the Court of Session?—No; I have known a divorce carried through for £2, 13s.

11,001. That case occurred in Edinburgh?—Yes.

11,002. And the witnesses were resident in Edinburgh?—Yes.

11,003. Take the case of persons living at a distance from Edinburgh, all the witnesses being on the spot, where the man may be earning small wages, which would exclude him from the Poor's Roll, or the wife may be in a similar position—would not the expense of such an action be very great in the Court of Session?—No. Travelling is cheap, third class. You bring the witnesses here in a day, and the matter is done

in a day. There is great danger in making divorces common.

11,004. Is there not the expense of making up a record in the first instance, of instructing counsel, and of bringing the witnesses forward? Can you say that in such a case as that the expense on both sides would be less than £30 or £40?—The defence is generally a simple denial of the statement in the summons. That is not long; and under our present system of shorthand writing the proof is got through in a day, often in half an hour.

11,005. Is not the expense of such a case as I put £30 or £40, including both sides?—Perhaps, including both sides, it would be, in a contested suit.

11,006. That must be paid by the husband?—True.

11,007. Is that not a practical denial of divorce in very many cases?—The law of Scotland is peculiar in allowing divorce to the wife for the simple adultery of her husband. In no other country in the world is that allowed, I believe, except in some of the States of America by recent legislation. Now, in very many cases, adultery is committed by the husband, and the wife never thinks of bringing a divorce though she knows it; she forgives it, and condones it. Unless the fact of adultery be accompanied by cruelty to the children (for the wife overlooks cruelty to herself), or by keeping the mistress in the house, the wife will never raise an action of divorce. All that a husband has to do, in order to put an end to an action of divorce at the instance of the wife, is simply to promise and protest very intensely that he will put away the wicked woman that made him fall,—that he will not ill-use the children any more, and will love his wife in the same affectionate way he did before they were married. But allow her to bring an action in the Sheriff Court, and she rushes into the Sheriff Court at once, and these people, who might otherwise have lived happily together,—the wife forgetting and forgiving the wrong done her,—would, by the facility of obtaining divorce, be sent abroad into society dissevered—in a very painful position for the wife, and a millstone would be hung round the necks of the children.

11,008. If the law be wrong in respect of the ground upon which divorce should be obtained, it may require a remedy; but assuming the law to be right, is not the present expense in such a case as I have put a practical denial of the right of divorce to the poor, while the rich have it?—No doubt it is a hardship, as all litigation is to the poor; but the way to look at it is this, would you not create greater evils by giving greater facilities for divorce?

11,009. Is there not that facility given to the man who has the means of paying the expenses? Why should not the same facility be given to those who have not that means?—I don't think it is a case in which any facility should be given at all. Our law of divorce is too lax; and if there were no facilities given, condonation and forgiveness would follow, and that ought to be legislated for.

11,010. Do you think the present facilities to persons possessing means should be more limited than they are?—I don't know that I would create greater obstructions than exist.

11,011. Then why should there exist a distinction between the case of the man who has means and the man who has not?—For this simple reason, that the crime or sin of adultery is in the higher ranks of life looked upon with more abhorrence, let me say, than it is in the lower ranks.

11,012. *The Lord Justice-General.*—Does not the inability to enter into litigation, of persons in the lower classes, apply to every species of action as well as divorce?—Yes. I was just going to give that illustration.

11,013. *Mr. Harrison.*—Perhaps the possession of education, and a certain position in society, is in itself a considerable restriction on people in the higher classes making the application?—Yes.

11,014. *Mr. Shand.*—The question to be determined in an action of divorce is a simple question of fact. Is not that the very class of actions in which of all others, so far as the subject of inquiry is concerned, that may be very safely entrusted to the Sheriff and his substitutes?—I don't think so. Are you to have an appeal to the Court of Session? If you are to have such an appeal, you double the expense. Suppose a husband brings his action in the Sheriff Court: the whole proof is taken there; the wife carries it to the Court of Session, and she does so at his expense. She is entitled to have the review of the court, and it is only in exceptional cases that she is not entitled to get the review of the Division of the court; so that the unfortunate husband, who has to pay the expense of both sides, must run the gauntlet of the Sheriff Court and the Court of Session before he gets a final decree.

11,015. Would not perfect protection be given against that, if the court disallowed any expense if they thought the judgment had been obtained with sufficient proof to warrant it?—I think that would be oppression. A woman is entitled to have her status ascertained by the Supreme Court, at all events by one judgment.

11,016. *The Lord Justice-General.*—Is it clear that the court would have power to disallow the expense? Is not the debt of the wife the debt of the husband till final decree is given?—It is so.

11,017. And therefore the husband would be liable to the wife's agent for the expense?—Yes. These are granted on the footing of necessaries to her. The defence of her honour is as much a necessary as food and clothing.

11,018. *Mr. Shand.*—You are aware that the judges of the Inner House have repeatedly intimated, that where a case is brought before them by a reclaiming note from a judgment of the Lord Ordinary, where it appeared to them clear that the judgment was right, the expense would not be allowed?—On the contrary, the First Division three weeks ago, in the case of Chalmers, laid it down and settled it as law, that except in very peculiar and exceptional cases, the wife was entitled to have the review of the Division; and in that case, in which I was counsel for the wife, they granted the expenses of the reclaiming note to the wife, who had lost.

11,019. Are you aware that there are *dicta* to another effect?—I know there is an admission by counsel to the court in one case.

11,020. I speak of *dicta* from the bench in Donald's case?—That was a very peculiar case, and there the expenses were allowed. There is a *dictum* of Lord Deas in Donald's case to that effect, but the judgment of the court was to an opposite effect.

11,021. *Mr. Baxter.*—Would you be surprised if I told you that I have known repeated instances of very respectable men in humble life being deprived of the remedy of divorce, because they could not afford the expense?—I would not be surprised at that; but I don't think it is a great evil. When the children grow up, the husband and wife come together again.

11,022. *The Chairman.*—It has been suggested that jurisdiction might be given to the Sheriff in actions of declarator of marriage and of legitimacy. What is your opinion as to that?—Declarators of marriage are very delicate matters to deal with, and I think that such cases as these ought to originate before the Supreme Court. It involves, no doubt, principally matter of fact, but there also you have relatives as witnesses; and it is desirable that their evidence should be considered by the Supreme Court as from the witnesses themselves, and that it should not be taken down in writing in the imperfect notes of the Sheriff-substitute.

11,023. *The Lord Justice-General.*—In those cases that you have spoken of, where questions have arisen before the Inner House as to ordering the husband to pay expenses, the question, as I understand it, always is, whether the husband shall be made to advance expenses to the wife's agent?—Yes.

11,024. But the question never has arisen, whether the husband is ultimately responsible to pay the wife's agent's account?—No, it has not.

11,025. Do you see any reason to doubt, that until final decree of divorce is pronounced, the husband is liable to pay the account of the wife's agent for carrying

Patrick Fraser.

on her defence to the action?—I see no ground in law to doubt it.

11,026. The issue in an action of divorce is a question of pure fact generally, and the time occupied in the trial of that question would probably be the same in one court as in another. Have you any reason to doubt that?—None whatever.

11,027. Then what is the cause of the difference of the expense of trying such a case in the Court of Session and in the Sheriff Court?—There must be a record in both, and the agent must be paid in the inferior court. It is simply the addition of the counsel.

11,028. The fees to counsel?—Yes; that is all.

11,029. Don't you think it very important, that in the trial of a question of such social importance as arises in an action of divorce, the best professional aid should be had on both sides?—I think so. I think the wife is entitled to that, where so much depends upon it.

11,030. Then the advantage of having the action in the Court of Session is, that you have both the best professional aid and presumably the best judges to try the question?—Yes; and you save the unnecessary expense of a litigation in the Sheriff Court.

11,031. And that is purchased at the expense of counsel's fees, that being the sole difference between the expense in the one court and in the other?—That is all.

11,032. *Mr. Shand.*—Does the bringing witnesses from a great distance not add very materially to the expense?—As I said before, travelling is cheap, and the witnesses get here very easily by third class.

11,033. Have you any notion what a large proportion the expense of bringing witnesses from a distance is?—I don't think it constitutes a large proportion of the expense. In a case like Donald's, where there were 80 or 90 witnesses brought from all quarters of the country—from Aberdeen, Ireland, and elsewhere—the expense of travelling was large. But that is an exceptional case.

11,034. Don't you think it a great hardship that after a husband has succeeded before the Lord Ordinary in a case of divorce, which is as plain as possible, he should be liable for the expense of a reclaiming note and a discussion upon that, if his wife should not acquiesce in the decision?—In the last case which I have referred to, the judges saved themselves by saying that if there was so plain and clear a case on the proof that no two minds could differ about its import, they would not give the expenses; but where there is reasonable ground for doubting the credibility of the witnesses or the sufficiency of the proof, the wife is entitled to have that review, for it affects not merely her own status, but that of the unfortunate issue of the marriage.

11,035. And in cases not of that class you hold the law to be open as to whether there is liability for expenses?—Yes.

11,036. *The Chairman.*—Have you any other suggestion to make?—There is a provision in the Sheriff Court Act of 1853, which has given rise to a great deal of inconvenience—viz. that a process shall stand dismissed unless some proceeding takes place in it within three months. Now I have had occasion to consider that in various ways. You make a remit to an accountant, and the accountant works away at the case for four or five months: has any proceeding been taken in that process, or does it stand dismissed? Then you sist process for some cause, and it remains over for six months, and one of the Sheriff-substitutes of Renfrewshire has held that it stands dismissed. The law creates a great deal of inconvenience, and does no practical good. It is easily evaded; and it is a kind of trap whereby, after a great deal of expense has been incurred, the process sometimes stands dismissed from an inadvertence on the part of the agent. I would humbly recommend that that provision should be repealed, and parties left to themselves to say when they shall go on, and when not, with a process.

11,037. *The Lord Justice-Clerk.*—I don't know whether, in answering a question which I put to you formerly, you had in view the decision of the court in the case of Wolthekker, on the subject of the arrestment of a ship on the dependence of an action, in which this was found: 'In an action of damages for injury alleged to have been caused by the arrestment of a ship on the dependence of an action, and by her consequent detention for a year in harbour, held that malice and want of probable cause must be put in issue?'—That certainly supports your view of the law. I was thinking of an earlier case than this.

11,038. Is not that a source of very great hardship in the case of a foreign owner? In that case I believe an arrestment was used against a party who had previously been proprietor of the ship, but who had ceased to be so. The ship was detained in Leith for some time, the crew dismissed, and large expense incurred, and it was held that there was no redress unless it could be established that the arrestment was used maliciously?—No doubt that law creates a case of great hardship, and should be altered. I think damages should be given if you arrest a ship and damage follows, even though there should be no malice. The party should do it at his peril. He defeats the voyage altogether, and the merchants who have goods on board the ship may suffer loss. I think that is very hard law.

11,039. *Mr. Shand.*—The law being so is an additional reason for requiring that the arrestment should not be given as a mere *pro forma* matter, but that there should be a *prima facie* case?—That certainly leads me to acquiesce more in your suggestion.

11,040. *Mr. Webster.*—Should there not be caution, as in an interdict?—That suggestion is well worth consideration. Let the arrester do it simply at his peril. I think he ought to bear the brunt of the strong proceeding, if he is afraid of the debtor running away.

11,041. *Mr. Shand.*—If it were imposed as an absolute rule, it might deprive seamen of the remedy they have for the recovery of wages. Would it not be better to leave it to the discretion of the judge in the particular case, to say whether caution should be found?—I think it would.

11,042. *The Lord Justice-General.*—Do you propose to put the arrestment of a ship on the same footing as an application for interdict? Do you mean that the party who proposed to arrest the ship should apply for a special warrant to do it?—I think so.

11,043. Then would the consequences of a wrongous application be the same as in the case of a wrongous application for interdict?—I think the law should be so made, although it does not seem to be so by the decision of the case of Wolthekker.

11,044. *The Chairman.*—Have you any suggestion to offer as to the constitution or procedure in the Court of Session?—As to the constitution of the court I have very little to suggest, except this, that the Court of Lords Ordinary might be made practically useful, consistent with having an Outer House, by composing it of three judges, viz. one judge from each Division and a Lord Ordinary, which would leave four working Lords Ordinary in the Outer House. The Court of Lords Ordinary took away the whole Outer House for two months last session, and stopped the whole business, which was a great hardship and inconvenience. Three judges would constitute a very good court; and as it would only sit at intervals, the taking of a judge from each Division would not very much interfere with the work of the Divisions. I was one of a very small minority who thought that there should be a Third Division, and that the Outer House should be entirely abolished. There was a draft report drawn up by a committee of the Faculty, and I believe I stood alone in that view, along with another member of the bar. I have since reconsidered the matter, and I have altered my opinion. I think it would be a very hard thing if the only remedy for an erroneous judgment of the Court of Session were an appeal to the House of Lords. A second discussion is always useful in any case. A court will go wrong very often at the first opening of a case, because they don't see it fully; but if it is twice discussed—and most cases, or at all events a great number of cases, ought to bear two discussions—you

save the risk of falling into grievous error. Suppose you go to the House of Lords, and succeed in the appeal, showing the clear error of the Court of Session, you don't get the expenses of the appeal. Therefore I have altered my view upon that matter of a third Division, involving as it does the abolition of the Outer House. The next consideration is this, Shall you have a review of the Division here? Now I don't see any good in that at all. By a review I mean a review by the other two Divisions of one Division, or by the Lords Ordinary and one Division. If there was a difference between the two, there would be an immediate appeal to the House of Lords, and it would just increase the expense to the parties. But keeping the Lords Ordinary, and allowing, as at present, a reclaiming note to the Divisions, I think we have the best system. On the other hand, I would keep the Third Division of Lords Ordinary for occasional use, for it has worked most admirably in disposing of the advocations.

11,045. *The Lord Justice-General.*—The use of that third court is of course only occasional?—Only occasional.

11,046. Nothing more was contemplated in the recent Act of Parliament?—No.

11,047. And the object of having sittings of that third court will be, of course, to aid in preventing arrears in the Inner House?—Yes.

11,048. So that by that means you have an instrument by which you can, as occasion requires, equalize the arrears between the Outer House and Inner House?—That is the use of it.

11,049. You think the best way of doing it would be to make a court of three?—Yes.

11,050. Taking one judge from each Division, and one from the Outer House. That would reduce the Divisions to three judges during the period for which that court sat?—It would.

11,051. Do you not think that a considerable disadvantage?—It is a disadvantage, no doubt; but there is an enormous disadvantage in taking away the whole judges of the Outer House, as they were taken away lately. The whole business of the Outer House was stopped, and there was great clamour in consequence, and I think, very naturally, impatience at the delays that took place.

11,052. But when the occasion arises that the Outer House is going too fast for the Inner House, it would seem a natural remedy to expedite the proceedings of the Inner House at the expense of the Outer House?—But the Outer House have recently done next to nothing in keeping down their rolls. Cases that stood for debate in the month of October have not been heard yet.

11,053. *The Lord Justice-Clerk.*—Is not that to some extent attributable to the preference given to proofs?—No doubt; but the Lords Ordinary were sitting as a Division for two months last session.

11,054. *Mr. Shand.*—The remedy you propose would expedite both the Inner House and the Outer House work?—Yes.

11,055. The present arrangement expedites the Inner House work at the expense of the Outer House?—Yes; and the result is, that there would be no work for the Inner House, because the Outer House is not working and feeding them.

11,056. A considerable amount of arrears have been worked off from the Inner House in the present session?—Yes.

11,057. Has a corresponding arrear taken place in the Outer House?—Yes. I suppose the Inner House rolls are nearly clear at present.

11,058. *Mr. Adam.*—The court you suggest is the same as the Registration Appeal Court?—Yes.

11,059. Was that a satisfactory court?—Yes, it was a very satisfactory court. It did its business very well, and it has brought unity into the scattered law of registration.

11,060. *The Lord Justice-Clerk.*—Having regard to contingencies, might it not be necessary to take the judges for the court which you propose either from the Outer House or the Inner House, at the option of the Lord President? One of the judges of the Inner House might be ill, or it might be advisable to leave one of the Divisions with four judges?—I would make it an absolute rule that one judge shall go from each Division, and one from the Outer House; but if one of the judges in the Inner House was ill, his place should be supplied by one of the Lords Ordinary.

11,061. *Mr. Webster.*—Is it not matter of great importance, that the work of the Lords Ordinary should not be interrupted?—Most certainly.

11,062. That is of far greater practical importance than a little delay in disposing of a Sheriff Court advocation?—No doubt of it, but it is desirable that there should not be delay in doing the work of the Inner House.

11,063. *The Chairman.*—You think your plan would accomplish both purposes?—I think it would.

11,064. *Mr. Shand.*—With the disadvantage, however, of having the Divisions only consisting of three judges,—a disadvantage which should last as short as possible?—It should be as short as possible; but we sometimes see it at the present moment, and we submit to that disadvantage.

11,065. *The Lord Justice-General.*—But when it does occur, it is a very considerable evil, is it not?—No doubt it is an evil.

11,066. *The Chairman.*—There is one use made of the judges of the Inner House at present, which might make it more difficult to carry through the arrangement you suggest, and that is the detaching one of them to take proofs. That could not be done if one judge from each Division was sitting in the third court?—No.

11,067. If your plan was followed, that proof might be sent to a Lord Ordinary to take?—It could not be sent to him under the existing Act.

11,068. But that could be provided for?—Yes, that proof might be sent to a Lord Ordinary in that special case.

11,069. *The Lord Justice-General.*—The effect of recent legislation has been, has it not, to increase the work done by the Inner House, and to diminish that done by the Outer House?—Yes.

11,070. For example, all appeals from the inferior court go straight to one of the Divisions?—Yes.

11,071. And the Lords Ordinary have no work to do of that kind at all?—None.

11,072. And the Lords Ordinary now sit for as long a period of the year as the Inner House?—Yes.

11,073. That was not the case formerly; and the Inner House were in the habit of holding extended sittings, which was never done in the Outer House?—That is quite true.

11,074. Proofs ordered by the Inner House are no longer sent to be taken in the Outer House, but are taken by one of the judges of the Divisions. There has also been the introduction of special cases, which come to the Inner House only. All these things have a tendency to increase the work of the Inner House, and to diminish proportionally the work of the Outer House?—That is quite true.

11,075. Do you not see a little difficulty arising from that, in regard to some of the arrangements you propose?—The only difficulty that occurs to my mind is this, that the Lords Ordinary might come not to have work to do; so much has been sent into the Inner House direct, that the Lords Ordinary may not have sufficient to employ them.

11,076. In that way there would be a tendency to repletion in the Inner House rolls, and to the reverse in the Outer House rolls?—That may be so, but experience will show. At the present moment the Lords Ordinary are quite full.

11,077. And you think that is ascribable to the long-continued sitting of the Lords Ordinary's court last winter session?—Very likely.

11,078. *Mr. Shand.*—Is there not one new feature which has added greatly to the work of the Outer House—viz. the proofs?—No doubt.

11,079. Has not the time occupied by these proofs much more than compensated for any time that might have been occupied by the hearing of advocations or

Patrick Fraser.

similar work now done in the Divisions? These proofs were all taken by commission before?—Yes.

11,080. *The Lord Justice-General.*—Before last session?—For two years.

11,081. That has been going on since the last Evidence Act passed?—Yes; since 1866.

11,082. *The Chairman.*—Would your difficulty be practically obviated, or materially obviated, if there was a better regulated use made of the court of four Ordinaries? Supposing that the Inner House arrear, which is now worked off, were to a great extent kept down, and that they were called on to sit at longer intervals, and not more than two days in any week, so as to allow the work of the Outer House to go on during the other days, would that obviate the inconvenience?—I don't think it. Even when the Court of Lords Ordinary was sitting, their Lordships sat as Ordinaries two days a week, viz. Friday and Saturday; but the effect of that was, that they took up a bit of a debate one of these days, and then it went over to next Friday, by which time the Lord Ordinary had forgot all about it, and the whole case had to be resumed. Unless you make the sittings of any court continuous, the usefulness of it is very much impaired.

11,083. *Mr. Shand.*—Can you speak as to the feeling of the profession generally as to taking away the Lords Ordinary from their daily duties to sit in that court?—According to all that I heard, it was very unpopular, and created a great deal of grumbling. I heard that from all classes of the profession, and from clients too, who could not understand why their cases were not moving before the Lords Ordinary when they had appeared in the debate roll in the month of October. I believe that the Court of Lords Ordinary sat during this last session two months and two days in all.

11,084. *Mr. Webster.*—At the commencement of the session there was practically no arrear of work before the Lords Ordinary?—Practically not very much, except in Lord Barcaple's roll.

11,085. Can you state the condition of the rolls at the end of the session?—I cannot from recollection.

11,086. *The Lord Justice-Clerk.*—The Inner House used to meet before and after the session to dispose of cases in the short roll?—Yes.

11,087. Would it not be a mode of obviating the difficulties of which you have spoken, if the Lord Ordinary's court were to be held at the close of the session, to wipe off the arrears?—I would not be willing to impose on these judges more labour than they do; and I don't see any necessity for resorting to that, because I can get a good Third Division without it, in the way I have suggested; and I don't see any objection to its consisting of three judges, though undoubtedly four are better. But I see three judges sitting in the House of Lords disposing of the most important appeals.

11,088. *The Lord Justice-General.*—I suppose you have no doubt that four is the best number for a court?—Certainly it is.

11,089. And especially for a court that is to review the judgment of one judge?—Yes; if there was a division of opinion, and one of three agreed with the judgment of the Lord Ordinary, there would be two to two, and such a result would not carry confidence with it.

11,090. *The Chairman.*—Have you anything to say as to procedure?—In reference to the distribution of business, I should like to make this remark, that all petitions should be Outer House work. Such administrative business is better done by one man than by four, and there is no necessity for taking up with a purely formal proceeding the time of a fully constituted court. In the next place, I think all these petitions should be competent to any Lord Ordinary. It is a great grievance if you get a man who, from timidity or irresolution, or (if I may say so, without irreverence) from crotchets in dealing with these matters, puts you to a great deal of trouble in advertisements, investigations, and so forth. Therefore I think we should be allowed to go to another judge of the Supreme Court, and present our petition to him. I don't see the advantage of confining us six or seven years, it may be, to one judge.

11,091. *Mr. Shand.*—Do you see any reason why the great bulk of these petitions might not be presented in manuscript, particularly for the appointment of factors and the like?—None; but that would not be any great saving, because when you have to make three copies it is as cheap to print. Printing also preserves the document, and is more convenient for future reference.

11,092. A petition in many cases is like a summons—you don't require copies of it?—Intimation has to be made to the relatives and others.

11,093. *The Lord Justice-General.*—And a copy for the walls?—Yes. In regard to procedure I have very little to say. I think our forms of procedure are very nearly perfect. In reference to investigations as to facts, we have two systems, viz. jury trial, and the taking of proof. In regard to jury trial, I have only to say that I think it the biggest farce that ever was instituted for the investigation and settlement of civil rights. You put men into the box who are not accustomed to continuity of thought, or to the compressed position in which they are kept for hours, and who are actuated very frequently, in a great many popular causes, with other than just views of the notions of right and wrong. In a number of cases, unless the judge descends into the arena, and takes the thing out of their hands altogether—in a case of road, for example—the verdict is sure to be one way; or where a widow claims damages against a railway company, or in a case of breach of promise of marriage, or seduction, where the pursuer is a pretty woman, the defender has no chance at all.

11,094. Do you think judges are altogether inaccessible to these influences?—I think they ought to be so. In other cases, again, the jury just go along with the charge of the judge, and practically the verdict is the verdict of the single judge. Now, if that is to be sufficient, we could get it without all the formality of a jury trial. But apart altogether from my own opinion as to jury trial, the practical result is this, that we have now tried it for fifty years, and it has entirely failed. You can't bring people to the jury court. Merchants in Glasgow say they would rather resign their rights and interests altogether than submit their case to a jury. You compel them to go to arbitration, or to give up their just and legal rights. It is of no use defending the system, as it occurs to me, upon abstract notions; for you have tried it, and it has been recommended by our wisest and greatest lawyers, but in vain. People won't come to it; and the only cases that you have are simple trash—cases of defamation, and other actions of that sort, which ought to be tried in the Small Debt Court. On the other hand, the new system of taking proof before the Lords Ordinary is working admirably, if the Lords Ordinary would just take kindly to it; but considering themselves (as one of them who is a member of this board told me) to be acting as mere commissioners, they do not take kindly to it. Now I complain of that. They don't give the Act fair play. But it commands the confidence of the profession. People will come to the court, now that they see there, an educated man accustomed to appreciate evidence, and above all those influences to which I have referred. They will have confidence in his judgment; and gradually it will come to this—and I see it already—that people will acquiesce in the Lord Ordinary's judgment, and not go to the Inner House at all. It will be looked upon as the verdict of a jury, and better than the verdict of a jury. We are new to it just now, but I have seen several judgments recently, where great care was taken by the Lord Ordinary in taking the proof and pronouncing judgments, and parties have acquiesced in them.

11,095. Would you think it desirable to make the Lord Ordinary's finding in fact final?—I would not do that. I see that in the United States of America nine States have adopted almost the very words of our Judicature Act in regard to the summons. Our Judicature Act says that the summons shall set forth the nature, extent, and grounds of action; and the State of New York have abolished all former systems of pleading, and have enacted that the statement

of facts constituting the cause of action shall be set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of ordinary understanding to know what is intended. They have trials before juries, and trials before the judge; and the mode in which the distinction is made is this: An issue of fact in an action for the recovery of money only, or of specific real or personal property, or for a divorce from the marriage contract on the ground of adultery, must be tried before a jury, unless the jury trial be waived, or a reference be ordered. Every other issue of fact must be tried by the court, subject, however, to the right of the parties to consent, or of the court to order that the whole issue may be tried by a jury. Now this issue of fact, when tried by the court, is tried before a single judge, and the remedy against error is a new trial; one of the grounds of the new trial being the insufficiency of the evidence to justify the verdict or decision. I see that that legislation has been adopted in the States of New York, Indiana, Iowa, Minnesota, Missouri, Wisconsin, Ohio, Oregon, and Massachusetts; and therefore it is not a novelty invented in Scotland for a single judge to try issues of fact. I think our course is better; instead of the remedy for error being a new trial, we have a reclaiming note on the evidence taken to a different court. Therefore I trust that this system, which is becoming popular, and which is certainly better than jury trial, will be retained.

11,096. Would you abolish jury trial altogether in civil cases?—I would abolish it altogether, except in cases of slander; but even that class of cases I think would be better tried in the Small Debt Court. I sometimes see, for very weak defamation, large sums of damages given by these juries. One frequently hears, 'Oh, this is a case of damage; it is a proper case for a jury.' Why should that be a proper case for a jury? The measure of damages is one of the most delicate things to determine; and an educated, practised lawyer is certainly a ten thousand times better judge than an ordinary juryman, of the measure of damage. Learned books have been written upon that very subject, and yet the whole thing is handed over to a jury, the judge simply telling them, 'The amount of damage is for you.' I would therefore abolish jury trial in every case, with, perhaps, the exception I have stated. I don't see any good that it serves.

11,097. *The Chairman.*—You say that cases of slander should be tried before the Small Debt Court. Would you limit damages for slander to the range of the Small Debt Court?—I would. What is the object of an action for slander? It is to make reparation; but its first object is to vindicate the defamed person's honour, and you do that if you get a decree in the Small Debt Court. Take, for example, the case tried before the Lord President some time ago, where a gentleman was accused of calling another a Highland thief; and the defender said he did not call him a Highland thief, but he called him a bad Highland chief; and though these were mere *verba volantia* passing at a railway station, and heard by nobody, the jury gave £300 of damages.

11,098. *Mr. Shand.*—If persons knew that they could slander to their heart's content those whom they disliked, at the expense of £12, don't you think that would increase the amount of slander?—I don't think so.

11,099. *The Lord Justice-General.*—Did you never see a case of slander, either verbal or written, in which you think the injured person should have got more than £12 of damages?—There are such cases—of accusing a lady of unchastity, or the like.

11,100. Or accusing a highly honourable man of dishonesty and embezzlement, and publishing that in the newspapers; would you restrict that to £12?—These are unusual cases, and perhaps the injured person ought to get more than £12; but if jury trial is to be preserved, I think that is the only class of cases in which it should be resorted to.

11,101. What is your opinion, then?—is it that jury trial should be continued in cases of slander, or not?—I think not.

11,102. Then you think that cases of slander should be tried by the Lord Ordinary under the other form?—Yes; and these cases have been tried before the Lord Ordinary, and a reclaiming note has been carried to one of the Divisions upon it. I refer to the case of two surgeons in the north, one of whom accused the other of unskilfulness. The proof was taken by Lord Kinloch.

11,103. *Mr. Shand.*—Such cases frequently arise in the Sheriff Court, and come to the Court of Session, and damages have to be assessed by the court?—Yes; the court assessed damages in the case to which I refer at £60.

11,104. Do you not think that it should be left to the discretion of the judge to say whether, in the circumstances of each case, jury trial is the best mode of disposing of it, or not?—That is no discretion. From my experience of the judges, they will always send cases for jury trial. To send a case to a jury, is an easy way of getting rid of the case.

11,105. Has it not been found in the working of the system of proofs, that they cause a very great amount of expense?—No.

11,106. I mean particularly in those cases where you have the evidence first taken down in shorthand, and afterwards printed, and made the subject of review in the Inner House?—Of course there must be expense there; but the same or greater expense would take place if there was a jury trial.

11,107. Don't you think that in many cases, if you include the expense of taking these judgments to review, and printing the proof and documents, you exceed the expense of a jury trial?—No; because there are motions for new trials and bills of exception in cases of jury trial, and I anticipate the time when we will acquiesce in the Lord Ordinary's judgment, and there will be very few reclaiming notes. I think the Divisions are acting on the principle, that unless it goes egregiously wrong, they will confirm the judgment on the facts, of the judge who saw the witnesses; and I think that is a very proper feeling.

11,108. *Mr. Webster.*—And where at present the verdict of a jury is upset on a bill of exceptions, or a motion for a new trial, the whole cost of the first trial is rendered useless, and parties have to begin *de novo*?—Yes, quite useless, and the same witnesses have to be examined. Your Lordship asked me if I had any further suggestions to offer. I think we cannot further improve our system of pleading. I think it perfect. It has been adopted by the States which I have mentioned—a summons, or plaint as they call it, and a defence. But there are one or two little practical matters that might be attended to: for example, great expense is incurred when a summons is long in requiring a written copy of it to be signeted. A printed summons ought to be sufficient. Then there is no necessity for writing out the formal will. A declaration in an Act of Parliament, that all summonses shall be held to have such and such a will, should be sufficient. Again, actions of reduction are unnecessarily verbose. All that should be necessary should be, 'And the said writ should be reduced,' without two pages of formal words. In multiplepoindings, where there are more than two parties, and where they have the same interest, a common agent should be appointed. The court had power, under the Act of 1850, to pass an Act of Sederunt in reference to that, but they never did it. Then there is no use whatever for pleas in law. Pleas in law are generally drawn by inexperienced counsel, and at a time when he is very tired, his head very hot, and his feet very cold, early in the morning; and he sometimes omits a plea. Now, why should a man not be entitled to plead his case upon the facts stated at the time of the debate, and after consultation between his senior and his junior counsel? These seem to me to have been always traps in the way of getting justice.

11,109. *The Chairman.*—Then you would not set forth the legal ground of action at all?—No; let the defender find that out. I make my statement of facts, and let him find out before the debate, or during the debate, what are my grounds in law.

Patrick Fraser.

11,110. *The Lord Justice-General.*—What would you say to such pleas as no jurisdiction, *non forum competens*, and *lis alibi pendens*?—What is the use of giving notice of the plea of no jurisdiction? It can be stated at the debate.

11,111. The use of giving notice, I always understood, is to prevent surprise?—Well, if there be surprise, the court have the remedy in their own hands of giving time. But there ought to be no surprise in reference to matters of law.

11,112. That is attended with delay and expense?—It may be. On the other hand, the way in which the court have thrown out cases by reason of the want of a plea that arose upon the facts, has been one cause of the unpopularity of the institution.

11,113. Is not that evil remedied by the large power of amendment in the recent Act?—To a great extent it is. At the same time, there are conditions of expenses attached to it which make one reluctant to resort to it.

11,114. The adding of a plea is not generally attended with a very heavy condition of expenses?—The amount is very variable.

11,115. It is very small?—That depends on circumstances. I have seen ten guineas imposed.

11,116. If I understand rightly, it did not require the recent statute to allow parties under the sanction of the court to add new pleas at any time?—No.

11,117. That power was competent under the Judicature Act?—Yes.

11,118. And was allowed upon very small and lenient conditions as to expenses?—I have seen ten guineas imposed by the First Division of the court.

11,119. Have you not seen one guinea also?—Never.

11,120. Did you ever see none at all?—I have seen the matter of expenses reserved.

11,121. *Mr. Shand.*—You don't contemplate, I suppose, in the suggestions you have made, that pleadings should be drawn otherwise than by counsel?—No.

11,122. Then if pleadings are drawn by counsel, and if it is found to be very convenient, and to save adjournments of cases, that pleas in law should be inserted as matter of notice, what is the benefit to be derived from omitting them?—The benefit is this, that you avoid miscarriage consequent on the omission of a plea.

11,123. *The Lord Justice-Clerk.*—Is there a discretion to refuse the plea?—Not under the recent Act.

11,124. *Mr. Shand.*—If there were no pleas in law, would there not be great risk that when the case was called, a point of law might be started which had not been observed on the other side, and the result would either be an adjournment of the case, or if it must go on, a very great hardship would result to one of the litigants, from his counsel not having anticipated that point?—No. When counsel have studied the case and come to the debate, all the pleas arising out of it will occur, or ought to occur, to themselves. Surprise seems to me inapplicable to matters of law. Counsel should be able to plead law on the spot in reference to the state of facts disclosed.

11,125. Why should they not have notice, if that notice can be given in the pleadings framed by a lawyer?—I see no use for it. There is a risk of missing the plea; and if you do miss it, you are amanded in expenses on the spot, which may be two guineas, or which may be ten.

11,126. The risk is the risk of an award of expenses against the risk of an adjournment or injustice. Don't you think the latter is the much more serious risk?—No.

11,127. *The Chairman.*—Do you think that the circumstance of a counsel having to frame the pleas in law on which he is to rest his case, has or ought to have the effect of making him consider the case very carefully before he proceeds further?—It ought to have, but it very often has not.

11,128. But if he is compelled to put on paper, pleas in law applicable to the case, will that not have the effect of making him consider more carefully the law that is applicable to the case, at the time of framing his record, so as to suit his facts to that legal result?—It might or might not. The way in which it is usually done is this,—one thinks what kind of pleas should be put on record, whether they are very good pleas or not, and they are all put in.

11,129. There are perhaps various ways of framing a record, but I should think one would be disposed to select the facts that were pertinent to the case, as relative to the grounds of action on which he was to maintain his case, and to put both these down would compel him to consider carefully; but if he reserves the legal consideration of the case till he comes to argue it, is it likely that his record will be as pure and perfect as if he had carefully considered them at first?—I see no necessity for delaying their consideration till the argument, and that would not be done by a counsel who did his duty. Always remember, however, that these pleas are drawn by juniors.

11,130. But I speak of the inclination to consider more carefully when you are obliged to deal with it at that time?—The same idea appears to have occurred to the author of the recent Act, when he requires every pursuer to come, at the closing of the record, with an issue. He thought that would concentrate the attention of parties on the true point to be settled; I don't think it does so.

11,131. That is going a step further, because, after you have got your pleas in law, it might be a very nice question what is the issue in fact that should be sent to trial?—I may add that Lord Justice-Clerk Hope, before a committee of the House of Commons, gave the same opinion that I have given as to dispensing with pleas.

11,132. *The Lord Justice-General.*—When was that?—In 1840.

11,133. The section of the Act of 1850, to which you were referring, gives power to the Court of Session, in processes of competition, to regulate the mode of making up the record—section 10. That has never been done?—No.

11,134. What would you suggest should be done in carrying out that provision?—There should be a common agent, where all parties have the same interest, who should state the case in one paper instead of twenty papers, as occurred lately in a case before the First Division. That would simplify procedure very much.

11,135. *Mr. Webster.*—Hitherto the election of a common agent has been by the votes of those who had previously lodged claims?—Yes.

11,136. So that you would require some costly operation before you got into shape?—That might be simplified too.

11,137. *Mr. Shand.*—By leaving it to the judge?—Let the judge settle which parties have the same interests, and let one counsel or two counsel for all the parties be retained by the common agent.

11,138. *Lord Justice-General.*—How would it do to allow in multiplepoindings that mere claims should be lodged in the first instance, without any statements of fact or pleas in law? Would that enable the judge to see whether it was a proper case for the appointment of a common agent?—No; it would not show the uniformity of interests.

11,139. The expense in multiplepoindings is very great?—Very great.

11,140. And it is very frequently all charged upon the fund?—Yes.

11,141. Don't you think that many questions upon the construction of settlements and the like, which have been tried under multiplepoindings, might very well be tried in the form of special cases?—Yes; and every one of these will now be tried in that way.

11,142. The number of multiplepoindings therefore will be a good deal diminished?—Yes; very largely diminished. I have settled three special cases lately for the Divisions, arising upon the construction of settlements, where parties are agreed, and there are no facts there to make them differ.

11,143. The direction to the court in section 10 of the Act of 1850 is to regulate the making up of records in such processes, in such way and manner as to assi-

milate, in so far as convenient, the procedure in such actions, with respect to the making up of the record, to the procedure by this Act provided. Do you think that is a wise direction? Would you assimilate it to records in ordinary actions, or would you not?—I don't see how you could very well assimilate a multiplepoinding to a record in an ordinary action.

11,144. Only by making every claimant answer every other claimant. You don't propose that?—No; but that was the law until recently altered.

11,145. *Mr. Shand.*—You expressed yourself satisfied with the system of pleading in the Court of Session? Do you not think that the pleadings might be abbreviated by adopting such a system as you are aware exists in England, where the cause or grounds of action and grounds of defence are stated very much more shortly than they are with us?—I am not aware that they are. Look at the Chancery bills that we sometimes see; they are longer than our own records. The greater part of the business of the Court of Session is equity business, and you require a long record there.

11,146. Confining attention to ordinary common law cases, as distinguished from the cases you are now mentioning, do you not think that some improvement might be introduced in our system of pleading?—What can be shorter than a well-drawn summons, simply setting forth that a contract of sale was entered into on such a date, and that the price is not paid? Two articles do it. And the defence is 'denied.' In England you have the declaration, which cannot set forth the thing more shortly.

11,147. Is there not detail frequently given in the pleadings?—Frequently, but very wrongly. The pursuer sets forth that he met the defender at such a market, on such a day; and having entered into conversation with him about certain horses, they came to a bargain. All that is very unnecessary, and bad pleading.

11,148. But the expense of it never has been disallowed?—I am not aware that it has.

11,149. Where such detail is given, and the party succeeds, he is allowed the full expenses?—It is the duty of the Lord Ordinary at the closing of the record to score that out, and formerly the Lords Ordinary did so. The Judicature Act imposed that duty on them.

11,150. *The Lord Justice-General.*—Such improper pleading is the fault not of the system, but of the counsel?—Of the counsel entirely.

11,151. *Mr. Shand.*—What remedy do you propose to correct that?—Simply a little exercise of vigilant attention on the part of the judge.

11,152. *The Lord Justice-Clerk.*—Or power to the auditor to strike off that expense?—It ought not to be allowed as legitimate expenses.

11,153. *Mr. Shand.*—It is an evil that could be corrected by a careful revision of the record, or by disallowing the expenses. Have you not seen many cases in which that is so?—I have seen very many cases of bad records which it was the duty of the judge to have corrected.

11,154. *The Lord Justice-Clerk.*—Is there not a great improvement in the style of our records of late?—Yes; but I think the court was to blame for our bad records: first, from not taking care, when the record was closed, to see that no irrelevant matter was put in; but next, and above all, by the sustaining of the plea of want of specification. There are judgments under the head of 'form of process' that are perfectly unjustifiable in my estimation; and it was the fear that the court would hold that a record was defective in point of statement, and that all the details were not set forth, that made counsel timorsome, and induced them to set forth evidence instead of the grounds of action.

11,155. *The Chairman.*—Before the committee of 1840, of which you have spoken, I think there was some evidence as to the prolixity of pleadings?—I think there was.

11,156. *The Lord Justice-General.*—Don't you think that the Judicature Act is to a certain extent answerable for the details that are set out on records?—We are required to set forth the nature, extent, and grounds of action, and the nature, extent, and grounds of the defence. That is all. Now, if that clause had been liberally interpreted—if the court had trampled down all frivolous and absurd objections to the record, and allowed justice to be done, sending parties out of court not on a technicality, but on the merits of the case—they would have gone away in a good humour. A man will manfully bear the loss of his case on the merits, if it is fairly heard; but the general public don't understand being kicked out of court on a mere piece of special pleading.

11,157. *The Chairman.*—And the profession are dissatisfied with that?—Yes; it is a most miserable thing for a man of business to have to tell his client that he has been turned out upon mispleading.

11,158. *The Lord Justice-General.*—The object, as I understand it, of the Judicature Act, in the regulations as to the preparation of records, was to have all the material facts in the case set out, so that parties might be brought by admission as near to one another as possible upon matter of fact. The eighth section provides that the condescendence shall set forth the facts which they aver and offer to prove in support of the summons and defence, which means a detailed statement of every fact that they consider it important to prove; at least so it used to be interpreted. And then there is a stringent provision, that when the record is closed, parties are foreclosed upon the matter of fact, and cannot be allowed to prove anything that has not been averred. Now, don't you think that that system, introduced by the 6 Geo. IV., has tended a good deal to lengthen our records beyond what is necessary?—The construction given to that clause has certainly done so; but it was competent for the court to have interpreted it to mean this,—shall set forth simply the grounds of action, without detailing evidence.

11,159. Do you think that provision of the Judicature Act an expedient one?—Certainly not. I think that provision of the Judicature Act has done no good.

11,160. Then you think the advantage that was proposed to be gained by the Act in that respect is more than counterbalanced by the evils that it introduced?—I think so. It was intended to get admissions, and admissions are not given. If there had been a penalty upon a man for denying a fact within his own knowledge, as ultimately proved, that might have been a judicious regulation; or if he had been compelled to swear to the truth of his averments or denials, he might not deny so readily as he now does. But it has entirely failed of its purpose; and I think that the better system now in existence, of confining it to the nature and grounds of action, ought to be continued.

11,161. Then you would prefer that there should be just a statement of the ground of action and of the ground of defence, such as the Judicature Act, 6 Geo. IV. required in the summons and defences?—Just so.

11,162. And no more?—And no more; and then we could close the case always on summons and defences.

11,163. *Mr. Shand.*—Would you give the judge power in special cases, if he thought it desirable, before a proof takes place, to appoint the party to give particulars? For example, in a question of damage, special damage might be alleged. Would you have the party appointed to give notice, such as is now necessary in cases of breach of patent?—There might be special cases requiring notice of that kind.

11,164. I believe there is such a power in England?—In patent cases there is. That is by statute.

11,165. But in cases generally, the judge has a power of that kind?—I am not aware.

11,166. *The Lord Justice-General.*—You are aware that there were great complaints in England, at one time at least, that the want of some such paper as our condescendence and answers led very often to surprise at the trial?—I am aware of that. Lord Campbell specially mentioned that.

11,167. Lord Campbell in one case mentioned it in very strong terms indeed. Is it not to be feared that if the record was as simple as you suggest, containing

Patrick Fraser.

merely the ground of action and the ground of defence stated in a short form, surprise would arise at the trial of the case?—Not in the majority of cases. Both parties know the ground of action and the ground of defence very well before they meet at the trial.

11,168. For example, in patent cases, if you were carrying out your present proposal, you would find it necessary to adopt the remedy of Lord Brougham's Act, and require a note of particulars before the trial?—Yes.

11,169. Specifying, for example, the cases of prior use intended to be proved, and the like?—Yes.

11,170. Then there must be a class of cases, at all events, in which something equivalent to a condescendence is required?—There may be.

11,171. Would you leave it to the discretion of the court to order that?—I think so. I think that would be the mode of doing it, instead of spoiling every record by requiring the whole minute facts to be set forth. I would treat these as exceptional cases. In America, it is provided that the cause of action and matters of defence shall be set forth; and I see that an American judge states that that system is not working very smoothly, from the want of detail as to what is to be proved at the trial.

11,172. *Mr. Webster.*—In such cases as actions against bank directors or others, for mismanaging the affairs of a bank, I presume it would be requisite that particulars should be given in some form?—And yet, in the case of *Cullen* v. *Johnston*, the House of Lords complained of the too great detail of all the frauds charged against the Directors of the Edinburgh and Glasgow Bank.

11,173. *The Lord Justice-General.*—It is quite possible to be in excess; but you must in such a case have very considerable detail in order to make the charge against directors intelligible?—True. It won't do to make a mere general charge of fraud, without telling how it was done.

11,174. *Mr. Shand.*—Was not the complaint there, that there was too much detail mixed up with the ground of action, while there might have been a distinct statement of the ground of action separate from the note of particulars?—I forget the exact words; but the record was complained of as being very detailed, and I abuse it, because it was drawn by myself. I put in all that detail, because I was afraid of the plea of want of specification. I should like to mention one thing that creates considerable dissatisfaction, and that is a practice which I am sorry to see is extending, of stopping discussions upon the opening speech. That opening speech is not delivered here, as it is in England, by the senior counsel. Sometimes it is imperfect; and a judge does not know the weakness of the conclusion to which his mind has come, unless he sees the weakness of the arguments in support of it. Now, if the judges are to go on stopping discussions at the outset upon the opening speech, you must introduce the system of making the senior counsel begin, and a client will acquiesce in the loss of his cause when he has got his best talent shown to the court.

11,175. *The Lord Justice-General.*—Then you would suggest that the senior counsel should open the reclaiming note?—Yes. The practice of making junior counsel in the cause commence the debate in the Inner House, is of comparatively recent origin. It seems to have begun, so far as I can trace, in the year 1836; but of course there are persons who can give information on this subject from their own personal knowledge, which I cannot do, as since I came to the bar the junior counsel has opened. The earliest indication of this having been sanctioned by the court, is in a note at vol. xiv. Shaw, p. 488, in the case of *Clark* v. *Newmarsh*, in the following terms: 'In the course of discussing this cause, a conversation took place between the Lord President and the Dean of Faculty relative to the duty of the junior counsel to be always prepared to open, on each side, when called on, and the disposition of the court to afford them every opportunity of doing so. In the result, his Lordship intimated that the court in future would not delay any case on account of the absence of senior counsel, unless in very special circumstances, but would call on the junior to proceed; and the Dean of Faculty observed that he had no doubt the course of proceeding would be equally satisfactory to the bar and to the country.' The matter does not seem to have been considered settled by this statement of Lord President Hope, for in the same volume, in another case of *Ramsay* v. *Anderson*, p. 574, there is a note to this effect: 'When this cause was called, the junior counsel for Dr. Anderson and Miss Ramsay stated that, although he was prepared to go on, if called upon by the court, yet, as the case was one of some difficulty, he felt it to be his duty to move the court to delay the advising till his senior, who was engaged in the other Division, might be able to attend. The Lord President observed, that after what had passed on this subject, he conceived it best to adhere to the rule already intimated, and to call on the junior counsel to proceed. There might be exceptions from this general rule, in particular circumstances, but this case did not appear to be one of these. The junior counsel accordingly pleaded the case.'

11,176. *Mr. Shand.*—Are there not many cases in which, before you have proceeded to open, you have remarked, 'I expect that we shall be thrown out on my own showing in this case?'—That is quite true. I admit that. But I have seen other cases which, in my judgment, ought to have gone on.

11,177. In the class of cases to which I have referred, would it not be a pity that the time of the court should be taken up by hearing three or four counsel; because if you hear two speeches, you must have replies?—Of course; but the remedy I suggest is, that senior counsel should open.

11,178. *The Lord Justice-General.*—The discussions to which you are referring are discussions upon reclaiming notes, I presume?—Yes.

11,179. Well, there is the judgment of the Lord Ordinary generally accompanied by an explanatory note of the grounds of his opinion; and if the opening counsel can suggest no good reason for differing from the Lord Ordinary, is it not a waste of judicial time to hear any more about it?—That is very true, but sometimes a miscarriage takes place, and then there is an appeal to the House of Lords.

11,180. Does that ever arise from the imperfection of the opening speech?—I think it often does.

11,181. That would be fully remedied by the suggestion you have made, that the senior counsel should open?—Yes.

11,182. *Mr. Shand.*—Are not appeals to the House of Lords much more frequent in cases which have been very fully argued?—I cannot give the numbers.

11,183. Do you remember any instance of cases thrown out on the opening speech, and appealed in consequence of want of full discussion?—I cannot name any particular case at the present moment, but I am under the impression that there are such cases.

11,184. *The Chairman.*—In such a case, when the junior counsel has made his speech, and the court are not satisfied that he has made out a case against the interlocutor of the Lord Ordinary, if the senior counsel offers to supplement the opening statement, is it ever refused?—No; it is never refused. It is very seldom offered. It is hopeless then, because the court have intimated their opinion.

11,185. *Mr. Shand.*—In practice, is it not the case that the senior counsel's observations don't carry the same weight in such circumstances?—Of course. The supplement is not well received, and it is not well given.

11,186. *The Chairman.*—Would you have the senior counsel, in opening the case, to go into full detail?—Certainly.

11,187. Then very little would be left to the junior to do?—No doubt; but the junior is there to assist—to get references, and to make suggestions.

11,188. *The Lord Justice-General.*—Do you contemplate that the junior counsel is not to speak?—No.

11,189. Then what is his function to be? Is he to follow the senior on the same side before the opposite side is heard?—No. Let there be an answer given to

the senior's speech first. There may be very little then to do.

11,190. Then you would leave the reply to the junior?—Yes.

11,191. Do you think that would be satisfactory? How does it work in England?—The senior counsel there replies on the whole. There are five speeches.

11,192. Don't you think there are a great many cases that come by reclaiming notes before the Divisions, where a speech by the junior following the senior would be a very superfluous and a very wearisome proceeding?—Very; and very often it would not take place at all. It would practically come to this, that you would just have three speeches.

11,193. *The Chairman.*—Have you any further suggestions?—Yes. One great cause of dissatisfaction with the Court of Session arises from the intervention of the summar roll in the middle of a case. A case is called at half-past three o'clock, and you have half an hour of it; then next day there is a summar roll, and that extends down to half-past three again, and you have another half-hour of the case; and very remarkable and, let me say, not creditable results are derived from it. For example, I know of a little case from Dundee—*Jaffrey* v. *Ritchie*, 21 Dec. 1860—in which there were no less than eight days' hearings,—little bits of hearings of half an hour each day consumed with a case relative to the rejection of goods as not being conform to order; and there are fees for each day's hearing to counsel and agents on both sides,—in a case that might, if it had gone continuously on, have been disposed of in two hours. Now I humbly think that when a case has begun, and the people have come from the country to hear it, and are staying in town all night, it should be called first next morning, and disposed of before you begin with the summar roll, however summary. You would thereby save expense, and enable those parties who have come from a distance to be present at the hearing.

11,194. Would you make any difference in a case that is likely of itself to occupy several days?—These are very rare cases.

11,195. There have been such cases, and there was one in which you spoke a considerable length of time, but I thought with remarkable brevity,—a case of Muirhead—the Bredisholm coal case?—No doubt such cases do occur, and they ought to be exceptionally treated by putting them aside, and taking the summar roll. But any ordinary case like that of *Jaffrey* v. *Ritchie* should be disposed of at once.

11,196. *The Lord Justice-General.*—Is that an evil of present existence, or is it matter of history?—It is an evil of present existence still.

11,197. Can you give any example during the last year?—I have not the names of cases in my mind.

11,198. *Mr. Shand.*—It is still the rule, is it not, that the summar roll takes precedence of the short roll, even where there are partly heard cases?—Yes; I understand that to be the rule.

11,199. I understand your view to be, that in ordinary cases, and unless there be something exceptional, if a case is once begun, the parties being in possession of the court, the case should be continued without interruption by other cases?—Yes.

11,200. Do you think that would cause a saving of considerable expense?—It would be a saving of expense.

11,201. And it would give a much more satisfactory discussion than any other system?—Yes. If counsel were allowed to state their whole argument without interruption, that would shorten the proceedings too; but there can be no earthly doubt that discussions take up a great deal more time than they ought to do, in consequence of the judges interrupting the counsel. A man, if he is allowed to go on continuously, cannot say the same thing more than two or three times over; whereas, if he is interrupted by four judges now and then, he says it seven or eight times. The first qualification of a judge is the faculty of silence within the limits of human patience.

11,202. Have you any suggestion to make about advisings?—I would make this suggestion, viz. that one speech, and one only, should be delivered from the bench; let the other judges concur. There is no need of four judges repeating the same thing over and over again, and in striving for novelty to give some fresh idea of the case. The result is, that sometimes bad law is laid down; and when the case goes to the House of Lords, that is fixed on, though the judgment may be very sound.

11,203. *The Chairman.*—But if the judgment had been pronounced by the judge who laid down the bad law—?—Yes; but he would not have laid down the bad law, except by reason of the fact that he was obliged to say something new.

11,204. *Mr. Shand.*—Is there no evil in respect of the time occupied?—There must be. After the President of either Division has pronounced judgment, what is the use of listening to three more speeches of the same sort?

11,205. *The Lord Justice-General.*—Of course you mean if the judges are all of one mind?—Yes.

11,206. And all arrive at the same conclusion upon the same media?—Yes, and in the majority of cases it is so.

11,207. *The Chairman.*—Do you think that that is a matter which ought to be the subject of any fixed rule?—No.

11,208. But you think that in most cases, and where there is no particular reason for more than one judge announcing the judgment, it should be left to one judge to do so; as I believe is the custom now very much in disposing of cases upon matter of fact. But if judges were in use simply to concur, the public might not have confidence in their having studied the case?—If it were once understood that it was the practice for one judge to deliver the judgment of the court, I don't think the public would think that the other judges had not studied the case. They have listened to it, and they have expressed their public concurrence in the judgment.

11,209. *The Lord Justice-General.*—Probably your view would be most applicable and most expedient in cases which have been taken to avizandum, and formed the subject of consultation, and where the judges all concur in the ground of judgment?—Yes.

11,210. You would think that the most fitting occasion for delivering one judgment?—Yes.

11,211. *Mr. Adam.*—In a case where a record was closed, and probation renounced, do you see any objection to allowing the parties to go straight to the Inner House, without taking the Lord Ordinary's judgment?—Yes, I would object to that altogether. That is practically abolishing the Outer House, and having only one judgment, viz. the judgment of the Inner House, though we are no doubt doing that at the present moment in reference to matters of pure law arising under special cases.

11,212. I was putting the case of a record closed and probation renounced. That would just be assimilating it to a special case?—Yes.

11,213. *Mr. Shand.*—Do you think it would be expedient that the court should have the power, in cases of a character in which they thought it desirable, to order a reference; for example, in cases where disputed questions arise about remuneration for contractors' or engineers' work, or work of that kind, so as to save the parties the expense of each bringing up witnesses of skill to give conflicting evidence?—I observe that there is such a provision in the American code. The court have power to order a reference to be made. But that is a point which I have not considered.

11,214. Have you not found in many cases that the expense is very unnecessarily increased by each party bringing up two or three men of skill to speak to a matter which a man of skill as judge could decide for himself?—True; and the court there exercise the discretion of remitting to a man of skill.

11,215. Do you think the court have power to do that, and to hold the parties bound by his report?—I don't know the state of the decisions on that point. They are somewhat conflicting, but I think the court have power to do it. In the Paisley Abbey Yard case,

Patrick Fraser.

the First Division laid it down that the court had the power to make an absolute remit. In that case there was an enormous proof of 200 or 300 printed pages as to the desecration of a churchyard, and it was laid down, I think, in that case, that a remit was the proper thing.

11,216. That was in the Sheriff Court?—Yes. It was upon an advocation.

11,217. *Mr. Adam.*—Was it not said that the remit should have been earlier?—The court said the remit should have been made at the outset, and no proof ordered.

11,218. *Mr. Shand.*—Does it occur to you, that in any cases expensive proofs might be saved by the court having power to order or allow the use of affidavits, or that a system of affidavits would be of any use with reference to questions of interim interdict?—No; I would not like to see the system of affidavits introduced into the Scotch courts. They have even been abolished in Exchequer cases now. They do no good. They might now and then prevent a man from making an untrue denial of a statement, but that is all.

11,219. Are they not often useful where a question of interim possession or interdict is to turn on the *prima facie* state of the facts?—A man who makes up his mind to apply for an interdict, or to oppose it, will make affidavit without fail.

11,220. Have you any suggestion to make about the Bill Chamber?—It seems to me that the Bill Chamber is now an utterly useless institution, because after a note of suspension and interdict is passed, you enrol it in the hand-roll of the Lord Ordinary at once. It does not need calling. It does not need the ordinary enrolling in the large roll. Then for what purpose does the Bill Chamber exist? To pass the note? What is a note of suspension and interdict but a petition for interdict? And the judge either refuses the interim interdict or grants it, and then the case should just go on like an ordinary petition for interdict in the Sheriff Court. Suppose he refuses to grant the interim interdict, why should he require to say, 'Pass the note, but refuse to grant interim interdict?' If interim interdict is refused, let the party go on or not as he pleases, without passing or no passing. We might come to the court in another shape, by an ordinary summons, claiming interdict in the conclusions, and we require no leave of the judge to come into court with such a summons. Now it seems to me that there is no use for the Bill Chamber at all, and that you ought to be allowed to present your application for interdict to any Lord Ordinary. One judge would no doubt be appointed in rotation to sit in Edinburgh during vacation. His clerk of court will be in town, and he will be the clerk to all petitions for interdict presented to him. The office of that clerk will be open. We would in this way get rid of a useless institution. Further, in regard to the Bill Chamber, I object to the limited hours that the office is open. It is only open for two hours a day. It ought to be open all day, and in the evening, for it is the most urgent court in the country. There might be a reason for keeping it up when formerly, after the passing of the note, as it was called, you required to call the case in the Court of Session, and to enrol it, and so forth, taking the two as different institutions; but all that being now done away with, I think it is simply an obstruction, and a useless expense.

11,221. The theory of the Bill Chamber has been, that it was a sort of outer court or threshold to the Court of Session. You think there is no substantial advantage to be got from that?—None at all. Formerly you came with advocations in that way, and until recently you required to come with all advocations of interlocutory judgments to the Bill Chamber, until these were abolished, and the judge judged of the propriety of allowing the advocation to go on at all. Now the whole of that jurisdiction is gone.

11,222. *The Lord Justice-General.*—The judge in the Bill Chamber in cases of interdict, and also in cases of suspension of diligence, judges whether the thing is to be allowed to go on at all?—Yes.

11,223. To whom would you transfer that power?—To any judge of the Court of Session during session.

11,224. That is to say, the judge to whom the note is presented will have the power of refusing the note *de plano*, as the Bill Chamber judge had before?—Yes.

11,225. That is hardly an exercise of the same kind of jurisdiction as the Lord Ordinary and Court of Session exercised—to refuse an application *de plano*, without even calling for an answer?—I would like to know why the judge should be entitled to refuse. He may refuse interim interdict on the *prima facie* statement of the case, but why should he refuse to allow a party to go on to prove the merits of his case upon a closed record?

11,226. Because it has no merits?—At the present moment he could come in another form into the Court of Session claiming interdict—viz. by a summons, with conclusions for interdict—and you cannot throw him out at the outset. In like manner, in the Sheriff Court, a petition for interdict is presented to the Sheriff: he refuses the interim interdict, but he cannot prevent the party going on with closing a record and proving his case on the merits, and demanding final interdict at the end of the day.

11,227. Then you think it desirable that the judge, whether he be Bill Chamber judge or not, should not have the power of refusing a note of suspension and interdict at once?—I think he should not have that power.

11,228. What do you say to the suspension of diligence?—There he should have simply a power of refusing the note.

11,229. That power must exist, because if he had not that power, the diligence would be suspended?—He refuses to suspend it in the meantime on this statement until the grounds of suspension are proved.

11,230. But a man against whom a caption is taken, who is going to jail, presents a note of suspension to have the diligence stopped: what is to happen there? If the judge is of opinion that there is no good reason why the man should not be incarcerated, what is he to do?—He refuses to suspend *ad interim*.

11,231. That is to say, he refuses the note?—Yes.

11,232. Would you alter that?—No, I don't propose to do so.

11,233. *Mr. Shand.*—Do I rightly understand your suggestion to be, that each Lord Ordinary should take up suspensions and interdicts just as the Sheriff-substitute would take up a suspension and interdict, deal with the question of interim possession, and leave the process to take its ordinary course?—Yes.

11,234. *The Lord Justice-General.*—But the effect of that would be, that the question whether a diligence is regular and ought to have effect would not be determined at once, but would remain to be determined, although the man was in the meantime in prison, or his goods poinded?—Yes.

11,235. Now is it not much more desirable that there should be a means of determining that at once, by the Lord Ordinary refusing the note, if he is satisfied that there is no ground of suspension, leaving the suspender to reclaim to the Inner House? Is it not very desirable that a question about the regularity or propriety of a diligence should be determined summarily and at once?—I don't propose to take away that power from the Lord Ordinary. I propose to give that power to the Lord Ordinary; but at the same time I want to take away from him the power of throwing it entirely out of court at once, on the mere statement in the suspension. Let the suspender prove his case if he can.

11,236. If he is to be allowed still an opportunity of proving his case, the matter will not be determined in that summary way?—The interim suspension will be determined. It is refused *ad interim*.

11,237. But in the question whether diligence has been regularly used, or whether there is sufficient ground for using diligence, and where it is desirable to have an immediate decision, is there any reason why the present system, under which you get that immediate decision, should be altered in favour of another, which

would allow the case to go on to make up a record, and lead evidence, when the court can at once pronounce without hesitation that the suspender has no ground for suspending the diligence at all?—Well, I would give the Lord Ordinary power, if he saw an irrelevant note of suspension, to throw it out at once; but in cases of interdict, what is the necessity for passing the note, when you are merely refusing interim interdict?

11,238. *Mr. Shand.*—If a party presents a note of suspension, and he is refused *ad interim* such relief as he asks, it is in his own choice whether he shall accept that as final, or go on with his case; but is there any hardship to anybody, that if he chooses to go on, he should be allowed to do so?—I don't see any.

11,239. Do you see any reason why that case should not take the usual course of closing the record, if the party who has not got the interim remedy desires that?—If the interim remedy is refused him, at the present moment he can get, without leave of the court, an attack made upon this diligence by reduction. He can get the same remedy, reducing it and setting it aside.

11,240. *The Chairman.*—But meantime the creditor has his diligence?—True.

11,241. And gets payment of his money?—So he would, if the interim interdict were refused.

11,242. *The Lord Justice-General.*—Do you mean that you would convert that into a process of reduction?—Practically it would be so.

11,243. *Mr. Webster.*—Suppose the interim interdict were granted on the condition of caution, how would you deal with that matter of caution?—Do you mean what clerk should take it?

11,244. Yes?—The clerk of the Lord Ordinary to whom the application is made.

11,245. *Mr. Shand.*—That is a case that occurs every day in the Sheriff Court?—Yes.

11,246. There is no peculiarity in suspensions in the Court of Session that does not apply to every case of suspension and interdict in the Sheriff Court?—Not one.

11,247. And there is nothing analogous to a Bill Chamber, or the passing of a note there?—No.

11,248. And it works satisfactorily?—Yes. The Bill Chamber seems to me to be an antiquated institution altogether. It is a mere name.

11,249. *Mr. Webster.*—How would you deal with sequestrations?—I would allow any Lord Ordinary to grant sequestration.

11,250. *The Chairman.*—You would hold the Lord Ordinary for the time in vacation to have the same power that the Bill Chamber judge has now?—Yes.

11,251. *Mr. Shand.*—Is it not found to be a considerable evil at present, that the junior Lord Ordinary's time is almost exclusively occupied for days during session with Bill Chamber work?—It is so.

11,252. What is the result of that on his ordinary business?—He can do nothing.

11,253. His debates lie over for months?—Yes.

11,254. Do you not think it would be very much better, both on that account, and in order to have important questions distributed among the Lords Ordinary, that applications for interdict should be presented to any Lord Ordinary?—I think so. No special business should be appropriated to one judge. His mind gradually gets a twist, and he gets into a particular groove. All business should be distributed over the whole court. One is sometimes afflicted with the peculiar notions of a particular judge, and it impedes business.

11,255. *Mr. Campbell.*—A practical difficulty has been suggested in the event of the abolition of the Bill Chamber Office, that assuming a man to present his suspension and interdict to one Lord Ordinary, and it was refused, he might repeat the processs and try another Lord Ordinary?—And why not? I see no great difficulty in that. He gets his remedy from one of the judges of the Supreme Court.

11,256. *The Lord Justice-General.*—You would require to have some special arrangement about caveats?—Yes; there might be a special arrangement that they should all be put up at a particular place. I suppose the same difficulty which Mr. Campbell has suggested occurs in England, where there are three or four Vice-Chancellors, and you see every day an application for an injunction made to one court, and it is refused, and the party tries another.

11,257. *The Chairman.*—But here, a party might try the whole of the five Lords Ordinary in that way. Would it not be right to limit the number of applications?—It might be limited, and a roll might be made up, from which it would appear whether a prior application had been made.

11,258. Or you might require that when a second application is made, it should be stated to be a second application?—Yes.

11,259. *The Lord Justice-General.*—What is the great advantage you expect from abolishing the Bill Chamber?—You distribute the work among the five judges. I think that a great advantage. You don't overwhelm one man with special business; you get rid of a useless form, and that is always an advantage.

11,260. *Mr. Webster.*—Would you also distribute the summary petitions, which at present go all to the junior Lord Ordinary?—I said so. I have nothing to suggest as to costs; that must be always a matter in the discretion of the court.

11,261. *The Lord Justice-General.*—I rather think that under that head is intended to be embraced any suggestion you may have to offer with a view of diminishing the expense of litigation. Have you anything to say about that?—I don't see how the business of a Supreme Court can be carried on more cheaply than it is at the present moment. I have been reading about the courts in other countries, and I see that the expense there is about the same as in our own, if not greater. Even in New York it is so, where persons are both counsel and agents at the same time. I cannot suggest any practical remedy to diminish the expense.

11,262. Have you ever considered the details of accounts of expenses, in order to see where the great expense lies?—The great expense lies chiefly in the continued hearings. If a case could be decided in one day, without being taken to avizandum, there would be little expense, comparatively speaking. That, of course, cannot be done in difficult cases; but where, as in the case of Jaffrey, which I referred to, you have eight different refreshers to counsel, and fees to agents for attendance, and that on both sides, it becomes very heavy.

11,263. *The Chairman.*—That is an exceptional case?—Well, I cannot say. For example, I don't think the calling of a case at half-past three, and giving half an hour or twenty minutes to it, is an advantage.

11,264. You would rather the court should rise?—Yes. The court are tired, and counsel are tired, and the half-hour counts in the matter of expenses as a day's hearing.

11,265. *The Lord Justice-General.*—Do you think it is indispensable, for the continuation of that discussion on the next day, that counsel should receive an additional fee?—I think that counsel must be paid according to the extent of his labour; and if he requires two days to debate the cause, he must be paid for it.

11,266. The counsel is in attendance at court all day, and every day; the amount of time occupied in preparing himself for the hearing, and the amount of time consumed in the hearing, is the same, although the hearing may be upon two days instead of one: why should he be paid more?—All I have to say to that is, that it is the rule.

11,267. Is it the rule, and therefore ought it to continue, or is it the rule, and a bad rule, and therefore ought it to be abolished? That is the alternative?—Why should cases be called at a quarter to four? It is the court that is to blame here, and not the counsel.

11,268. *Mr. Baxter.*—Suppose you are fee'd to state the case, should you be fee'd twice?—Certainly not; but it is the rule here, and I believe the rule in the House of Lords too, that for every day a paper is in the cause-list, fees are due to agents and to counsel.

Patrick Fraser.

11,269. *The Chairman.*—There is some little difference there, because counsel taken to the House of Lords have not the same means of being occupied in other courts on that day. In the Court of Session, counsel don't give themselves for the day to a particular Division?—I refer to English counsel when I speak of the House of Lords. They have bar fees for every day the case is on the roll.

11,270. *Mr. Campbell.*—In the Sheriff Court the payment is regulated by the number of hours occupied. Would such a rule not apply to counsel, viz. if he gave a number of hours to the discussion of a case, equivalent to the average length of one or more days, that he should be paid for that one or more days' work according to the number of hours occupied?—In the Sheriff Court they are paid by the hour in proofs, but not for speeches.

11,271. *The Lord Justice-General.*—Suppose a counsel to have sent with his papers originally a fee quite sufficient to remunerate him for his study of the case, and for his debating the case, is there any reason in principle why that fee should be supplemented because the discussion of the case is begun one afternoon and finished next morning, instead of having begun in the morning and finished in the afternoon?—I admit there is none. It is a modern practice. Lord Cowan told me that it was not in use in his time; and it is not in use in the Outer House.

11,272. Is it the case that the scale of fees to counsel has been increased very much in the last ten years?—No; I don't think it has increased very much; but the scale of fees here is lower than it is in the English courts.

11,273. But in the Scotch courts has it or has it not increased within the last ten years?—Large fees have been given, no doubt, to counsel, which the court have disallowed and cut down; but there has not been an increase to any very great extent.

11,274. *Mr. Campbell.*—Has not the rate of professional remuneration in all learned professions, and professions of skill, been largely enhanced within the last ten years?—Very much.

11,275. *The Lord Justice-General.*—Has the rate of remuneration of agents in the Court of Session increased at the same time?—Yes; they have got an increase.

11,276. When was that?—By the last table of fees.

11,277. *Mr. Webster.*—I think the rate of fees, as fixed in 1806, remains unchanged?—Oh, no; it is a great deal later than that.

11,278. *Mr. Adam.*—Are you not thinking of fees for conveyancing?—I daresay I am.

11,279. *The Chairman.*—Do you think there is any propriety or any practicability in fixing absolute limits to counsel's fees?—I think it would be utterly impossible, because of the varying nature of cases.

11,280. You cannot tell beforehand how long a case will occupy?—If you attempt to fix any rule of that kind, it would come to be a matter of special bargain in every case.

11,281. It would cease to be a honorarium?—Yes; and no member of a learned profession is bound to work for less than his talent is worth; and he won't do it, fix it as you please. Further, it would degrade the profession altogether. I don't know any place where it is done.

11,282. *The Lord Justice-General.*—Bargaining for fees would probably not lead to their being smaller?—No; a counsel is necessary, or thought to be necessary, for a particular case.

11,283. It would seem, then, that the only point in which counsel's fees can be very well meddled with is the matter of continuation fees?—Yes.

11,284. Not with a view to abolishing additional fees altogether, because causes may last much longer than was anticipated when the first fee was sent?—Yes.

11,285. That you would of course except from the answer you formerly gave?—I would.

11,286. *Mr. Webster.*—A suggestion has been made, that a good deal of the formal work in which at present counsel is required, might be done by direct communication between the agent and the judge at chambers. Would you favour us with your views upon that matter?—Would you give an example of the kind of formal work to which you refer?

11,287. Applications for diligences, or for commissions to examine witnesses?—I see no objection to that being done by the agents going to the judge direct.

11,288. The signing of any note or minute about a mere matter of procedure or form?—There you come upon more difficult ground,—putting papers into process signed by any other than the counsel in the cause. But as to applying for diligences, that can be done at present by applying to the clerk, and counsel are excluded.

11,289. You can only at present apply to the clerk with effect if your opponent consents, which is practically never done; but is there any reason why the agent might not do that kind of work in direct communication with the judge?—None whatever. I see no reason why he should not do it.

11,290. As to reclaiming notes, which are now mere matter of form, is there any necessity for keeping up the system of having these signed by counsel?—It is a prayer to the court to get a judgment altered. It must be signed by some one; and unless it is signed by counsel it will be signed by agents, who will get their fee for it instead of it going to counsel; so that it is no saving to the client.

11,291. The agent never gets fees for signing. He would get his fee of six shillings for drawing the reclaiming note, which is matter of form, without a prayer?—He does not sign it at present; but he would soon claim and get his fee for signing.

11,292. *The Lord Justice-General.*—Suppose it were to be provided that the additional labour undergone by the agent in attaching his name to the reclaiming note which he has written, should not entitle him to any additional remuneration, then the counsel's fee would be saved?—Well, it would only be a guinea. The counsel is generally asked the question, Shall we reclaim against this interlocutor? and his opinion is delivered upon that, and he is paid for his opinion by the guinea which he gets for signing the reclaiming note.

11,293. *Mr. Webster.*—For that he also attends the moving of it?—Yes. As regards the privileges of agents, there are sometimes very anomalous matters connected with that. For example, I have two bodies of procurators in Renfrewshire, totally separate and independent of each other. The Paisley procurators cannot plead in Greenock, and the Greenock procurators cannot plead in Paisley. I have very frequently found great inconvenience arising from that. The Paisley ones have got a charter, and the Greenock ones have not; they come under the Procurators Act. Now I would propose that all agents throughout Scotland should be eligible to practise in every Sheriff Court. It would be very little taken advantage of. Sometimes a Glasgow writer might come out to Paisley, or to Pollokshaws. They do come out there already, and I am obliged to hear them there, because Pollokshaws is six miles from Paisley, and only two from Glasgow. I would therefore allow all the procurators throughout Scotland to practise in any Sheriff Court; and I think that would very frequently conduce to convenience. In like manner, I would abolish the law established in 1823 by a decision of the court, to the effect that it is *pactum illicitum* for a country agent and a town agent to bargain about the division of their accounts. That system exists in England, and works very well; and it gives the country agent an interest in the cause, and is the only way of remunerating him.

11,294. *The Lord Justice-General.*—Would you carry that extension of the privileges of agents any further?—So as to enable them to practise in the Court of Session?

11,295. Yes?—I would. That would be very little taken advantage of either, I think. There must be some person in Edinburgh to go to the clerks' offices, and to borrow processes. It would take away a kind of privilege which is supposed to belong to the Edinburgh agents. It would, I think, increase the affection, if there be any, for the Court of Session in the minds of country agents, who would then know that they were members of that court as well as the Edinburgh agents.

11,296. *The Chairman.*—Would you have any control of the court as to admitting them as agents to practise before the court, or would it be a right which they would have by reason of their admission anywhere?—No, I don't think so. I think all these procurators, if they have the privilege of practising in the Supreme Court and throughout the country, should be admitted by one central authority, as they are by the Court of Queen's Bench in England. Every Sheriff is at present entitled to admit, and does admit, procurators. I would take away that power from the Sheriffs, and confer it either on the Court of Session, or upon representatives of various bodies—such as the advocates, the writers to the signet, and the solicitors themselves throughout the country.

11,297. *The Lord Justice-General.*—The admission to practise before courts is rather a judicial act, is it not?—It is. Well, give it to either of the Divisions of the court.

11,298. *The Chairman.*—It would be difficult for the court to make trial of the qualifications of all the procurators in Scotland. But how would it do that such country practitioners as desired to have the privilege of practising in the Court of Session should have themselves admitted, the court satisfying itself as to their qualifications?—I would make all the procurators at present in existence members of the Court of Session without any examination at all. They have been admitted, and they have passed. But in future I would say the procurators must be admitted by the court; and make them all be admitted procurators of court, without reference to application at all. A great many people won't take the trouble of making application, and yet would like to be considered members of the Court of Session.

11,299. Do you think they ought to have some person in Edinburgh who would be responsible for the borrowing of the papers, and so forth?—Yes; there should be the same rule here as in the House of Lords. Any agent here, for example, may practise in the House of Lords; but he must have an office in London. He may put his own name on the back of the appeal case, and not employ an English attorney at all; but he must have an office in London, where papers can be served on him. Now, if a country agent is to borrow processes, he must have some person in Edinburgh responsible for the borrowing of them.

11,300. A suggestion was made before this Commission, that country agents should have the privilege of communicating from the country direct with counsel, and that the counsel by his clerk should borrow the process, and transmit it to the agents in the country. Do you think that would work?—No, it would not work at all. Some counsel would do it, and some would not, and could not be expected to do it.

11,301. I understand from what you have said, that you think the court should consist of Lords Ordinary and two Divisions, with an occasional Division when required?—Yes.

11,302. Do you think that the number of judges in the Court of Session is too great for the work they have to do?—No; I think it should be added to; and I humbly think that the salaries of the judges of the Court of Session should be increased. The salaries of the judges of the Court of Session are lower than those of the supreme judges in England and Ireland. At present I think the staff of the court is insufficient for the work. Some of the judges in the Outer House are overwhelmed with work; and in all probability one or two of them will have no vacation. Now a judge requires some rest; otherwise he becomes unfit for duty.

11,303. Have you anything to say as to the Court of Justiciary?—The Court of Justiciary exercises a jurisdiction of review in notes of suspension and liberation; and the applications to it on that ground are generally made by poor people, so that it may be considered as the poor man's court. Now the fees in that court are the highest of any court in the country. Before a hearing can be got in the Court of Justiciary, each of the parties—the suspender and the respondent—must pay a guinea to the clerk, and half a guinea to the macer; that is three guineas. If the case is continued till next day, other three guineas must be paid to these officials; and if there is avizandum made to a third day, other three guineas must be paid.

11,304. *Mr. Baxter.*—What for?—Just for nothing at all. I have here a note of clerk's dues *in causa* '*Caledonian Railway* v. *Fleming*, payable by respondent, Feb. 20: diet of court, £1, 1s.; copy interlocutor, 2s.;' and the copy was taken by the clerk of the agent. That is £1, 3s. for that diet paid to the clerks. And then the macer's account is: 'To diet of court in advocation and suspension, Caledonian Railway, 10s. 6d.' Now that ought to be abolished. If it is necessary that these clerks should be remunerated, they ought to be remunerated in another way than by exacting these heavy fees, which are a practical obstruction to the review by the Court of Justiciary.

11,305. *The Lord Justice-General.*—Do these fees go into the pockets of these officials?—I am so informed.

11,306. In addition to their salaries?—I suppose so. They go into the pockets of these officials.

11,307. Are you sure that they don't account for them to the Exchequer?—That would make it still worse. I was informed that they get them themselves. Now it is the more necessary that this matter should be regulated, seeing that the jurisdiction of the Court of Justiciary in these suspensions has been very largely increased by the Summary Procedure Act of 1864. Cases which were formerly considered civil cases, and were brought before the Court of Session, are now relegated to that court. While speaking of the Summary Procedure Act, allow me to say this, that that Act contains very stringent provisions, very large powers to Justices of the Peace, and cutting off the review which formerly was competent to the Court of Justiciary. For example, it is no longer necessary that proofs should be written down in any of these cases; whereas the law formerly was, that unless the writing down of the proof was dispensed with, it must be written down, and the court saw where there was any error or flaw. But all that is now required to be done is to present the complaint, to state the plea, and then the sentence. Now it was proposed that the Justice of the Peace should be obliged to state a case for the opinion of the Court of Justiciary upon the application of the defender; and clauses were drawn and inserted in the bill, and it passed the House of Commons in that form. But an outcry got up, stimulated by a number of the Procurators-fiscal in the west, to the effect that it would trouble them very much to prepare these special cases, and the whole of these clauses were struck out of the bill in the House of Lords. These were the clauses in the English Act 11 and 12 Vict. c. 43. In England any party is entitled to demand from the Justice convicting him a case setting forth the facts as he found them to be proved, and then the law as he applied it, and that is put before the Court of Queen's Bench. Now I say that that power ought to exist in this country also, for very frequently a Justice himself feels difficulty in construing the statute; he convicts with hesitation, it may be, and is anxious that his judgment should be set right, but there is no means of doing it. I would therefore propose that the whole of these eleven or twelve clauses giving that power of stating a special case should be passed into law.

11,308. *Mr. Baxter.*—Does it apply to Justices of the Peace only?—No; it applies to Sheriffs also.

11,309. *Mr. Campbell.*—In general, the Sheriffs have thought the Summary Procedure Act so inexpedient, that they have proceeded under the old form, and have not availed themselves of the provisions of that Act?—They have. In a number of counties Sheriffs have directed the Fiscals not to bring prosecutions under the Act at all, but to bring them under the old form, and to take down the proof, where it is not dispensed with by the special statute. I may state, in reference to the matter of costs in the Court of Justiciary, that the Faculty of Advocates made a report on the subject to the late Lord Advocate, and gave him a table of fees, but he did not attend to it—I don't know through what

Patrick Fraser.

influence. The Faculty reported: 'The attention of the committee has been drawn to the fees taken from suitors before the High Court of Justiciary, in the office of the Clerk of Justiciary, and by the macers. These appear to the committee to be excessive. The committee recommend that a provision be inserted in the present Bill to the following effect: "The following and no other or higher fees shall be allowed to be taken for any matters due in or under any bill or process of suspension, suspension and liberation, or advocation, by clerks or macers of court."' That report was approved of by the Faculty.

11,310. *Mr. Baxter.*—Are the fees suggested very much less?—Very much less.

11,311. *The Chairman.*—What is the date of that report?—26th May 1868.

11,312. *Mr. Adam.*—It is a report upon the Court of Justiciary (Scotland) Bill?—Yes.

11,313. *The Chairman.*—Have you any other suggestion to make?—I have no further suggestion.

SATURDAY, 3D APRIL 1869.

Members Present:—

LORD COLONSAY.
THE LORD JUSTICE-GENERAL.
LORD BARCAPLE.
A. R. CLARK, Esq.
JAMES CAMPBELL, Esq.
GEORGE HARRISON, Esq.
JAMES ADAM, Esq.
A. B. SHAND, Esq.
CHARLES MORTON, Esq.
JAMES WEBSTER, Esq.
J. B. BAXTER, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

The Hon. Lord Ormidale.

THE HON. LORD ORMIDALE, examined.

11,314. *The Chairman.*—You are one of the Senators of the College of Justice?—I am. But will you allow me, before the examination proceeds, to mention that I have been till to-day engaged constantly in the discharge of my official duties in court or otherwise, and therefore I fear that I have not been able to bestow that attention on what I understand are to be the matters of inquiry, to enable me to give my answers so fully or so satisfactorily as I should wish; but so far as I can, I shall be most happy to give every information and aid in my power to the Commissioners.

11,315. How long have you been on the bench?—Seven years in February last.

11,316. In what year did you come to the bar?—In 1838; I think I was twenty-three years at the bar.

11,317. Previous to coming to the bar, you had an opportunity of seeing a good deal of practice in the department of preparing cases?—Yes; previous to being called to the bar I practised as a writer to the signet for several years, and for eight years while at the bar I was Sheriff of Renfrewshire.

11,318. I believe you have directed your attention a good deal to the forms of procedure, to the evils of delay, and to the expense attending litigation in the Court of Session?—I could hardly avoid doing so, from the long experience I have had in various departments of the legal profession.

11,319. Have you any suggestions to offer to the Commission in regard to obviating these evils, or improving the constitution and procedure of the court?—I would prefer if questions were put to me on the various points on which my opinion may be desired. I may mention, however, that I have to some extent directed my attention to what appears to me to be the causes of the great delay and expense which have attended litigation in the Supreme Court; and I have also had some experience, although not as yet a year's experience, of the recent statute, which has to a considerable extent, I think, remedied those evils. It has already done a great deal of good, and I expect it will be found to effect a great deal more. I should add, however, that I may perhaps be somewhat partial to that measure, because it embodied and gave effect to a very great extent to many of the views and suggestions which I had given public expression to, shortly before it was introduced into Parliament.

11,320. And given expression to after full consideration?—I think I may say so.

11,321. Have any further changes occurred to you which you think it would be desirable to make?—In regard to the mere regulations of the court, for the purpose of carrying on litigations, from any experience I have had of the working of the recent statute, I don't feel myself in a situation to suggest any material changes or alterations, except such as I think the court under the statute have power themselves by rules or Acts of Sederunt to carry into effect. But we have scarcely as yet had sufficient experience to enable us to frame such rules or Acts of Sederunt. I, for one, think—and I believe my brother judges may probably be of the same opinion—that we should not be hasty in making these rules, till we have had more experience of the working of the statute.

11,322. I infer from what you say, that nothing has presented itself to your mind that would require the intervention of the Legislature to correct?—I think not, in regard to the mere regulation of the proceedings in court. Probably the Commissioners may be aware that I have entertained for a long time an opinion in regard to the constitution of the court itself, which has not been given effect to in the recent Act, and I may say that I still continue to entertain that opinion.

11,323. What is that opinion?—It relates to the doing away with the Lords Ordinary in the Outer House. According to my view, the same number of judges, however, would require to be continued, to carry on the work on the footing that I have now to suggest to the Commissioners, of three Divisions being formed; because then there would only be one judge left, supposing that each of the Divisions consisted of four judges. Assuming, then, that there were three Divisions, with four judges attached to each, there would be only one judge left for the Bill Chamber work; which, with those other proceedings that at present are carried on before the junior Lord Ordinary, would probably engage the most of his time; and if it did not, there would be jury trials and proofs, and other matters which I need not enumerate, quite sufficient to occupy the whole time that he would have at his disposal.

11,324. Have you considered how you would regulate the procedure in the event of there being three Divisions? I suppose that causes would have to originate in the Divisions?—That does not occur to me as probably the best course. I think that there being always one judge in the Outer House, as I have suggested, all causes should be called before him in the first instance; and if it were found necessary, there might be another judge in turn from one or other of the three Divisions, before whom the causes in the first

instance would be prepared to the extent of having the record closed and probation renounced; and that being done, the causes would take their places in the Divisions, to be then proceeded with. And it might possibly happen, even after that was done, that a remit for certain purposes would require to be made to the judge officiating in the Outer House, for the purpose, for example, of taking an incidental proof; or if the number of trials and proofs were to increase, so that it was impossible for the single judge in the Outer House to overtake them, they might occasionally require the services of one of the judges of the Inner House.

11,325. You would not contemplate, then, that in the Outer House any judgment should be pronounced?—No judgment on the merits of the suit. There might be many subordinate questions occurring in the course of the preparation of causes, as to which it would be quite right and proper that the judge before whom the making up of the record was going on should at once decide. Many matters of that description, I think, might be fairly left to his judgment, without giving any right of reclaiming to the Inner House. At the same time, his judgment on these points, or some of them, might be left open for reconsideration in the Inner House, when the case went there, although not reviewable in the first instance. There are a great many of such details which could only be well dealt with in the course of preparing a measure upon the general basis I have suggested; and therefore any suggestion which I now make about them, must be on the understanding that I have not matured my mind in regard to them.

11,326. The case being prepared for judgment in the way you describe, it would go to the Division and be heard by counsel?—Yes.

11,327. And then the Division would pronounce judgment upon it. Would you have that judgment to be final?—No; I think that in certain circumstances, and subject to certain conditions, there ought to be a right in the unsuccessful party to have the judgment reviewed in a court of review or court of error, whatever it might be called, consisting of 5 or 7 judges of the other two Divisions—I mean the Divisions other than the one in which the judgment was pronounced. But it has occurred to me that it might be advisable to have always one judge of the Division in which the judgment was pronounced present in the court of review, that he might give such explanations as might be thought right to the court of review. But that, again, is a matter of detail which could only be well considered in the preparation of a measure in conformity with the general principles I have explained.

11,328. Do you mean that the composition of the court of review is a matter of detail?—The composition of the court of review, and the question whether any of the judges of the court by whom the judgment was in the first instance pronounced should be present in that court, may, not inaccurately, I think, be called matter of detail, although of the greatest importance. Then, as a check to unnecessary litigation by parties asking a review in all cases, it has occurred to me that such review should not be allowed at all, except in those cases where there has been a difference of opinion among the judges in the first instance, in which case I think the right of the unsuccessful party to have a review should be absolute, but that where the judgment of the court in the first instance is unanimous, there should be no review, unless with the leave of the court obtained at the time the judgment is pronounced, or very soon afterwards. It has occurred to me that that would give sufficient protection to litigants against the risk of a hasty or erroneous judgment in the first instance; and it rather occurs to me, that a judgment pronounced in the circumstances and subject to the right of review I have explained, would probably turn out to be more satisfactory to the country, and in reality to be sounder and better, than a judgment pronounced under the present system. I think that, according to the plan I have suggested, there would be a very great saving of time, and also in the general case, where there has been no review of the judgment of the Division, an immense saving of expense. Any one who has had experience or been conversant with litigation as it goes on in the Court of Session, and probably in all courts—the superior courts in England as well as in Scotland—must be aware that there are many questions litigated, and very keenly litigated, which neither involve much difficulty, nor much patrimonial or pecuniary interest. In a great many of these cases, I think that one judgment of the court is quite sufficient, more especially if that court consists of four judges, each of whom, it may be presumed, has had large experience in different departments of the law. One may have had great experience in the conveyancing department, or construction of deeds; he may have been very much engaged while at the bar as a chamber counsel, giving opinions on deeds and conveyancing questions; another, again, may have had very large experience in the jury court, and be familiar with questions of evidence; another may have been, from circumstances, much engaged in commercial questions, and so on. One judgment by a court so constituted, would, I cannot doubt, be found, in by far the greater number of causes, to be quite sufficient, and satisfactory to the country.

11,329. That is, when it is unanimous?—When it is unanimous; and the review being a right absolute in the party where there is a difference of opinion, would probably completely clear up the difficulty; and at all events there would be obtained as sound and satisfactory a judgment as could in any circumstances be expected.

11,330. When the judgment was unanimous, it would not be competent to the party without leave to go to the court of review?—That is my opinion.

11,331. Would you make it competent to the party to appeal to the House of Lords?—I would leave that open. I think that should not be denied to a party. It might be a consideration with the House of Lords, when the cause went there, that the court below were so satisfied as to the soundness of their judgment, that they saw no sufficient reason for a review. But I would leave the right of appeal to the House of Lords open.

11,332. Would you have the Division to take the evidence in the case themselves?—If the single judge, who would always be officiating in the Outer House according to my suggestion, had time at his disposal, I think that to the extent of the time which he so had at his disposal, remits for proofs might be very well made to him. But there would be this disadvantage, that he could only report the proof; while if one of the judges of the Division took the proof, he would then form one of the court giving judgment upon it, and be able to give his views to the court, and to give them very valuable assistance as to the judgment that ought to be pronounced, having had the advantage, which the other judges forming the Division would not, of having seen and heard the witnesses.

11,333. You would not contemplate that evidence should be taken before the four judges, but only by one of them?—I cannot contemplate its being taken before four judges. That would require I don't know how many judges to overtake the proofs; but I have some observations to make at another stage of the inquiry on the subject of proofs before a judge, because I have thought for a long time—indeed, I never had any other opinion—that the proofs which are now so much gone into ought to a large extent to be superseded altogether, and that in questions of disputed fact a jury is the proper tribunal.

11,334. Have you considered whether the judge that sits in the Outer House to prepare records should be always the same judge until a vacancy occurs in one of the Divisions, or whether there should be a change?—That is a point which has not occurred to me for consideration. It is a matter of detail.

11,335. Have you not formed any opinion on that subject?—I have really formed no particular opinion on it. The only thing which had caused some little consideration of it in my own mind was a suggestion I saw lately made, to the effect that the Inner House judges should take their turn in the Outer House, and that the

The Hon. Lord Ormidale.

Outer House judges should take their turn in the Inner House. Now, in regard to that proposal, which involves to some extent the point which you are now inquiring about, I cannot see the propriety of it at all. In the first place, I don't see what object it would serve; and in the second place, I can quite understand, and am fully convinced, that it would give rise to a great disarrangement of business, and to loss of time. A Lord Ordinary sitting in the Outer House for a month, and then transferred to another tribunal, would leave a number of cases in a transition state; and the time that he had been engaged with them would probably be entirely lost, because a new judge would require to begin them again. Therefore I cannot see any advantage arising from that proposal, and I see a great many disadvantages.

11,336. You are aware that that system at one time existed, and that it was abolished?—I am aware that it did exist, and I am not in the least surprised that it should have been put an end to. It was abolished in 1810. I have had a little experience recently as to what would be the working of such a plan—I allude to the Court of the Lords Ordinary. There I felt, as I have no doubt all the Lords Ordinary who formed that court must have felt, that even the attending it led to very great embarrassment in the proper discharge of their other duties as Lords Ordinary, and to the loss of a great deal of time, and a great deal of unnecessary trouble to the litigants and their representatives.

11,337. I believe a considerable portion of the time of the Lords Ordinary at the commencement of last winter session was so occupied?—According to the best of my recollection, there were two periods of four weeks each, during which that court sat for three days out of five in each week.

11,338. And all the Lords Ordinary except one were engaged in that court?—Yes; four out of the five Lords Ordinary were so engaged.

11,339. Have you anything to state with reference to the jurisdiction of the court?—I should like, before doing so, to make one or two additional suggestions with reference to the subject of the three Divisions. It has occurred to me, in regard to that matter, that the practice has by no means been consistent, and it is difficult to reconcile it with the idea that there ought to be an independent judgment, in the first place, by a Lord Ordinary, and then a review by a Division of the court. For according to any little investigation I have had time to make on the point, I find that in many of the most important, complicated, and difficult cases, the Lord Ordinary, in place of deciding the case himself, reported it to the Inner House; and not only so, but very eminent judges have stated as a reason for their doing so, that the difficulty of the case, and the greater expedition in obtaining a judgment, recommended that course to them. I find that that course was frequently followed in entail cases. In the Auchindoir case, for example, 20th November 1840, 3 Dunlop 136, Lord Jeffrey did not decide the case. He ordered written argument for the purpose of reporting, and then he reported without a decision, 'merely that the parties might,' as he said, 'have the benefit of a final judgment with the least possible expense and delay.' Lord Cuninghame, in the Strathbrock entail, on 23d June 1842, 4 Dunlop 1430, followed the same course; assigning as his reason, that both parties expressed a desire to obtain a judgment with as little delay as possible. Again, in the Rannieston entail case, 26th February 1842, 4 Dunlop 816, Lord Jeffrey reported the case to one of the Divisions without any judgment of his own, assigning as his reason, that the parties 'may have the benefit of a final judgment with as little delay as possible, and because it appears to him that some of the points that are raised in it are attended with considerable difficulty;' and in the Aboyne entail case, 4 Dunlop 843, Lord Jeffrey followed the same course, assigning as his reason, that it was necessary that it should be decided with the least possible delay. In the case of *Stevenson and Others* v. *Hamilton and Others*, 3d December 1838, 1 Dunlop 181, involving difficult questions of the rights of a husband and wife in a question with creditors, Lord Moncreiff adopted that course, stating that, 'although the Lord Ordinary has formed a decided opinion on some points in the case, he thinks that the most important question involved is one of difficulty; and as the decision of it one way would supersede altogether several of the other points which it would be necessary to determine if an opposite judgment were pronounced, he thinks that it would be most convenient for saving expense to the party that the cause should be reported without a judgment.' And we are all aware that some of the most important causes, and just because they were held to be very important, were appropriated exclusively to the Inner House, and not allowed to go to the Lord Ordinary at all.

11,340. *Lord Barcaple.*—Perhaps you would explain how that course of reporting came to save time?—That is another affair; but I can understand that it would save time in this way, that if decided by the Lord Ordinary, there must be a full consideration by him in the first instance; and some of the more important cases might remain on his table a considerable time before he gave judgment.

11,341. Did the Lord Ordinary not, in every one of the cases you have mentioned, give a very detailed and elaborate note?—It is one thing to decide a case, and it is another to report the *pros* and *cons*—the argument of the one party and the other—and even to indicate the judge's own view. The Lords Ordinary did so in all these cases, I presume, or at all events in most of them; for they gave very elaborate opinions,—opinions that must have been of great use to the judges of the Inner House; but I have yet to learn that it is the proper function of a judge to report cases, and not to decide them. I think it is an anomalous position to put judges in, to make them mere reporters to another tribunal.

11,342. I suppose the case got precedence in the rolls of the Inner House by being reported?—I am not aware; I don't think so.

11,343. The system of reporting in that way from the Outer House is now in abeyance, is it not?—So far as my experience has gone, I report few cases; I decide them.

11,344. *The Lord Justice-General.*—I think the cases you have referred to as examples of reporting all occurred before the year 1850?—Probably they occurred mostly before that; but I don't think all of them did.

11,345. I think all you have mentioned did so?—Yes.

11,346. You are aware, I daresay, that since that date there have been very few cases reported?—Probably very few; and the practice has gone into desuetude lately.

11,347. To what do you ascribe that?—It is difficult to tell. I got no direction one way or other when I was appointed a judge. But I thought it was my proper duty to decide each cause, and I have accordingly done so.

11,348. You are aware of the section of the Act 1850, prohibiting the ordering of cases or minutes of debate in the Outer House?—That may have been partly the cause.

11,349. Previous to that Act it was not competent to report cases without ordering cases or minutes of debate. The same section rendered it competent to report them without cases or minutes of debate; but still, notwithstanding the facility thus given for reporting cases, as soon as that statute passed, the custom came to an end?—I cannot say that.

11,350. Is it not to be explained in this way, that ordering cases or minutes of debate saved the Lord Ordinary the oral hearing before himself, and saved him also the labour of pronouncing a judgment?—I doubt that very much, because, according to any recollection I have on the subject, there was generally a full oral hearing before cases were ordered. That is my recollection; but I speak under correction, and especially in the presence of one whose greater experience would enable him to correct me if I am wrong.

But according to my recollection, we had ample discussion in the first instance, and it was not shortened or limited in the least. And I don't see how it could well be otherwise, because the parties by the oral discussion were enabled to understand the views that were to be advanced on one side and the other, and to prepare their cases much more satisfactorily.

11,351. Was it not very common, when the Lord Ordinary contemplated ordering cases, to hear only one counsel on each side—merely to hear juniors open?—That may have occurred, but I rather think that the full discussion usually took place.

11,352. *Lord Barcaple.*—In one or two of the cases you have mentioned, the Lord Ordinary notices that, after hearing junior counsel, it came to be suggested that there should be a case; but my experience is that there was generally a full debate?—That is my experience also. While I was at the bar, I prepared a good many cases, and my recollection is that the full oral discussion had taken place. I should rather be inclined to go even this length, that in the greater number of those causes in which written cases were ordered, and ultimately a report made to the Inner House, the idea of reporting to the Inner House only occurred to the Lord Ordinary after he had made avizandum, and that it had not been alluded to at all in the course of the discussion.

11,353. *The Lord Justice-General.*—You are not able to give any explanation of the immediate alteration which took place on the practice after the passing of the Act of 1850?—Unless it is what you have suggested, no other explanation has occurred to me; but there may be some reason which does not occur to me at present.

11,354. *Mr. Webster.*—Have you not seen the practice disapproved of by the judges in the Inner House?—I am not sure of that. It may have been so. I know there has been a great difference of opinion among the judges on the point, and that some of the judges were remarkably fond of, and clung to the last with great tenacity to written in place of oral pleading. I myself have all along been against that, and I was glad when it was substantially put an end to.

11,355. *Mr. Shand.*—If there was a full discussion in the Outer House, what was the saving of expense or time attending that arrangement?—None that I can perceive, except that the Lord Ordinary would probably have taken some time longer to decide the case. I don't know any other.

11,356. *The Lord Justice-General.*—There might perhaps be this saving, that the case coming upon written argument to the Inner House, superseded the necessity of a long oral discussion there. Do you think that was a desirable result?—I don't think it was at all, for this reason, that I don't think there was any saving of time in that respect. The time that was consumed in the preparation of these written cases by prorogations and otherwise, was in many instances immense, and far beyond anything that an oral discussion would have taken up.

11,357. Was it not your experience, that judgments pronounced in the Inner House on written argument without a hearing were, generally speaking, not so good as those that were pronounced upon a full hearing?—I have always been of that opinion, very strongly.

11,358. Was it not the prevalence of that opinion that led to the enactment of the Act of 1850?—It is possible, but I really don't know, though I was probably aware of it at the time. That is Lord Rutherfurd's Act, and I was one of the committee who gave their views on the subject. I think it is very likely that I may have suggested that as a reason, because it has always operated on my own mind. I thought that written pleadings were always a most unsatisfactory mode of discussing a case, and I think so still.

11,359. Then the departure which you spoke of from the practice of having two judgments in every cause—one in the Outer House and one in the Inner House—is a departure that you entirely disapprove of?—No.

11,360. The reporting of them?—I disapprove of reporting and written cases. But if they had at once sent causes to the Inner House, and the discussion had taken place there only, I would have approved of that.

11,361. My question was, whether that particular mode of departure from the rule of having two judgments was not in your opinion objectionable?—As long as Lords Ordinary continue, I think that they ought to pronounce judgments, and not to act as mere reporters. Following up the same matter, the inconsistency I have alluded to continues, irrespective of the practice of reporting cases. In Mr. Gordon's recent Act, which is now in operation, there is a provision entitling parties to adjust and settle the facts, and then to go to the Inner House to have the law, however important, disposed of by one judgment; and not only so, but we know very well that in various recent legislative enactments,—I think in some railway proceedings, as to consigned money and other matters, though I have not had time to look into it so carefully as to give the instances,—but I have a general impression that there are many instances in which the litigation and the judgment are confined to the Inner House, without coming before the Lord Ordinary at all.

11,362. *Mr. Webster.*—All cases under the Lands Clauses Act are sent to the junior Lord Ordinary?—That may be so; but I am sure there are some proceedings which are not sent to the Lord Ordinary.

11,363. *The Lord Justice-General.*—In the form of petitions, do you mean?—Yes.

11,364. I am not aware of any?—I rather think there are. Are there not petitions, for example, under the Poor Law Amendment Act, that go to the Inner House, and are disposed of there, and there alone?

11,365. For what purpose?—Complaints, for example, against a parochial inspector, and other officials engaged in the administration of the Poor Law, for refusal to discharge their duties, or for malpractice. I am quite sure there are cases of that kind.

11,366. Petitions and complaints against officials for malpractice always came to the Inner House?—Yes; and they go at once there because it is supposed that they are very important.

11,367. Actions of proving the tenor go to the Inner House?—They are peculiar to the Inner House.

11,368. But actions of aliment, which were at one time confined to the Inner House, are now commenced in the Outer House?—Yes.

11,369. That is a change in the other direction?—Yes. The appointment of factors on lapsed trusts was till a very recent period confined to the Inner House. Indeed, where the *nobile officium* of the court was called into exercise, the applications were usually confined to the Inner House. There has been a tendency in the opposite direction, and many of such applications now go on in the Outer House, before the junior Lord Ordinary. I believe that change was made to relieve the Inner House of work.

11,370. Has not the tendency of legislation on that subject recently been to send every petition or application to the Outer House that is not an appeal to the *nobile officium* of the court?—I am not prepared to say that at present.

11,371. You are aware of the provisions of the Act of 1856 in regard to petitions?—Yes.

11,372. That was a very large and sweeping measure in that direction?—Yes; I have alluded to that.

11,373. *Mr. Shand.*—Practically, has not the course of legislation in that direction been to relieve the single bills of the Divisions, and to save a great deal of time that used to be occupied by having four judges engaged about matters which are better disposed of by one?—No doubt; and I think that should be all done yet under the system which I have suggested by the judge officiating in the Outer House, for they are generally merely formal matters.

11,374. *Lord Barcaple.*—Very few of them leading to any reclaiming note or double judgment in any form?—They are *ex parte* generally.

11,375. *Mr. Shand.*—Taking the exceptional case of a proving of the tenor, do you not think it would be very advisable that that should go on as other actions do?—I entertain the impression very strongly, that there should

The Hon. Lord Ormidale.

be no distinction of cases, and arrangement of them into classes. I think there should be no distinction at all, even of Teind and Exchequer cases. I think they should all come before the court as other causes. Unless there is some reason in the arrangement of clerks, I know of none, so far as the judges are concerned, for keeping up any distinction in regard to these cases. Take the teinds as an illustration. It cannot be in respect of the difficulty attending the disposal of teind cases that they are kept before a particular judge in the Outer House; for it generally happens that that judge, when he comes to administer teind cases, has only been a few months on the bench. I was myself not six months on the bench when I became Lord Ordinary in teind causes; and I was not one month on the bench when I became the Exchequer judge, which I am still. So that there is nothing in connection with the peculiarity or difficulty of these causes which can be the reason why they are so classed and kept before a particular judge. It humbly appears to me—and I allude to it merely as illustrative of my general principle—that all that kind of classification should be done away with, for it gives rise to embarrassment, trouble, and delay in the administration of justice.

11,376. *The Lord Justice-General.*—Will you allow me to inquire what exactly you contemplate as being the work of the single Lord Ordinary whom you propose to leave in the Outer House? He must do all the Bill Chamber work?—Yes.

11,377. Would you leave the petitions with him as they are now?—I rather think so, leaving it to him, as at present, to exercise a discretion of coming to the Inner House for assistance in those *ex parte* cases where that is necessary, because a judgment pronounced *ex parte* may form a precedent, and should not be rashly pronounced.

11,378. Would you leave the motion roll in teind causes to the Lord Ordinary?—The preparation of teind causes, up to pronouncing judgment on the merits, I think should go on before the judge in the Outer House, in the same way as all other causes. I don't know any reason for a distinction.

11,379. Is there much business of that kind in Exchequer causes?—No, there is not a great deal; and for some reason or other—I suppose it is because there are fewer attempts to defraud the revenue—the Exchequer business has been becoming gradually less and less, and the reports show that there have been recently very few disputed cases.

11,380. The preparation of records in all causes you would still leave in the Outer House?—I think so.

11,381. With all that variety of business, are you satisfied that a single Lord Ordinary could overtake it?—I am not at all satisfied that he could overtake it; but I think that, without infringing upon the efficiency of the three Divisions, they might in the general case, and for such purposes, be able to spare one of their number to assist in that, and so regulate their business as to have their full number of four when any very important or difficult case or cases were to be heard and disposed of. There are a great many cases that don't require four judges to adjudicate upon them.

11,382. You contemplate then, only occasionally detaching one of the judges of the Division?—Yes; and it is to provide for such contingencies, and for the event of sickness, that, in my opinion, it would not be safe to diminish the number of judges. I am anxious to make myself clear upon that point. I think it would be exceedingly perilous to diminish the number.

11,383. *Mr. Webster.*—Would not the occasional assistance which you have suggested be liable to all the objections which you have stated against changes of Lords Ordinary?—No; it is a different kind of work that they would have to do. It is not pronouncing judgments in causes. It is a kind of incidental work, and the greater portion of it only requires a few minutes for the disposal of each case, or of each point. We cannot get everything perfect, but it does not occur to me that it would give rise to the objection which I take to such a court as the court of the Lords Ordinary.

11,384. *The Lord Justice-General.*—You do think it desirable to have a review within the court itself?—I think so, to the extent and in the way I have explained. The principle of review within the court itself is desirable and right, I think, but at the same time I don't think it is the least necessary in every case; and not being necessary, I think it is wrong to have it in every case. It might be used for the purpose of oppression, for creating expense and delay, and for no other object.

11,385. The arrangement which you contemplate resembles a good deal the constitution of the Exchequer Chamber in England?—Probably it does; but I have not made such minute inquiry on that subject as to enable me to say how far it resembles, or does not resemble, the constitution of the Exchequer Chamber.

11,386. Are you aware how that system has worked in England?—I am not aware, except as one of the public.

11,387. As one of the public, are you not aware that it has worked ill?—I am not aware of that. I saw within the last two or three years a discussion on the subject in the House of Commons or the House of Lords, and, according to my recollection, it did not affect the views that I have explained at all. My recollection is, that it was the constitution of the court, and not the court of review itself, that was objected to. However, I don't know how that may turn out upon more minute inquiry and consideration of how it works in England. I am happy to think that you have among your number some very eminent English lawyers, who must know well how it works; and I am glad it is so, in order that any views which I entertain on the subject may be checked and corrected, and thrown aside if they are found not to be right in themselves.

11,388. Where the first judgment is not unanimous, would you allow an appeal direct to the House of Lords?—My inclination would be not, because I don't think that the system of allowing parties to pass over a tribunal is consistent with principle at all. Either the court of review which I have suggested is a good thing in itself, and calculated to do good, or it is not. If it is calculated to do good, then the parties ought to avail themselves of it, and ought not to be permitted in their option, and to serve some sinister object possibly, to pass it over.

11,389. A judgment may be pronounced where the four judges are quite unanimous in the result they arrive at, but they arrive at that result on different grounds. Would it not be expedient that such a cause should be reviewed within the court itself?—I think it would not be expedient to make the right of review absolute even in that case. I think it would be sufficiently provided for by the court having it in its power to give leave; and I cannot doubt that if they found that, although unanimous in the result, they arrived at that result on different considerations, they would give leave; and therefore a review would be had.

11,390. Suppose that the party against whom the judgment is pronounced wishes to go direct to the House of Lords, but the court are very strongly of opinion that it would be desirable that he should go to the court of review?—Well, that is a matter of detail; and I think it is well worthy of consideration whether the judges might not have it in their power themselves, when they find that they arrive at the same result, but upon different grounds, to say that if the parties are not satisfied, they must go to the court of review first. That is matter of detail, to which I had not applied my mind; but I think it is well worthy of consideration.

11,391. *Mr. Clark.*—Do you think it an advantage that the court of review should consist almost exclusively of new judges?—I have suggested that one of the court that pronounces judgment in the first instance should always be in the court of review.

11,392. And therefore I said almost exclusively of new judges?—I think, with that one present, it would work quite well; but that is also matter for consideration.

11,393. Might not the result be, that the decision

was ultimately given according to the opinion of a minority of judges who had heard the case?—That should, I think, be prevented by the constitution of the court of review.

11,394. Suppose the number is seven, and the difference of opinion in the original court is three to one, you appeal to a court of seven, and the difference of opinion there is four to three against the judgment, you would have seven judges on the one side, and four on the other?—Well, that might be, and it is an anomaly which I should think might be provided against.

11,395. *Mr. Webster.*—Would you send in one of the majority or one of the minority into the court of review?—I don't know. If it could well be done, I think the President of the court would be the best party to be present in the court of review, but perhaps that could not well be arranged with reference to the proper despatch of business in his own court.

11,396. *Mr. Clark.*—What is your objection to the present mode of calling in a certain number of additional judges?—That is a mode of review which might do very well.

11,397. *Mr. Shand.*—By the present mode you secure that where the judges have differed, both sets of opinions are represented on the bench. Don't you think that is better than taking one judge out of the court of first instance, where there has been a difference of opinion?—The constitution of the court of review is matter for serious consideration, and it involves a great many details, and, it may be, a great many difficulties. My object is to have a court of review. How that court of review is to be constituted is a matter that I have not gone into, except suggesting generally what has occurred to myself. But all the considerations that have been adverted to would require to be carefully considered, and objections avoided as much as possible.

11,398. With a Lord Ordinary so fully engaged as we presume he must be, it would be necessary, would it not, for the purpose of inquiries into fact, whether by means of proofs as at present, or in any other way, frequently to detach a judge from each of the Divisions?—It might be.

11,399. Judging from the experience we have had of the extent of time occupied in inquiring into questions of fact, would that not be a matter of almost daily occurrence in the course of the session?—One cannot tell yet, because we have not had experience as to how far it would occupy time. I don't know whether the system of proofs is to continue, but it has been growing very much, and will, I fear, if continued as now, come to absorb time altogether. But if the system is to continue, I can see no reason why one of the judges should take the proof with a shorthand writer sitting beside him, or any reason why an experienced advocate might not do it equally well, reporting it to the court for judgment.

11,400. *The Lord Justice-General.*—How would you provide for the remuneration of the experienced counsel?—That is a matter which, not being Chancellor of the Exchequer, I don't say anything about.

11,401. Do you contemplate that he should be paid by the public?—Decidedly; because I think the payment by the public would be comparatively little, and I am very anxious to remove all clogs of that nature from the public administration of justice.

11,402. *Mr. Shand.*—In the absence of such a system of commissioners, would there not be a judge detached very frequently from each of the Divisions?—I think that is very likely, but you can judge of that as well as I can.

11,403. On that assumption, you would be left to a Division of three instead of a Division of four?—Well, I think that might do very well, and the President of the Division would, I have no doubt, manage without much difficulty to secure that the court was full at the hearing and disposal of what might be held to be the more important and difficult cases. If I mistake not, though the courts at Westminster Hall, the Queen's Bench, Common Pleas, and Exchequer have five judges attached to each of them, there is always one or more absent at chambers, or on other duty.

11,404. *Mr. Clark.*—The number is six now?—But there are never more than four present, and that is held to be the complement for the discussion of cases; but we know very well, and latterly I think it has been very much the case, that not more than two or three have been present. I notice from the newspapers that the cases are so arranged, that very important ones are taken before what they call a full bench. I don't see why we should not follow the same system. A great many cases don't require four judges to dispose of them.

11,405. Where parties do not renounce probation, do you contemplate that the Lord Ordinary should take up the question of proof, or that the case should then go to the Division?—That is a very important question, and I have not given it the full consideration which it probably deserves. It is very much one of those questions of detail which could only well be judged of in drawing up a measure upon the general principles I have stated. The more that is done by the judge in the Outer House, I think the better, prior to the merits being taken up and actual judgment pronounced.

11,406. *Mr. Webster.*—Is not the taking of proof generally attended with very great expense?—At present?

11,407. At all times?—There is a great difference between the mode of taking proof formerly, and the mode of taking it now before one of the judges. It is only fair to say that one of the favourable features of the present system is, that the diets go on very peremptorily. Once a diet is fixed, my own experience enables me to say that the witnesses are generally in attendance, and that there is not much delay caused in that way. I have also found, more especially latterly, that the counsel are always quite ready to go on with the argument on the conclusion of the evidence, and a great deal of expense is saved in that way.

11,408. *The Chairman.*—Does it appear to you that the disposition to adopt that mode of investigating facts is increasing?—I suppose it is. My experience enables me to say that at the bar the tendency is very much to ask a proof, and to avoid a trial by jury.

11,409. What do you ascribe that to?—I have thought of it again and again, not only recently, but for years, in order to discover, if I could, what are the causes that appear to have influenced the public mind on that subject. I have been thoroughly satisfied that a jury is the best tribunal for disposing of questions of disputed facts; but I find that parties are not sensible of that, and that they avoid juries. I have therefore tried in my own mind, by deliberate consideration, to ascertain what it is that has influenced the public against jury trial. If experience had shown that the verdicts of juries were generally erroneous, uncertain, and capricious, or perverse, one could understand the reason at once; but that is not my experience at all, and I am happy to have the opportunity of stating what perhaps may not be generally known, that out of the fifty-eight jury trials at which I have presided since I have had a place on the bench—I am sorry to say that that is the whole number of jury trials I have presided at, and my clerk informs me that I have tried more than any other Lord Ordinary during the same period—out of these fifty-eight there have been only two new trials. One of these was the well-known case of *Wilson* v. *Merry and Cuninghame.* It came before me for trial the second time, and the second jury gave the same verdict as the first, awarding £100 of damages. The case then went by bill of exceptions to the Inner House, and the exceptions to my ruling were sustained. It then went to the House of Lords, where the judgment of the Inner House was affirmed, finding that the law I had laid down to the jury was erroneous.

11,410. That was a point of law upon which there was rather unsettled opinion?—No doubt about it. In this court the law had not been matured, and there had been a great difference of opinion on the bench on the subject. I may not have put it well to the jury, but I had very much adopted what I understood to be the law laid down by one of the Divisions of the court.

The Hon. Lord Ormidale.

That is one of the two cases in which the verdict of the jury did not stand. And undoubtedly it was not the fault of the jury. If there was a fault—and we must hold there was—it was the fault of the judge, and not of the jury. The verdict of the jury was in perfect accordance with the direction of the judge on the law, and I think in accordance with the facts. Therefore I have nothing to complain of the jury in respect of the case of *Merry and Cuninghame*. The only other case in which the verdict of the jury was disturbed, and a new trial granted, was the case of *Jenkins* v. *Murray*—involving a right of way through the policy of Polmaise. There was a great deal of evidence, and the case lasted for three or four days. I was not much surprised that the jury should have taken the view they did. I thought, however, at the time, and I so expressed it to the Lord President, who asked me about it when the application for a new trial was made, that, looking to the very important interests involved, and the serious nature of the question, viz. a right of way through a gentleman's policies, the surrounding country being full of villages, it was quite right that the case should be re-tried; and accordingly there was a new trial granted, but the case never went further. Now, with the exception of these two, every verdict in the fifty-eight cases which I have mentioned has stood untouched; and in my humble opinion, the verdicts were right, with the single exception to be immediately noticed. I generally avoid as much as possible giving very strong directions on questions of evidence to the juries, but all of the verdicts were in accordance with my own views of the evidence, except perhaps in one case. In that one, however, I suppose the parties were satisfied with the verdict, for there was no attempt to disturb it; and on further consideration afterwards, I came to entertain very considerable misgivings as to whether I was not wrong and the jury right. I may add that in not above half-a-dozen cases was any attempt made to disturb the verdict, and, as I have stated, only in two was the attempt successful. Such has been my experience of jury trial; and if that is a fair example of it, I cannot understand what is the objection to it at all. There is finality at once, the facts are settled, and there is no more litigation. Contrast that with the system of proofs. A proof is taken before the Lord Ordinary; he pronounces judgment; his judgment is brought under review of the Inner House, and reversed by three out of four judges—for that has happened; the case goes to the House of Lords, the House of Lords takes a different view, and returns to the judgment of the Lord Ordinary—that has happened. There is in this way years of litigation, and the expense is enormous, the worry is unspeakable. And yet that is the course of litigation which may occur, and which has occurred, in cases where juries are avoided.

11,411. *The Lord Justice-General.*—And that upon mere questions of fact?—Yes. I have heard it suggested, that the expense of jury trial is so great that it frightens people. Now, I am not able to appreciate that objection, because I don't think there can be any great difference, if any at all, of legitimate expenses: of course, I cannot tell what people choose to incur unnecessarily. Take, for example, a proof before one of the judges; the expense of the witnesses, I presume, is precisely the same as if they were before a jury, for I don't understand how there can be any difference. Then where is the difference? It can't be the expense of the jurymen, which under the recent statute is only £6 a day; for there is an expense in taking a proof which is not incurred before a jury, and which, I think, almost meets the expense of the jurymen,—I mean the expense of the shorthand writer. He has his two guineas a day for a day's proof, and perhaps three or four more for extending it; so that the expense of the shorthand writer is equivalent to the expense of the jury. So stands the matter in point of expense; and when we keep in view that the verdict of a jury is final as to the facts, and puts an end to all expense and litigation, while, on the other hand, the House of Lords alone will put an end to the litigation in a case where the evidence has been taken before the judge, I think there is no comparison between the one tribunal and the other. The advantages of the one are out of comparison superior to those of the other.

11,412. *The Chairman.*—There may be some little saving of expense in this respect, that parties may be more anxious to multiply witnesses before a jury than before a judge?—My impression is just the opposite; but I should be very glad that the other Lords Ordinary expressed their opinion on that point. My impression is, that there is a heaping of evidence and of witnesses before the judge, in a way that would not be tolerated or thought of if there was a jury present. A jury operates insensibly as a check on the parties, and perhaps also to some extent on the judge, and tends to keep all right.

11,413. *Lord Barcaple.*—I suppose that sometimes, when a judge sees that there is a tendency to great prolixity of evidence in a jury trial, he can, without undue interference, obtain the view of the jury on that subject?—He can; and my experience of jury trial, which has been considerable, has always taught me this, that the merest hint from the court to a party as to how he is conducting his case,—for example, that he is going too far in one direction, or heaping up evidence unnecessarily,—will be more readily given effect to where a jury is present, than where a jury is not present, for the obvious reason that the object of the party must be to keep well both with the court and jury, because any adverse observation from the court, in presence of the jury, may operate very seriously against him.

11,414. My question pointed to this, whether the slightest manifestation of a feeling of that sort on the part of the jury itself was not very conclusive?—Very conclusive.

11,415. Have you found, in taking proofs, that a moderate manifestation of a feeling of that sort by the judge is equally effective?—I don't think so. The parties probably think, and think rightly, that however a judge may feel about an unnecessary proof, either parole or written, it will not affect his judgment, and therefore they take their own way as far as they possibly can.

11,416. *The Chairman.*—Then can you account for what you say is the fact—the unwillingness of parties to go to a jury, and their preference for proofs?—I have been unable on any grounds satisfactory to myself to account for it. I have heard it suggested, and it is probably the case, that they make a great parade and fuss about jury trial: it is treated as a grand dramatic performance, and great performers are thought to be necessary for such a proceeding; and some are not very far from my observation at the present moment who have had their day on such a stage. It is thought necessary to obtain the services of certain individuals at the bar, and probably for the purpose of securing these individuals large and most unnecessary fees are given. That leads to very great expense; and the losing party especially, though he may have authorized it in the first instance, grumbles very much afterwards, when he finds that it has not produced the desired result.

11,417. Do you think that the same performers don't appear before you in the proof, or that if they do, they don't appear on the same conditions?—In the first place, they don't usually appear before us. There is no dramatic effect desired there. They do appear occasionally, but not so often or so uniformly as they do before juries.

11,418. *The Lord Justice-General.*—Do you find, as matter of experience, that when great stars are retained, the trial is better conducted, or that it is better conducted when minor performers alone are engaged?—That is a difficult question to answer. Perhaps the necessity of being prompt and thoroughly prepared before a jury, from the nature of the tribunal, requires a counsel of larger experience than before a judge, where the whole proceeding is quieter, and where the judge has the opportunity, and probably takes advantage of it more frequently, of aiding both parties in conducting the case so as to arrive at the truth. Before a jury it is difficult for the judge, and indeed not very advisable, to step much out of his way to assist either party.

11,419. *Mr. Harrison.*—Were many of the 58 cases which you have mentioned actions of damages against railway companies and similar cases, claiming compensation for injuries?—There have been many such cases before me.

11,420. Has it not been your experience, that the most varied amounts of damages have been given in very similar cases?—It so happens that during the last two years I have had a good many of these cases before me—more than I recollect, perhaps, for the whole of the rest of the time that I have been a judge; and I cannot say that such has been the result of my experience. I do not at the present moment recollect any instance of the jury having gone far wrong. There are no two cases the circumstances of which don't vary, and without knowing the whole circumstances one is not in a situation to say that the one jury has been extravagant, or the other too moderate. The result of my experience in that class of cases has latterly been very much to the effect that the juries have been remarkably sound in their verdicts. And I may say, in regard to jury trial in Scotland, that I regret exceedingly there should be a feeling against it just now, when I think it has come to be matured, and when juries understand their functions better, and are generally giving much more satisfaction in their verdicts. At one time there was a very strong feeling prevalent—and probably I thought it justified so far—that there was a certain class of cases in which it was difficult or impossible to get a sound verdict from a jury. Take, for example, one of a class of cases which Mr. Harrison has adverted to—coal-pit accidents in which there has been loss of life: the sympathies of the jury were apt to be so much affected by the nature of the cause, that it was thought very often that they went wrong in their verdicts. But I think that has been very much corrected in later times, and I am not the least afraid of a jury going wrong in that class of cases now. We had a very good illustration of what I am now pointing at in a trial that took place before me within the last ten days, in which Mr. Shand was counsel for the defender, a well-known and extensive shipbuilder in Greenock, founded on an accident which took place, resulting in the loss of life. I was not afraid of the jury, and the result showed me that I had no cause for being so; for though it was a case calculated to excite their sympathies, they returned a verdict for the defender, in accordance with what I thought to be the law and justice of the case. In short, I have found that juries have of late years been very easily directed, and that they are quite sensible of what their true duty is.

11,421. *Lord Barcaple.*—It seems to result from what you have said, that if you, as an individual judge, had disposed of these cases upon a proof, if there has been any feeling that the damages given have been unduly assessed by juries, in all probability the very same dissatisfaction would have existed with your judgment?—I have not the least doubt of that; and I beg to say on the matter of assessing damages, that I don't know anything more difficult for a judge than to assess damages. I don't know a more difficult task. For my own part, though urged to it repeatedly—with one or two exceptions, which I am sorry I ever made—I have declined to undertake to assess damages. I don't think I am so nearly competent to do so as Mr. Harrison and the gentlemen who usually compose juries.

11,422. Have you made any observation during the last two years as to whether the practice of jury trial was tending to diminish or to increase,—I mean before the recent introduction of proofs?—I have not adverted to that.

11,423. Have you made any observation as to whether a proof goes more rapidly on than a jury trial?—With the assistance of a shorthand writer, we get through a great deal of evidence.

11,424. Is it your observation, that you get through the evidence more rapidly?—I am not at all prepared to say that; but I am prepared to say this, and I am happy to be able to say so, that within the last year or two, I think I have observed a tendency on the part of all who are concerned in the conduct of jury trial, to get over the case with less unnecessary evidence and less elaboration than formerly. I have observed that latterly we have got over cases involving difficulty, involving a great many disputed facts, and a great deal of evidence, within a comparatively short time.

11,425. *Mr. Shand.*—Are you satisfied with the class of jurors as they now exist, or do you think the public might fairly require a greater proportion of men of higher education?—There has been a very great improvement recently. I have observed in recent trials since the passing of the last Act, some gentlemen on the juries who would not have been on them formerly. I think it is a great object to have some men of all classes on the juries, because they assist each other in coming to a sound result. A single judge may have his mind in a particular groove, or may have peculiar biases; but if twelve gentlemen come together to consider facts, if one is inclined to go wrong, he is put right by another; and if they are reasonable, they will in the end come to a fair conclusion. But when a question of disputed fact is left to one individual, he may take an erroneous impression, and he has nobody to correct him, or to assist him in keeping him right. I have observed lately, that all the common law judges in England who have been engaged in the trial of election petitions, men who have had immense experience in the conduct of jury trials in England, have expressed their regret that they had not the aid of a jury, and their inability to deal with evidence without the aid of a jury. They have experienced the difficulty of settling disputed facts without that aid.

11,426. *Mr. Clark.*—Did not the public express their great satisfaction that they had not the aid of juries?—I don't know that.

11,427. *The Chairman.*—There is no doubt that in the trial of facts, it is a great relief to the judge to have the aid of a jury?—No doubt about it.

11,428. And I daresay the English judges regretted that they had not that relief and assistance?—My view is, that the court and the jury assist each other.

11,429. *Mr. Campbell.*—In the Sheriff Court it is the habitual practice of the Sheriff to dispose of questions of damages. Do you think that the decisions pronounced by the Sheriff-substitute, as reviewed by the Sheriff on questions of damages, are less satisfactory than the verdicts of juries in similar cases?—As a general rule, questions of damages occurring before the Sheriff are comparatively trifling questions. Cases involving character very seriously, or other cases leading to large damages, come before the Supreme Court, and are tried with the aid of a jury. But I am glad you have given me an opportunity by your question of mentioning an instance of how cases of that nature are managed without the aid of a jury. I allude to the case of *Hallowell* v. *Niven*, 1st March 1843, 5 Dunlop 759. There, according to the rubric of the report, a woman was found not entitled to damages for an alleged assault, in respect she was the aggressor, and that there had been no greater degree of violence on the other side than was necessary for self-protection. That case occurred at Greenock, and the Sheriff-substitute, Mr. Marshall, who was one of my substitutes for some time, and a most excellent man, assoilzied. The case then came by appeal to the Sheriff-depute, now Lord Benholme, who altered the substitute's judgment, and found £1 of damages due. It was brought by advocation to this court, and was heard before Lord Ivory, in presence of the Lord Probationer, afterwards Lord Wood. I argued the case on the one side,—for the lady, I think; Lord Wood, according to usage, reported his opinion to the Inner House, to the effect that he thought the Sheriff-depute was wrong, and the Sheriff-substitute right. The case was further argued before Lord Ivory, by whom it had to be decided, and he thought that the Lord Probationer was wrong, and the Sheriff-depute right, and accordingly he dismissed the advocation. The case then went by reclaiming note to the Inner House, and they unanimously held that the Sheriff-substitute was right, and that Lord Ivory and the Sheriff-depute were wrong. Now there was only a small sum involved there, and the case was of a trifling

The Hon. Lord Ormidale.

nature, but it was an action of damages, and it is an illustration of such a case as disposed of by judges and not by a jury. I may explain, in case you should think of looking into the report, that you will find it to be exactly as I have stated, except that Lord Probationer Wood's opinion is not mentioned; but I recollect it because I was counsel in the case, and I have often spoken about the case since. It is a very remarkable illustration of what I think would be the fate of such cases if they are to be determined by judges. I think that judges are by no means well qualified to dispose of questions of damages.

11,430. *The Lord Justice-General.*—I suppose nobody suggested that the lady should get more than £1?—I don't know. The defender was ultimately assoilzied.

11,431. *Mr. Campbell.*—It has struck me that of late years, in Glasgow more particularly, there have been large sums of damages awarded by the decision of the Sheriffs, in cases of collision on the river, and in the various other incidents of social life. Now do you think there is such an advantage in the system of jury trial, for the ascertainment of facts, that it would be desirable to introduce that system into the Sheriff Court?—I doubt that very much; I am not inclined to think that it would be an advantage to introduce it into the Sheriff Court, because I think the trial can be had in the Supreme Court at just as little expense, presided over by one of the judges, having experience in that mode of trial, with probably a more satisfactory result.

11,432. Don't the advantages to which you have referred as arising from jury trial—advantages in point of economy, for example—arise merely from the fact that practically there is no appeal from their decision?—I am of opinion that juries in cases, at all events, where damages are to be assessed, and generally in cases of disputed fact, are calculated to arrive at a sounder result than a judge, and will generally do so.

11,433. *Mr. Webster.*—Would you explain what it is that incapacitates a judge from deciding upon evidence, and qualifies the common run of jurors for doing so?—A judge is like jurymen; he has, it may be, his prejudices, or at all events he has his biases; from his education and his training he has certain modes of thinking which lead him to adopt certain views; and if he is an honest man, he will probably, just because he is an honest man, give effect to his peculiar views, for he ought not to give effect to views that he does not entertain. If he thinks they are views which beset him, and he is not sure of their soundness, he may deliberate as well as he can, so as not to be unduly influenced by them; but he will necessarily be so far influenced by his peculiar views. The result of a decision of a single individual may therefore be quite erroneous. But if you select twelve men as jurymen, you have various individuals, with various biases and views. I assume that they are fairly reasonable and intelligent; I have generally found them so; and I have generally told them how to proceed when they retire. They, it must be presumed, confer with each other, and after ascertaining that they differ in their views and opinions, they argue the matter among themselves to some extent. The one yields and concedes to the other, and the result is generally a sound one.

11,434. *Mr. Clark.*—A sort of average opinion?—No, it is not taking an average.

11,435. But an average opinion?—That may be.

11,436. *Mr. Webster.*—Would your Lordship ascribe the standing of so many of the verdicts in cases that you have tried to the soundness of the verdict, or to any extent to the difficulty of review, and the enormous cost of a new trial?—I cannot, in the particular cases to which I have referred, ascribe it to anything but the soundness of the verdict, because these verdicts were sound, according to my opinion,—in accordance not only with the directions which I gave in law, but quite in accordance with any leaning that I may have shown in my addresses to the jury.

11,437. *Mr. Clark.*—A verdict may be upset on the ground of its being contrary to evidence, but that is a very difficult thing to make out?—Yes, and it ought to be.

11,438. So that the person who has lost the verdict has very little chance of getting it upset unless it is very wrong?—Quite true.

11,439. *Mr. Webster.*—Would your Lordship apply the same test to the standing of these verdicts that you apply to your judgments on the merits of causes?—Precisely the same.

11,440. *The Chairman.*—Why should a judge be supposed to have leanings and propensities to lead him wrong, when in all the cases that you have tried, your propensities led you to what you consider to have been the right verdict?—That is a matter which would require considerable explanation.

11,441. *The Lord Justice-General.*—Don't you think that in a jury trial the judge and the jury influence one another reciprocally?—I think so; and that may be an answer so far to the question which Lord Colonsay has now put.

11,442. They control one another?—Not the least doubt of it. I feel that strongly. As I said before, the one is a check on the other.

11,443. Is it not matter of experience with you that after you have expounded the evidence in the cause to a jury in your charge, you have a much more satisfactory and complete view of the evidence, and of the true result of the question of fact, than you would have had if you had been studying it without a jury?—That is certainly the result of my experience. There is an insensible acting and reacting on the minds of the court and the jury in the course of a jury trial that leads the one to the same result as the other, assuming it to be the desire of both to arrive at the truth.

11,444. *Mr. Webster.*—Your Lordship alluded to the necessity that was felt of keeping on good terms, or on a good footing with the jury, in the conduct of the case, and in regard to the extent of evidence to be led. Is a tribunal which may be actuated by feelings of that kind, a suitable tribunal for the trial of a case?—I think all tribunals ought to exercise a certain degree of firmness in checking undue evidence, and the improper conduct of a cause.

11,445. Your Lordship alluded to indications of feeling on the part of the jury?—What I alluded to was this, that any indication on the part of the court, in presence of the jury, as to what was right, would probably be more readily adopted and given effect to by the parties, than if the jury were not there. My experience is, that juries show very little indication of what their opinion is till the end. I have found them to be always very decorous in their conduct.

11,446. *The Lord Justice-General.*—Don't you find, however, that juries are, generally speaking, very impatient of needless repetition of evidence?—Probably they are. Most men are, and properly so.

11,447. Which of course has a tendency to prevent an accumulation of evidence?—I have often admired the exemplary patience of our Scotch juries.

11,448. *Mr. Shand.*—Is it according to your experience that reclaiming notes are frequent against decisions in cases in which you have had proofs, and have decided the facts as well as the law?—I don't know how that may exactly stand. It is matter for statistical inquiry; but I cannot doubt, from my general impression, that reclaiming notes are very frequent against judgments upon proofs.

11,449. In that case, the proof which has hitherto been in manuscript requires to be all printed, and there is a renewed discussion of the whole facts of the case before the Inner House?—Yes; and great expense incurred.

11,450. Does that add materially to the expense beyond what would be necessary in a jury trial, as a rule?—I think it must add very considerably to the expense. I am glad to think that a considerable improvement has been made, under the provisions of the recent Act, in regard to challenging verdicts of juries. During last session, motions for new trials and discussions on bills of exceptions, have been taken up very promptly by the Inner House, and finally disposed of at very little expense.

11,451. Besides the additional expense to the parties, of such review on questions of fact, the time of four judges is occupied with them, which would be avoided under the system of jury trial?—No doubt. One who has arrived at my time of life must have some recollection of the strong animadversions which have from time to time been made in regard to questions of disputed fact depending entirely on evidence going through all the courts up to the House of Lords. There have been very strong animadversions made in the highest quarter, and by the most eminent men, on that kind of system, and it has been denounced very much.

11,452. Is the finality of the verdict of a jury, as a rule, one of the great advantages which you have in view in the opinion you have expressed?—Yes. It is a very great advantage with that safeguard which always exists, that if the verdict on evidence is egregiously or plainly wrong, the court have it in their power to correct it, and to order a new trial.

11,453. *Mr. Webster.*—Would there be any material difference of cost of getting the verdict of a jury upset, and getting the judgment of a Lord Ordinary on evidence reviewed?—I think there would be a very considerable difference in favour of the review of the verdict of a jury. I can give a very remarkable instance of a trial which occurred before me in a case which only came into court, if I am not mistaken, in October last. An issue was prepared and sent to a jury, and £10 of damages were awarded. Application was made to the Second Division for a new trial, and I was asked to attend with my notes of evidence. The new trial was unanimously refused, so that there was an end to the whole matter within a few months, and the application for the new trial must have given rise to hardly any expense.

11,454. *The Lord Justice-General.*—Were the notes of evidence printed?—No. There was also a case of *Laurent* v. *The Crown* for damage to premises. That case came into court, I think, last summer; a record was made up, and an issue settled and sent to a jury; and after the verdict, application was made for a new trial to the First Division upon a bill of exceptions. The bill of exceptions was adjusted by me without any loss of time. It did not set out the evidence as was formerly done; but it consisted, I think, of three pages of print altogether, including what was necessary of the charge, and the exceptions and other formal matter; and that was heard before the Inner House, and disposed of at no great expense.

11,455. *Mr. Webster.*—These are two cases in which the verdict was allowed to stand; but suppose the case of the verdict being upset, would there not have been an entirely new trial and inquiry?—Yes.

11,456. Suppose it had been the review of a decision by the Lord Ordinary upon evidence taken before him, would not a final decision have been given upon the evidence so taken?—No; I don't think it follows that there would be a final decision. If the Lord Ordinary decides one way and the Inner House another way, the case sometimes goes to the House of Lords.

11,457. It may go to the House of Lords?—And has gone. But in the case of the verdict of a jury, there is no such thing as to the facts.

11,458. Would your Lordship approve of a change in regard to the way of dealing with matters of fact, where the evidence is taken before the Lord Ordinary, so as to allow the Inner House finally to ascertain the facts, in the same way as is done in cases coming from the Sheriff Court?—I think that is well worthy of consideration; but the Lord Ordinary has heard and seen the witnesses, and he has been influenced, and properly influenced, in some degree by their deportment, and the manner in which they have given their evidence. The Inner House have no opportunity of seeing or hearing the witnesses; and yet three out of four of the judges there may recall the Lord Ordinary's interlocutor, and they cannot help themselves according to their impressions of what is right. The result, therefore, of making the decision of the Inner House final on questions of fact may be, that judgment is given by three judges who have not seen the witnesses, while the judge who did hear and see them took a different view, and one of the judges of the Inner House concurred with him. The decision may therefore be given by a majority of one judge. Now, that is not a satisfactory result.

11,459. *The Lord Justice-General.*—Would you approve of making the finding of the Lord Ordinary who hears the evidence final?—I am not prepared to say so. I think that would be very hazardous, and would probably not prove satisfactory. Whether he was right or wrong, there might not unnaturally be great dissatisfaction on one side, or, it might be, sometimes on both. Those who dislike juries would probably prefer to have finality by three judges, who should hear and see the witnesses; but that is a thing which is so extravagant in itself, and would give rise to such consequences in the way of appointment of judges and otherwise, that I suppose it is not to be thought of.

11,460. That would be a very costly tribunal?—Yes, it would be very costly to the country. I don't know how many judges would be required.

11,461. *The Chairman.*—Would it not be hazardous to make the Lord Ordinary's judgment final on fact in such a case as the Breadalbane case?—Yes; I am against that entirely. I think it would be too hazardous.

11,462. *Mr. Shand.*—Are you content with the provision in the recent Court of Session Act, which leaves it to the court to determine what shall be the mode of inquiry, so that it shall be in the hands of the court to say whether the case is one for proof or for a jury? Would you desire to make any legislative change upon that, making it imperative to try any class of cases, either in the one way or in the other? Or are you satisfied with the enactment as it stands?—I think there was a power more limited formerly in the court to direct cases to be tried differently than by a jury, and yet not so absolute as that provision makes it. I am inclined to think there is too great a discretion now; and if we could be restored to where we were before, viz. that generally cases of disputed facts shall go to a jury, I would prefer it.

11,463. But if both parties desire that the case shall be determined by the judge?—I am not quite sure that the desire of parties should be submitted to in all cases. I could quite understand that if both parties desire that there should be a proof before the judge, their desire should be acceded to at once, on the condition that his judgment should be final; but the idea of their desiring, in the first place, to have the proof led before the judge, and then to go through the whole courts up to the House of Lords, is a thing that I don't think should be agreed to in all cases.

11,464. *Lord Barcaple.*—Have you found that, in a great many cases, both parties desire to have a remit to a commissioner?—In some cases it has been so; and I don't see why there should not be a remit to a commissioner much more frequently than there is at present, if the existing system of taking proofs is continued. Prorogations were the great evil of proofs taken before commissioners; but I cannot understand why the diets should not be made peremptory before commissioners as before one of the judges; and if that were so, the proof might be perfectly well taken in Glasgow, Dundee, or Aberdeen, and many other places, at a considerable saving of expense, because the witnesses being in the locality, it would be unnecessary to bring them here.

11,465. *Mr. Shand.*—Giving the power to have the evidence taken by a shorthand writer in that case also, would, I presume, be a great advantage?—Surely. If it is of advantage in the Superior Court, it should be an equal advantage before a commissioner.

11,466. *The Lord Justice-General.*—You are merely proposing to substitute the commissioner for the judge?—Yes; as to taking the proof, but not to decide the cause.

11,467. But allowing the mode of taking the evidence to be in other respects the same?—Yes.

11,468. *Lord Barcaple.*—In what respect is the assistance of a shorthand writer a great advantage?—It saves time.

11,469. Is it your experience that it saves time?—I think it does.

The Hon. Lord Ormidale.

11,470. *Mr. Shand.*—Was it not found to be a very serious consumption of time, under the old system of commissions, that the evidence had to be taken down without the advantage of shorthand writing?—Oh yes.

11,471. *Mr. Webster.*—In regard to your Lordship's proposal as to commissions, would you require the attendance of counsel in taking the evidence, in the same way as is done before the Lord Ordinary?—That is a point I have not thought of.

11,472. Does it not affect the expense very much?—I would leave it to the parties. I don't think it should be made indispensable. There is a reason for counsel being present before a judge of the Supreme Court; not so much perhaps that many agents might not be as competent and able as any counsel to do all that is necessary in the mere leading of the evidence; but it is necessary, with reference to the position and dignity of the court, that those who practise before it should alone appear before the judge sitting in court.

11,473. To what length does your Lordship carry your view that only counsel should appear before the judges of the Supreme Court?—Neither further nor less in length than the existing practice.

11,474. Is your Lordship aware, that in the Appeal Committee of the House of Lords, agents alone are received to discuss questions of competency and procedure?—I don't know; but the Appeal Committee is not the House of Lords.

11,475. It consists of the Lord Chancellor and others?—That may be; and in the Bill Chamber here, or in chambers during vacation, we are always very glad to see agents and to receive assistance from them. So in England, I believe, the agents, or agents' clerks, attend the common law judges in chambers. But it is a different thing in public court, when a case comes to be disposed of on its more important branches.

11,476. *The Chairman.*—Have you any further suggestions to make?—I am not in favour of the Court of Lords Ordinary. I think it disarranges business very much; but it is perhaps unnecessary to say more about it now, because any arrears that could well be complained of in the Inner House having been worked off, and not being likely again to arise, there will be no necessity for the Court of Lords Ordinary, and it may never in my time sit again.

11,477. At all events, it is not likely to sit two months in one session?—No; and therefore perhaps it is hardly worth adverting to; but I doubt very much whether any fluctuating court of that kind will ever carry with it the weight and authority in the minds of the public which is desirable.

11,478. *Lord Barcaple.*—I think it results from something which you formerly said, that you would disapprove of a court for one special class of cases?—Yes; it decides only a certain class of cases sent to it, and that takes away from the authority which it might otherwise be supposed to possess; and it may also cause dissatisfaction to the parties to these cases, from the feeling that they have been singled out as cases of a subordinate or inferior description.

11,479. *The Lord Justice-General.*—I understand your feeling to be that all the judges should be engaged in all kinds of causes?—I have a very strong impression to that effect. I would even adopt the English rule, that there should be no distinction between the criminal and civil judges—between the judges who go circuit in criminal matters, and those who remain at home to dispose of civil causes. It is a great advantage to the judge that he should have some experience in all departments.

11,480. In connection with that, is there not something very anomalous in the position of the single Lord Ordinary whom you are proposing to leave in the Outer House? As far as I can see, he is not to pronounce judgments at all. Now a judge who does not pronounce judgments is somewhat of an anomaly, is he not?—He pronounces judgments in all cases of *ex parte* petitions and applications.

11,481. But I mean judgments *in foro*?—He pronounces judgments in the Bill Chamber.

11,482. *Lord Barcaple.*—And some of these questions are not *ex parte*?—No; they are not necessarily so.

11,483. *The Lord Justice-General.*—But at all events this judge will be very far from being in the position of dealing with all classes of cases by judgment?—That gives rise to this suggestion, that it might be worthy of consideration whether that Outer House judge should be always the same judge.

11,484. If he is not to be so, then it comes back to the old system of sending a judge to the Outer House from the Inner House?—It would to some extent. There are a great many considerations connected with that matter which I don't think affect the principle of the scheme which I have suggested.

11,485. *Mr. Shand.*—Assuming the constitution of the court to remain as at present, it has been suggested that if the Inner House gets into arrear, a better course of overcoming arrears than by taking up all the time of the whole of the Lords Ordinary would be, that one judge from each Division and one Lord Ordinary should be appointed as an aiding Division. Does it occur to you that that would be a better course than to take up the time of four Lords Ordinary, and to stop the Outer House work, as was done last session?—I doubt very much whether it would be better. I am rather inclined to think that it would be a worse expedient. I don't think that the judgments of that court would be found to be satisfactory to the country. If two of these judges reversed the judgment appealed against, that would not be satisfactory, because then the judges would be two to two. That of itself appears to me to be an insuperable objection to the expedient which you suggest.

11,486. Don't you think that that evil as a temporary evil would be less than was experienced last session, in the almost total stoppage of the Outer House work for a good many weeks?—I don't think it, and for this reason, that even supposing the Court of Lords Ordinary were to continue to be called into operation occasionally, it is not in the least likely that any necessity will arise for their sitting so long as they did last session. But even as it was, although they were away three days out of five for eight weeks, it is astonishing how little arrear is left in the Outer House. There is some arrear, I have no doubt, but not a very great deal.

11,487. Are there not a good many debates which came out at a very early period of the session in the Outer House rolls that still stand there?—I am not aware of it. I know that in the earlier part of the session, I could not get parties to fix a diet of proof. If they had done so, there would have been judgment given in many cases before the end of last year. The result was, that previous to the commencement of the year I had not my blank day occupied, as I was quite willing to have it occupied, by proofs. Since the beginning of the new year, my blank days have been all occupied, except one, when a proof went off after it was fixed, and that one was made up by my sitting a whole Monday to a late hour. That suggests to me, that under the recent statute our blank days are practically gone; and I think the sooner they are gone nominally, as well as in reality, the better. There is no use in keeping up the semblance of a thing when the reality does not exist.

11,488. *Lord Barcaple.*—Do you think nothing has been lost by the loss of the blank day?—In what respect?

11,489. Were there not very important uses to which the blank day was applied?—In the way of consideration of cases?

11,490. The consideration of cases and the preparation of judgments?—No doubt.

11,491. Have you found difficulty in consequence?—I have managed to keep up my work pretty well hitherto.

11,492. *Mr. Shand.*—Have you any suggestion to make about pleadings?—No; I have no suggestion at present. I stated before that we require a little more experience than we have yet had of the recent statute,

to enable one with safety to suggest much alteration on the pleadings as they exist. I think that latterly the pleadings and the records have greatly improved; that parties have come to understand that the less they put upon the record the better, provided there is sufficient; and my impression is that the setting out of evidence is not so much indulged in as it was at one time.

11,493. *The Chairman.*—Have you any further suggestion to make?—I have one suggestion to make about the Sheriff Court, and it is the result of the experience I have had in the Court of the Lords Ordinary. I have heard a great deal said about the expedition of litigation in the Sheriff Court, and the little expense at which it is carried on, and an unfavourable contrast has frequently been drawn with reference to the Supreme Court. Having that in view, I paid considerable attention to the cases that came up for review in the Lords Ordinary's court. There were only twenty-five cases disposed of by that court, and I asked my clerk to make an examination, the result of which, as given to me by him, I shall state. In the twenty-five cases there were fifty-seven appeals from the Sheriff-substitute to the Sheriff, and the average duration of the litigation was two years and some days. There was one case from Wigtown—*Macdouall* v. *Brown*—in which the litigation continued for four years and eight days, and there were six appeals.

11,494. *The Lord Justice-General.*—What was that case about?—I think it was about taking delivery of farm-stocking.

11,495. *Lord Barcaple.*—It was a dispute between Mr. Macdouall of Logan and his sub-factor—a matter of accounting?—Yes, it was.

11,496. *The Chairman.*—Were any of these appeals upon evidence?—I don't know.

11,497. *Mr. Clark.*—I think there were not?—I believe not.

11,498. *Mr. Baxter.*—Do you know how the delay of four years arose?—No; I cannot give the particulars. Then there was an advocation from Aberdeenshire—*Cruickshank* v. *Davidson & Co.*—the litigation in which continued in the Sheriff Court for four years, eight months, and nineteen days. The action was at the instance of Davidson & Co., a firm in Norway, and the sum concluded for was £25, 1s. 7d. In that case there were eight appeals; and I think it was stated to us in the course of the discussion, that the reclaiming petition in support of one of these appeals extended to nearly 300 pages.

11,499. Can you state the delay occasioned by the appeals?—No. Then there was a case from Renfrewshire, *Aitkenhead* v. *Aitkenhead*, in which the duration of the litigation was five years, one month, and eight days, and there were two appeals in that case. I believe the ultimate decision here was in accordance with an early judgment pronounced by my friend Mr. Campbell.

11,500. *Mr. Campbell.*—The delay there resulted from a remit to an accountant, before whom a great deal of procedure took place?—Yes. Then we had two cases from Lanarkshire—one at the instance of *Sir Charles Ross* v. *Hamilton*, a weaver in Lanark, the duration of the litigation in which was five years, six months, and twenty-eight days, and there were six appeals; and the remaining case was *Strickland & Co.* v. *Nelson & Mackintosh*, the litigation in which lasted for four years and twenty-five days, and there were two appeals. Now these are five out of twenty-five cases.

11,501. *The Lord Justice-General.*—Were they all cases upon proof?—They were.

11,502. *Mr. Clark.*—And were they causes always going on in the Sheriff Court, or had there been any sists?—I don't know. I rather think they were going on. There were consents to prorogations, and things of that kind, which I am happy to think is put an end to in this court under the recent statute, and which was a fertile source of delay and vexation.

11,503. *Mr. Campbell.*—You have said that all these cases were on proof. I think the case of Aitkenhead was a question of construction of a deed of settlement. I don't think there was any proof there, except so far as the accountant's report may be regarded as proof. But the decision arrived at by me was exclusive altogether of any such remit, and the remit turned out to be quite fruitless. There certainly was no parole proof there?—Well, we had an enormous print in the case.

11,504. *The Lord Justice-General.*—Did you notice in any of these cases how long the proof lasted?—No; but in some of them, according to my recollection, it lasted a very long period, owing to prorogations and adjournments of diets. In the case of the foreign house from Aberdeenshire, there was a great deal of prorogation.

11,505. *Lord Barcaple.*—In that case there was a proof taken in Norway which had to be translated?—That should not have created any great delay.

11,506. *Mr. Shand.*—Was there a good deal of delay in these cases, or in most of them, arising either from consent of parties, or from parties allowing the case to lie over, and reviving it under the statute from time to time?—No; I think it was from adjournments of diets, and consents, and reclaiming petitions, and things of that kind. I don't think much of it arose from parties allowing the case to become dormant, and then reviving it.

11,507. *Mr. Baxter.*—Has your Lordship any suggestion to make about the constitution of the Sheriff Courts, as consisting of the Sheriff and his substitutes?—That raises a very important question indeed. It has only been recently agitated in public, and it is but right to say that I have not given it that consideration which would enable me to offer such an opinion as would be likely to be of much service to the Commissioners. But for the sake of preventing delay, and also to some extent preventing expense, and obtaining at once the best judgment that can be obtained, the inclination of my opinion is, that there should be just one Sheriff, and a direct appeal, with as little expense as possible, to the Supreme Court. My belief is, that that would be found to be quite satisfactory to the country.

11,508. *The Chairman.*—You would not substitute any other kind of review within the Sheriff Court itself for that which now exists?—No, I don't think so.

11,509. *Mr. Shand.*—If it should be found that the review of the Supreme Court cannot be obtained in ordinary cases at a less expense than £10 or £15 a side, would that affect your opinion?—No, I think not. I think, if the review of the Supreme Court is obtained for £10 or £15 a side, it is a moderate expense; and my expectation is, that under our improved system it could be obtained with very little delay, and then there would be a final and conclusive judgment of the Supreme Court, which would be likely in most instances to be satisfactory to the parties.

11,510. Don't you think that an expense of £20 or £30 as the minimum would be a practical denial of any review in the great majority of Sheriff Court cases?—I am not prepared to say that. If there are fair and reasonable grounds for a review, all my experience has taught me that there is no such thing as a denial of justice in this country. There are various ways in which that is accomplished, and will always continue to be accomplished, without much difficulty. It is said that the review of the Sheriff can be obtained at an expense of £1 or £2; but if there is a reversal, that leads to farther review. It is all very well to say that a poor man may go at once for a trifle to the Sheriff-principal, but it does not in the least follow that the other party will rest content with that. You may have as many tribunals as you please, but they may be, and often are, made engines of oppression. In most—I would be disposed to say in all—cases that originate and are carried on in the inferior court, where it is desirable that there should be a review of the Sheriff-substitute's judgment, that may be obtained very simply, within a short time, and at very little expense, in the Supreme Court. At the same time, from having been for eight years a Sheriff, I must say that I have a partiality for the double Sheriffship.

11,511. *The Chairman.*—It has been suggested that a better system of review than that of the Sheriff-principal, would be to divide Scotland into five or six

The Hon. Lord Ormidale.

districts, and to appoint two gentlemen of the bar to perambulate each district, to hear appeals from the Sheriff-substitutes, and that their decision should be subject to review in the Court of Session. Do you see any advantage in that system?—I must say that I can see no advantage in it, but a great many disadvantages. I think it would be very speedily found to work very ill.

11,512. Do you think that when a judgment of the Sheriff-principal confirms that of the Sheriff-substitute, that review being cheaply obtained satisfies the parties that they ought not to incur the expense of an appeal to the Supreme Court?—That assumes the existence of the double Sheriffship, and I can quite understand that in many instances that may be found satisfactory by the parties. I have no very strong opinion against the double Sheriffship, because I think that there are considerable advantages connected with it in many ways, independent of the exercise of the judicial functions, in the Sheriff going to his county occasionally, and assisting, by his advice and otherwise, in the administration of affairs. It is attended with considerable advantage, and it is not a very expensive institution to the country.

11,513. *Mr. Clark.*—Would you increase the sum up to which the Sheriff's judgment is final?—I am against finality of judgments as a general rule altogether, and I would not increase that. I think it is a mistaken idea, that justice is to be obtained by declaring judgments final. It may be a mode of perpetrating injustice.

11,514. Don't you think that by permitting litigation in regard to sums not much above £25, you allow of a cost which is quite disproportioned to the stake?—In many cases that will be so; but there are other cases which, though involving only £25 of pecuniary interest, involve considerations of a much higher kind, and it would be very grievous to prevent parties from getting the judgment of the Supreme Court upon them.

11,515. In actions for the recovery of money, would you increase the sum up to which the judgment of the Sheriff is final?—I have such a repugnance to finality of judgments, that I am against that. I think we are all—judges of the Supreme Court as well as of the inferior court—the better of the checks which exist in the way of review of our judgments.

11,516. Does not that allow a rich man to cause great expense to a poor man?—That may happen occasionally; but a judgment of the Supreme Court, even in cases of small amount, can be obtained at such little expense, and with so little delay, that it would not, I think, be right to declare the judgments of the Sheriffs final, beyond the finality which now exists.

11,517. *The Chairman.*—Do you think it would be expedient to extend the jurisdiction of the Sheriff to questions of status, such as divorce, declarator of marriage, and declarator of legitimacy?—I am against that entirely; and I think that the greater portion of the intelligent and thinking community would be against it also; and for this most obvious reason, that the interests of the whole of society are involved in these questions of status,—for example, as to whether a man is to be divorced from his wife; and the consequences are so serious, that I think judgment in such cases should only be pronounced by the superior court.

11,518. *Mr. Baxter.*—Is it not a very serious matter to poor people, who are not able to come to the Supreme Court?—No doubt litigation is a hardship in one view to all concerned; but we cannot but recollect that, till very recently, a divorce could only be obtained in England through an Act of Parliament, and here only at an immense expense. It is not upon light grounds that man and wife are to be separated; and I think I speak correctly, when I say that the expense of obtaining a divorce in the Supreme Court is now very small, and it is got very quickly. The proof is appointed to take place at once; it goes on under the superintendence of the judge; and a judgment is obtained without delay, and at very small expense, while you have all the precautions that are likely to be attended to in the Supreme Court.

11,519. *Lord Barcaple.*—The witnesses must be brought to Edinburgh?—Yes.

11,520. Assuming it to be the case of a poor man in a remote county, is not the remedy of divorce practically excluded by the present state of the law?—I am not prepared to say that.

11,521. Do you recollect to have had divorces of that class of poor persons from remote counties?—I cannot at present say.

11,522. Has not the whole of society a great interest, according to our Scotch notions, in the remedy of divorce, where there are grounds for it, being easily attainable? Is there not a very strong moral reason for it?—Quite so, but I am afraid of too much facility.

11,523. In what way would you expect the facility to act badly, the jurisdiction being extended to the Sheriff of Caithness, we shall say?—Just upon the same principle, that from various considerations, which I need hardly enter into, there are not committed to an inferior court all those great questions which are held to be more appropriate to a supreme tribunal. You might as well say that all important cases should begin and be determined, in the first instance, by a bench of Justices of the Peace.

11,524. Is it not a simple issue in point of fact, and is not the question as to evidence generally a very simple one in these divorce cases?—I would be a little afraid that if divorces were made competent in the inferior court, they would be got up, and the check of having them in the Supreme Court would be entirely removed, so that divorces might be obtained which never ought to have been obtained. I should be afraid of that; and other considerations also lead me to form an opinion against it.

11,525. *Mr. Shand.*—At present there is every facility given to a man of means to obtain divorce by coming to the Court of Session?—And every facility is given to the poor man, consistently with his finding a very small amount of money.

11,526. If he has not the means, and resides at a distance from Edinburgh, is not the door of the court shut to him?—A very poor man can get on the poors-roll, and have the aid of counsel and agents. We cannot put money in every man's pocket.

11,527. Can any man who is earning day's wages get on the poor's roll?—That is another question, whether the right of getting on the poor's roll is too limited. I am not prepared to say whether there is not sufficient facility given.

11,528. *Mr. Campbell.*—You are aware that, under the existing Sheriff Court Act, an appeal is contemplated to the Sheriff without either oral or written argument, unless the parties insist on it. Do you see any objection to a similar appeal being granted direct to the Lord Ordinary from the Sheriff, assuming that there is but one Sheriff in each district, instead of a double Sheriff?—I have not thought of that mode of appeal, but it strikes me at the moment as being not a judicious or right course at all. I am against all private and secret judgments or proceedings in judicial matters; and to send up an appeal in that way, by writing to the Supreme Court, and deciding it in chambers (for that would be the result of it), instead of before the public, is a thing that I don't think would operate well, and would give rise to great dissatisfaction. The kind of appeal to which you allude was very seldom resorted to when I was Sheriff, though it did sometimes occur, but I am not surprised that it occurred so seldom.

11,529. Such an appeal taken to the Lord Ordinary would be as cheap as an appeal taken to the Sheriff?—But how can it be maintained that a satisfactory judgment would be pronounced in such circumstances?

11,530. There might be a confirmation of the judgment?—And that might be very erroneous.

11,531. *The Lord Justice-General.*—You are aware that under the existing law, for a very considerable time, a litigant in the Sheriff Court has had a right of appeal from the Sheriff-substitute to the Court of Session, passing over the Sheriff?—Yes.

11,532. And he has in that way a choice either to appeal in the first instance to the Sheriff, or direct to the Court of Session. You are probably aware also that the percentage of cases appealed direct to the

Court of Session from the Sheriff-substitute is very small indeed?—Very small.

11,533. Do you draw any inference from that, favourable or otherwise, to the existing system?—I am not prepared to draw any inference from that at all. Certainly the appeal to the Sheriff-principal can be obtained very easily, and at very little expense; and very likely the kind of conclusion that the parties or their advisers come to in the first instance, is to try that before going to the Supreme Court.

11,534. You are probably aware also that the number of cases brought for review to the Court of Session, where the appeal is taken to the Sheriff in the first instance, is also very small?—Compared with the number of cases in the inferior court, it is very small indeed.

11,535. Does not that indicate that when a litigant in the Sheriff Court has had the opinion of two judges in the Sheriff Court, he is upon the whole satisfied without going any further?—I have my doubts as to whether that is the reason.

11,536. Then how do you account for the state of the fact?—The agents in charge, by whom the parties are naturally, and perhaps quite rightly advised, have no interest in the Court of Session, or in bringing a case to the Court of Session, but the contrary. They are not permitted to practise here, and they have no right to do so. Not only so, but it is held to be contrary to law for them to participate directly or indirectly in the remuneration awarded to the agent in the Supreme Court; and the result is, that while they may give very efficient assistance towards the prosecution of the appeal in the Supreme Court, and thereby incur a large account to themselves, they cannot recover it from the other side, and it is all disallowed. That, I rather think, very often operates, and not unnaturally, against the prosecution of appeals that might otherwise be brought to the Supreme Court from the inferior court.

11,537. Would you be prepared to make any alteration of the law in that respect?—I am told, and I believe it is the fact, that in England no such law as that to which I have alluded exists, and that practitioners in all parts of the country may follow their appeals to the superior courts; and they form connections—which would be the practical result here also, if the law were altered—with the agents in London, through whom appeals are prosecuted in the superior courts, which enable them to participate to a fair and reasonable extent in the fees. If that has been found to operate well in England, and no real disadvantage arising from it, I don't see why the same rule should not exist in Scotland; and I am the more inclined to say so, because I am entirely in favour of the assimilation of the laws and practice in both ends of the island, so far as that can be carried judiciously into effect.

11,538. Then you would be disposed to allow the practitioners in the inferior courts to follow their appeals to the Court of Session?—I would. The practical result would be, that they would form connections here.

11,539. Would you carry that further, and give them a general right of practising in the Supreme Court?—That is a matter I have not thought of. I doubt that. It would give rise to a great many considerations with reference to corporations which have privileges at present. I think it would be very rash to make any definite answer to that question.

11,540. I am sorry to press you with the question?—I have not considered it so as to enable me to answer it.

11,541. There is a rule of law at present existing, standing upon a decision of the court, which prevents the country practitioner and the Edinburgh agent from making any arrangement as to the distribution of their profits. Would you abolish that?—It is a principle of law given effect to by a decision of the court. If the country agent is to be entitled to follow his case to the Supreme Court, and to participate in the emoluments, that law would require to be abrogated as a matter of course. And as I have said—and that very much influences me in the opinion I have given expression to on this point—I understand that such a state of things exists, and has long existed in England, without any objection in practice being found to result from it. If it is so in England, I don't see why it should not be so in Scotland.

11,542. *The Chairman.*—If that law was abrogated, then although the country agent did not participate in the profits of a suit which had not originated in the Sheriff Court, it would still be competent for him to make arrangements with an agent in Edinburgh as to causes that were advised by him to be brought by his country clients?—I don't know if there would be any serious evil resulting from that. I am quite aware of the law, and I think I have read the case giving effect to the law as it exists.

11,543. *The Lord Justice-General.*—There is only one case, I think?—There is only one, I daresay; but my impression is that the principles there expressed are not very formidable, and do not recommend themselves very strongly to one's mind. I don't see why there should not be partnerships among legal practitioners as well as other persons, everywhere and anywhere.

11,544. *The Chairman.*—I suppose you would have a person who has been admitted by the court to represent them?—Yes, that is quite right; but I don't see why we should go into their private relations with one another.

11,545. *Mr. Campbell.*—You said that there are very few instances of advocation direct from the judgment of the Sheriff-substitute?—Very few, I should imagine, from the mass of cases decided in the inferior court.

11,546. Are you aware whether, when such advocations have been brought into court, the court have expressed any opinion as to the conduct of the parties in passing over the Sheriff without taking his opinion? Was that not reprobated by the court?—I rather think some indication to that effect may have been given.

11,547. *The Lord Justice-General.*—That must have been a reflection on the statute that permitted it?—I suppose so.

11,548. *The Chairman.*—Can you suggest any mode by which the expense of accountings in the Court of Session could be diminished?—I am not fond of accountings in any shape.

11,549. They are necessary evils?—They are. I interfere with them as little as possible.

11,550. A suggestion has been made that there might be one or two official persons paid by the public, to whom accountings should be referred, the parties paying their own agents and expenses attending it, and a tariff for these official persons?—If that could be accomplished, I would have no objection.

11,551. At present the accountant is paid by the parties, and he acts as a quasi-judge; and there is no very good way of limiting the amount of charge?—I don't know whether there are official accountants in England paid by the country.

11,552. There are, I believe, officials before whom cases of accounting are prepared and adjusted?—Then it should be so here also. I am in favour, as far as possible, of the principle of all the proper expenses of courts of justice being sustained by the country, and not by the litigants. And it is so very much now in Scotland. Clerks are so paid, and judges are so paid, and other parties are so paid. There is a remnant yet, in the opposite direction, in the shape of the fee fund, which I think might very well be done away with.

11,553. *The Lord Justice-General.*—I suppose you are of opinion that the present practice in matters of accounting is very objectionable?—In what respect?

11,554. Is it not very expensive?—I presume it is very expensive, and may operate as a denial of justice sometimes.

11,555. *Mr. Clark.*—And it is very tedious?—Very tedious. Official accountants would probably give rise to a much improved mode of reporting for the information of the court. I think there has been a great improvement in late years made in accountants' reports. We are not now treated to a statement amounting almost to a volume sometimes, as to what the parties have pleaded and not pleaded, and all they have said and not said. That has very much gone into disuse, I am

The Hon. Lord Ormidale.

happy to say; but even yet there is far too much statement by accountants. If there were official accountants, I have no doubt they would say as little as they possibly could.

11,556. *The Chairman.*—And being officers of court, there would be greater facility in the court communicating with them, if they wished to remove any doubt existing?—That would be a great advantage.

11,557. *Mr. Clark.*—And they would get more into the habit of disposing of that kind of business?—Yes; and the expense, after all, would perhaps not be very great.

11,558. *The Lord Justice-General.*—Have you any suggestion to make with a view to the diminution of the costs of litigation generally?—No, I have not, because I rather think, from what I have heard complained of as the great cost which has been incurred in many litigations, that it is beyond the remedy of legislative enactment. It is owing to the parties themselves, and it is impossible to restrain them from doing as they like in that matter. There is one suggestion which I may make, viz. that the court has it in its power to check the expenses of ligitation frequently; and I cannot help thinking that in some respects, though not so much recently, they have been a little unobservant in that matter. They have allowed charges for more than two counsel, where perhaps it might have been just as well that they had not.

11,559. Do you mean too many counsel a side?—Yes; I am told that a distinction is allowed at present between the expense of counsel in jury trials and in proofs.

11,560. Where has that distinction been taken?—I have been told that the auditor makes that distinction. I was told so in answer to a question that I put in the course of a discussion before myself recently.

11,561. *Mr. Baxter.*—What is the distinction?—I was told that the auditor makes such a distinction,—that he allows as against the unsuccessful party larger fees to counsel for attending a jury trial than for attending a proof, assuming it to be of the same duration.

11,562. *The Lord Justice-General.*—Do you disapprove of that?—I do.

11,563. You think there ought to be no higher fees for attending a jury trial than for attending a proof?—I think not. The one is far more disagreeable and irksome than the other. I would myself take a smaller fee to attend a jury trial.

11,564. *The Chairman.*—Do you find that in the proofs you have the same constant attendance of senior counsel throughout the investigation that you have in a jury trial?—Very possibly not; but it is not the way to secure their attendance, to give a higher fee in jury trials, and less in proofs. That is an evil which should not be encouraged if it can be avoided. I don't say it can. I hope we always do make indulgences in that way, but the attendance of counsel should be as constant as possible.

11,565. *Mr. Baxter.*—Do you get much assistance from senior counsel in taking proofs?—Yes; all the ordinary assistance.

11,566. They come in for ten minutes possibly, and go away again, without knowing what is doing; is not that so?—In the conduct of a proof before the judge, things go on very quietly, and the judge can and does lend his assistance to both sides, for the purpose of getting at the truth, in a manner that he could not well be expected to do at a jury trial.

11,567. *The Chairman.*—If the proof does not monopolize the attention and time of counsel so much as a jury trial does, but allows him to multiply himself so to speak, should the fees be the same as when he is compelled, as counsel who attend jury trials generally feel themselves compelled, to be nowhere else?—I don't like to recognise the principle of a counsel attending only as he pleases in the place at which he is engaged to attend. I ignore that principle altogether, and I desire to have it ignored, in place of having it recognised by allowing smaller fees for a proof. The result of encouraging the practice would be, that we would have the name of counsel's attendance, but not the reality.

11,568. *Lord Barcaple.*—By the recent statute, the debate must go on immediately at the end of the proof?—Yes.

11,569. Is it at all tolerable as regards the interests of the client, that the counsel who are immediately to address the court upon a proof shall not have been pretty continuously present during the proof?—The more continuous he is in his attendance the better, though we all know from experience that it is quite amazing how a man who has reached the position of senior counsel, from great experience, and probably from higher gifts, makes his assistance available, even when he has only been present occasionally.

11,570. But is it a fair thing to the court, or the parties, that the case shall be instantaneously argued by him without his being told what has taken place, or without the possibility of seeing it recorded?—The provision of the recent statute puts it always in the power of the judge who takes the proof to postpone the hearing, and I think that is a sufficient safeguard.

11,571. Is there such a provision?—Yes. You may send it to the ordinary debate roll. It is not peremptory to hear the debate at the end of the proof.

11,572. The reason of my question is, that my own experience is that, since the passing of the late Act, senior and junior counsel attend well at the taking of the proof. Before that, the debate probably went on after a considerable interval of time, and after the parties had been furnished with the proof?—That was a vicious thing.

11,573. *The Lord Justice-General.*—The thirty-second section of the Act of 1868 directs, 'that in all proofs before the Lord Ordinary, no adjournment shall be allowed, except on special cause stated in an interlocutor; and the evidence shall be summed up by one counsel on each side at the conclusion of the examination of the witnesses, as in the case of jury trial.' Now, is that not in observance?—Oh yes, it is quite in observance; and in the general case the argument takes place at the end of the proof. We try to enforce that as much as we can. But in a case involving considerable difficulty—involving questions of law as well as evidence—it is not always done. The advantage of a senior over a junior counsel in addressing the court on evidence is not great, if anything at all; but when there is an important legal principle mixed up with the evidence, and it is found at the conclusion of the proof that leading and experienced counsel have not been able to give that close attention which might be desirable in some views, but which is sometimes impracticable (for business could not be carried on if you were to enforce it), then I would hold that to be perfectly sufficient cause for an adjournment; and I would state in the interlocutor—that the case involves legal principles of great importance and difficulty, and the leading counsel had not been able to give close attendance, so as to proceed at once with advantage.

11,574. In such a case, what adjournment do you make?—I have endeavoured to make the adjournment as short as possible.

11,575. How long do you ever make it?—I send it to the ordinary debate roll in some instances.

11,576. How long may it stand there?—According to circumstances, a considerable time. There can be no objection to that, in many instances, because the proof that has been taken may be in itself a comparatively unimportant part of the case. The real difficulties of the case may depend on the construction of a number of deeds or documents; but at the same time there may be some matters requiring to be cleared up by evidence, which the parties could not adjust, and without which they were not in a state to renounce probation; but in reality and substance, the case may not depend on the oral evidence. In such a case as that I would have little hesitation in making the statement of the cause in the interlocutor; and if the parties consent, or, as more often happens, concur in moving the court to send it to the debate roll, I would not have any hesitation in doing so.

11,577. But, in a case depending entirely or mainly on evidence, do you ever take that course?—Never if I can avoid it. But the proof has sometimes been con-

cluded at so late an hour that it is unavoidable. But whenever it is possible, it is put out for next day. It is always put for hearing with as little delay as possible.

11,578. *Mr. Shand.*—You have not adjourned many proofs in that way?—I have adjourned some; but sometimes, when I insisted on going on, I could see from the look of the parties that it was very much to their annoyance. I think I may say for myself, that ever since I had a place on the bench, I have struggled hard against delays of every sort.

11,579. *The Lord Justice-General.*—But do you think it desirable that the counsel who is to sum up the evidence at the conclusion, should be present throughout the whole taking of the proof, as much as if you had a jury sitting with you?—I don't know that it is so necessary; I think it is very likely not.

11,580. Why?—In the taking of a proof before the Lord Ordinary, they can always get a little delay if they desire it, which cannot well be given, and ought not to be given, where there are twelve gentlemen sitting as a jury. But in taking proofs we always try to accommodate each other, and give little delays, that the senior counsel may confer with their juniors, or postpone a witness, and take him up out of his place, and so on; these little things don't affect the judgment on the case, but are inadmissible at a jury trial, which must go on more exactly than proofs. I endeavour to be as peremptory as I can in the conduct of these proofs, and of business generally in the Outer House; but I cannot forget that there are probably six or seven courts sitting at once, and it cannot be expected that counsel who are in large practice will tie themselves down to a particular bar. Such a thing is impracticable.

11,581. *The Chairman.*—And it would add to the expense?—I have no doubt it would.

11,582. *The Lord Justice-General.*—We have had the subject of refreshing fees brought under our notice. Have you anything to say as to that?—I did not know that that system existed. It is a matter I have not turned my attention to, and I would therefore be reluctant to say anything about it. It is very much a question for the parties. I suppose it is in consequence of the present auditor, as well as his predecessor, having understood their business remarkably well, and discharged their duties remarkably well, that objections to auditors' reports are very uncommon now before me, and I believe before the court; so that really we know less now of the nature of accounts and charges that are made than we did some time ago.

11,583. *The Chairman.*—In regard to distributing the business among all the judges, as you formerly suggested, would there be no difficulty in doing that with Teind cases, with reference to the Teind clerk?—I am afraid there may be a difficulty there, and I am not prepared to say how it could be obviated; but I cannot allow myself to suppose that it could not be got over in some way. *The Hon. Lord Ormidale.*

11,584. How would you deal with questions of augmentation? Would you leave them to one of the Divisions?—I think that might be quite sufficient, if it was necessary to begin in the Divisions at all. Probably it would be better to begin there, so as to save the necessity for review; otherwise I don't see why such cases should not be judged of by the Lord Ordinary.

11,585. It is a discretionary matter a good deal, and it is also imposing or transferring a burden?—I am inclined to think that it should go before one of the Divisions at once, and should not be disposed of by a Lord Ordinary in the first instance, because very likely some heritor might bring it under review, and lead to a good deal of expense and litigation. I don't know that there is any good ground why an augmentation should not be granted by one of the Divisions.

11,586. *The Lord Justice-General.*—You are aware there is no appeal in these cases?—Well, let it be so. I have no objection to that at all.

11,587. *The Chairman.*—In regard to procedure in localities, would you deal with them in the Division?—If the Lords Ordinary continue as they are, I suppose there would be a remit to one of them. I don't think that such procedure could be well dealt with in a Division. It would be taking up the time of the court with a good deal of detail which had better be done by a single judge.

11,588. In regard to Bill Chamber matters, how would you prevent the same application running the gauntlet of the five Lords Ordinary?—I think there must be one judge there. It might be worth considering whether the Lords Ordinary, if they continue, should not take it in turn; but if the Lords Ordinary continue, I don't see any reason for disturbing the present arrangement.

11,589. In either view you would retain the Bill Chamber?—Yes.

11,590. *Mr. Shand.*—Have you turned your attention to the question whether the Bill Chamber might be conveniently done away with, and all applications for suspension and interdict, and the like, brought before any judge?—No, I have not directed my attention to that.

11,591. Do you think there is any necessity or propriety in continuing the practice of judges' trials, by which every one who has received an appointment of judge from Her Majesty must proceed to hear certain cases, and give a *quasi*-judicial opinion on them before beginning to administer justice?—I think it is an antiquated ceremony that might very well be done away with. It serves no good purpose now, though it may at one time have done so. My own impression is that it does neither harm nor good.

THURSDAY, 29TH APRIL 1869.

Members Present:—

LORD COLONSAY.
THE LORD JUSTICE-GENERAL.
MR. JUSTICE WILLES.
LORD BARCAPLE.
THE LORD ADVOCATE.
MR. E. S. GORDON, Q.C.
MR. A. R. CLARK.
MR. JAMES CAMPBELL.
MR. A. ORR EWING.
MR. JAMES ADAM.
MR. A. B. SHAND.
MR. CHARLES MORTON.
MR. JAMES WEBSTER.
MR. J. B. BAXTER.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

GEORGE HUME, Esq., examined. *George Hume.*

11,592. *The Chairman.*—You hold an official situation?—Yes. I was chief clerk to the Master of the Rolls for 13 years, from 1852 till 1865, and since that time I have been one of the taxing masters of the Court of Chancery.

11,593. You have seen a note of points on which the Commissioners are desirous to get information?—Yes. The first of them was as to the nature of the proceed-

George Hume.

ings in chambers; and with regard to that, the best thing I can do is to refer you to a return prepared when I was a chief clerk, in November 1862, and sent to the English and Irish Law and Chancery Commission, and which is embodied in their second report, pp. 126 to 131. That return gives a detailed account of the proceedings in chambers before the chief clerks and assistant clerks; it requires a little alteration, owing to subsequent changes made by Act of Parliament, and I hand in a copy corrected in that respect. (See No. 1 *infra*, page 455.) Another document, which I think would be very useful to this Commission, is Mr. Chapman Barber's statement of the proceedings in the Court of Chancery in England, appended to the first report of the same Commission. The next question in the note of points was, what duties of a judicial character are performed by the chief clerks, and what by the judges personally? The Masters in Chancery Abolition Act (15 and 16 Vict. c. 80), which established the system of conducting business in the chambers of the equity judges, enacts, by section 29, that each judge shall have the sole power to order what matters and things shall be investigated by and before his chief clerks, either with or without his direction, during their progress, and what by himself. The business of the judge's chambers is conducted under the immediate control and direction of the judge; and the great safeguard of the system is the ready access to the judge, on the part both of the chief clerk and of the suitor, whenever necessary. The judge personally hears and decides all questions which he may direct to be brought before him, or which are adjourned to him by the chief clerk for his consideration; and for that purpose the judge sits in chambers once or twice in every week during the sittings of the court, from three or half-past three o'clock in the afternoon until five or six o'clock, as may be required; as well as at other times on any urgent occasion. Where the parties desire to have the assistance of counsel on each side, cases adjourned by the chief clerk are usually heard by the judge in open court during the ordinary sittings of the court. The judge is also at all times accessible to the chief clerk for advice and assistance in any proceedings pending in chambers; and in all cases, any party interested in the proceedings has the right to have any question brought formally before the judge, for his personal opinion or decision. The chief clerks must by statute (15 and 16 Vict. c. 80, s. 17) have the qualification of ten years' practice as solicitors immediately preceding their appointment. They are therefore, from their practical knowledge and experience, fully competent to discharge the important duties of their office. It is obvious that every inquiry, account, investigation of a pedigree, allowance of debts, etc., requires the exercise of what may be called 'judicial discretion;' and even decisions upon applications for time to answer may be called 'judicial.' These cases necessarily involve mixed questions of law and fact, and the principle upon which the business in chambers is conducted is, that the chief clerk investigates all these matters; and then, if a question either of law or fact arises, which the chief clerk for his own guidance considers proper, or any of the parties desire, to refer to the judge, this is done as a matter of course, not in the nature of appeal or review, but for the decision of the judge himself in lieu of that of his chief clerk. In such cases the question may be adjourned for the judge in chambers or in court, or be reserved by the chief clerk's certificate for the decision of the court on hearing the cause on further consideration, according to the nature of the question and the convenience and wishes of the parties; and in these cases it is the duty of the chief clerk to see that all the evidence is complete, and the question ripe for the court or judge. The whole principle is, that the chief clerk should transact such business as from the nature and importance of the question involved may safely be entrusted to a solicitor of experience; and that whenever during the proceedings a question of any kind arises which ought to be disposed of by the judge, this may be done in a ready and inexpensive manner. Counsel are not heard before the chief clerks in proceedings in chambers.

11,594. Do you take evidence at these meetings?—The depositions of witnesses are taken in chambers, unless the witness or parties desire to have the assistance of counsel, in which case the examination is adjourned to the examiner.

11,595. Who examines him?—The solicitor for the party examines him, and the chief clerk takes down the deposition.

11,596. Do you take it down *verbatim*, or only the substance of it?—It is taken down in the narrative form, and read over to the witness, and he signs every page. It is then filed, and parties can get a copy of it.

11,597. Is it taken on oath?—Yes.

11,598. *Mr. Webster.*—Is it taken upon oral questions?—Yes.

11,599. *The Chairman.*—What is the next point?—The next is as to how litigation involving matters of accounting is disposed of. The nature of the account to be taken is defined by a decree or order of the court or judge; it is usually an account of the estate of a deceased person, or of the transactions between A. and B. as partners or otherwise. The account is then brought into the judge's chambers, where the vouchers for the disbursements are produced to the junior clerk, and examined by him in the presence of the parties. The consideration of all doubtful or disputed or unvouched items, and of any surcharge brought in against the accounting party, is reserved for the chief clerk, who proceeds thereon in the presence of the parties, and upon evidence, if necessary; and the several items in the account or surcharge are allowed or disallowed by the chief clerk, subject to review before the judge if so required. The result of the account is then stated in the chief clerk's certificate, and the opinion of the judge thereon may be taken by any party before the judge approves the certificate. Any party may also take out a summons to vary the certificate after it has been approved by the judge and filed; and such summons may be heard by the judge in chambers or in court, as the parties may desire and the judge shall think fit. Any person may take out a summons and get the opinion of the judge on the finding of the chief clerk. The certificate is signed by the chief clerk, and when approved of by the judge it is filed.

11,600. That summons is served on the opposite party?—Yes; and the summons to vary the certificate is generally adjourned to come on with what is called the further consideration of the cause, and the ultimate decision is stated in the order of the court.

11,601. Is there any limit of time within which the summons may be taken?—The judge cannot approve the certificate till four days after the chief clerk has signed it; and any person objecting to it after it is filed must take out a summons within eight days. After that the certificate is binding on everybody.

11,602. How are the costs of that proceeding paid?—They are costs in the cause, unless any particular proceeding is so vexatious that the judge thinks fit to visit the party with the costs of it.

11,603. Do the parties pay any fees to the clerk?—No.

11,604. *The Lord Justice-General.*—Can you give us any notion of the expense of an accounting conducted in that manner?—I cannot give the separate expense of it. I have here some returns showing the general expense of an administration suit.

11,605. *The Lord Advocate.*—Can you show also the time occupied?—Yes. I prepared these returns in 1864 for the chairman of the committee on the Bankruptcy Bill. The first case given is a case before the Master of the Rolls. The testator died in August 1852; amount of property, £4694; the summons to administer was taken out, and the order made on 1st December 1852; chief clerk's certificate, 10th March 1853; order on further consideration, 20th April 1853; costs of suit, £155, 15s. 10d. I also prepared a return of several suits, stating the amount of assets on one side and the taxed costs on the other, and taking them together the costs come to about 3 per cent. I hand

in a copy of these returns. (See No. 2 *infra*, page 459.)

11,606. *The Lord Justice-General.*—Can you give us a case of partnership?—I have no case of partnership in these returns. I see in another case the amount of property was £13,628; summons issued, January 1861; certificate, May 1861; costs, £156, 18s.

11,607. That is an administration suit?—Yes.

11,608. *Mr Clark.*—What kind of question was involved in the suit?—Ascertaining probably who were the next of kin of the deceased, or the legatees, and taking an account of the debts and assets of the deceased. These are the ordinary inquiries in an administration suit.

11,609. *Mr. Webster.*—What did the costs chiefly consist of? Fees to counsel and solicitors?—There were very few fees to counsel in this case, because there was no preparation of a bill. The only fees to counsel were those paid on the hearing of the cause on further consideration. The fees to counsel in the case I have mentioned were not £15 altogether.

11,610. *Mr. Shand.*—Were these cases in which there were litigated points between the parties?—No; there were no litigated points of any importance.

11,611. *Mr. Baxter.*—Is the accounting ever so large that you require the assistance of an accountant?—It is seldom required except in cases of partnership, where it is often impossible for any person except an accountant to investigate and what is called raise an account.

11,612. *Mr. Shand.*—Suppose a partnership suit to arise, involving a great many disputed points, are these all disposed of by the chief clerk?—So far as regards any question to be determined, it is done by the chief clerk, subject to the opinion of the judge. And in any question of account the judge or chief clerk may require the assistance of an accountant.

11,613. In practice, how are these cases disposed of?—In partnership cases it is very common to send the account to an accountant, the chief clerk giving his assistance.

11,614. In accountings, when questions of disputed fact arise, do you take evidence?—That is done on affidavits; or the parties may summon witnesses to be examined *viva voce* before the chief clerk.

11,615. *Mr. Webster.*—Has the accountant the privilege of direct access to the judge?—No; he comes to the chief clerk if he likes, but not to the judge.

11,616. *Mr. Shand.*—Suppose evidence requires to be taken, do you fix a day on which the parties must bring evidence?—We generally direct affidavits in support to be brought in on one day, affidavits in answer on another day, and in reply on a third day; but we find it impossible to confine the parties to these days.

11,617. Are these affidavits part of the evidence?—Yes.

11,618. Do the witnesses appear before you where there are affidavits?—No; unless they are cross-examined.

11,619. And the whole evidence consists of affidavits not taken in your presence?—Yes; but any party may examine a witness in chief, or cross-examine a deponent who has made an affidavit; and that is done *viva voce* before the chief clerk or an examiner.

11,620. Do you have evidence in supplement to the affidavits?—Very often.

11,621. *Mr. Baxter.*—Are accountants' fees paid by the parties?—Yes.

11,622. *Mr. Shand.*—Is the evidence taken at the option of the parties?—We don't allow evidence to be brought in upon accounts or inquiries unless the chief clerk requires it. If a party brings in evidence which is not required, he runs the risk of having the expense of it disallowed on taxation.

11,623. *The Chairman.*—When a case does go to an accountant, is there any control as to the fees of the accountant?—Yes. Under section 42 of the Masters in Chancery Abolition Act (15 and 16 Vict. c. 80), the judge has power to obtain the assistance of an accountant; and by section 43, the accountant's fees are to be regulated by the taxing master, subject to appeal to the judge, whose decision shall be final; and in a recent case the Master of the Rolls has decided that, in the absence of any special agreement, the Court of Chancery will allow on taxation the scale of charges fixed for accountants and their clerks by the general order of the Court of Bankruptcy of 19th May 1855, which is as follows:—Principal's time per day of eight hours, including necessary affidavits, £2, 2s.; chief clerk's time, £1, 15s.; other clerks' time per day of eight hours, 10s. 6d. to 15s. The expenses of taking accounts in the Court of Chancery are borne by the parties to the particular cause, as the judge may direct.

George Hume.

11,624. *The Lord Justice-General.*—Are the charges you have mentioned the accountant's charges?—Yes; in the case referred to the accountant charged £700, which was thought monstrous. He charged five guineas a day; and the Master of the Rolls reduced the amount to the scale allowed in bankruptcy.

11,625. *Mr. Baxter.*—The charges for clerks are for the accountant's clerks?—Yes.

11,626. *Mr. Webster.*—Do you find high-class accountants satisfied with two guineas per day of eight hours?—No, they are not at all satisfied with it.

11,627. *Lord Barcaple.*—Do they accept the employment?—Oh yes.

11,628. *The Lord Justice-General.*—The best accountants?—Yes; I am not aware of any difficulty.

11,629. *Mr. Adam.*—Do the accountants do the work personally, or through clerks?—It is chiefly done through clerks. I do not know if any of the Vice-Chancellors have adopted the rule to which I have referred.

11,630. *Mr. Shand.*—I suppose the cases you have given us of the expenses of administration suits are not a fair representation of the expense of partnership questions?—I don't think any of these were partnership questions.

11,631. Do you find that in partnership questions the expense has been a good deal more?—No. I should not think that, generally, it is more than an ordinary suit, unless you come to very expensive accountants' fees.

11,632. In partnership cases, have you not more frequently disputed questions?—No. I think in partnership accounts there are very seldom disputed questions.

11,633. *The Lord Advocate.*—In the case of partnership accounts and accounts of mercantile companies, what is the usual time that it takes before a report can be made?—I should think about a year and a half or two years; but of course it depends very much on the length of the accounts, and the obstacles put in the way by the parties.

11,634. Do they very frequently go on longer than that?—Very frequently; three or four years perhaps.

11,635. *Mr. Shand.*—Are there interim orders dividing funds from time to time as they come in?—Any party interested may apply at any time to have the funds in court divided; and orders to that effect are made. That is done by summons, and the expense of an order is not great; probably about £10.

11,636. *The Lord Justice-General.*—Have you ever such cases in Chancery now as Small and Attwood?—I don't know any recent case of that magnitude. The heaviest cases I remember at the Rolls during the time I was chief clerk, were those of Stainton and the Carron Company, Pole and Leask, and the York and North Midland Railway Company and Hudson. These all involved very large amounts of property, and questions of great difficulty. I think they all went on appeal to the House of Lords, and the litigation lasted some ten or twelve years.

11,637. *Lord Barcaple.*—Where there is a remit to an accountant, what is the ordinary proportion of the entire expense of the accounting that goes in fees to accountants and their clerks?—I can form no idea. A simple account may take a long time or a short time.

11,638. Have you, under the scale of fees which you have mentioned, pretty large sums paid to accountants?—I am not able to state the total amounts paid to the accountants.

11,639. *The Lord Justice-General.*—You mentioned one case in which the claim made by an accountant was £700. Was that a claim such as used to be allowed

George Hume.

before the order was made by the Master of the Rolls?—Yes; it was made out on the principle of charging five guineas a day for the accountant, and two guineas for his clerk's time. I advised the accountant to make it £500; but the charge came before the Master of the Rolls, and in the result he got about £400. If he had charged £500, I should not have objected to allow it. The rule laid down by the Master of the Rolls is thought by the accountants to be a hard rule.

11,640. *Mr. Shand.*—Has business been conducted subject to that rule since?—In the Master of the Rolls' chambers certainly. He will not employ an accountant unless he consents to it.

11,641. *Mr. Adam.*—Who checks the accounts?—The chief clerk generally. The accountant keeps a note of the time during which he and his clerk are engaged.

11,642. *Mr. Shand.*—Do the proceedings for winding up companies fall under the chief clerk's control?—Yes.

11,643. What is the procedure there?—After the order to wind up, the parties apply to proceed upon the order. The first thing is to appoint an official liquidator, and then to settle the list of contributories, and ascertain who are the shareholders, which is generally a very difficult matter, and very much contested. The claims against the estate are then ascertained, and paid out of the assets of the company, or by calls upon the contributories.

11,644. How much of that falls under the duty of the chief clerk?—It is all done by the chief clerk.

11,645. Has it not been the practice in recent times to name an accountant?—The official liquidator is generally an accountant. He brings in the accounts of the estate, and makes out a balance-sheet. The chief clerk has nothing to do with that, except to verify it.

11,646. The chief clerk's duties there are very much judicial?—Yes, very much, especially in settling the list of contributories; but that is always subject to review by the judge.

11,647. *The Chairman.*—Is the liquidator paid by a percentage?—Sometimes; and sometimes by a lump sum. The rule in my time was a percentage, and that is very objectionable. The judges have now settled a scale of remuneration for liquidators, a copy of which I beg to hand in. (See No. 3 *infra*, page 460.)

11,648. *The Lord Justice-General.*—There is another class of accounts in the winding up of private trusts. Do these come before you?—No; except in a suit, when a bill is filed against trustees for an account.

11,649. That is what I mean?—That is very common.

11,650. Is that an expensive proceeding?—That depends very much on the length of the account.

11,651. It may extend over a long series of years?—Yes. Sometimes parties will consent to waive a detailed account, to avoid expense, and take a balance-sheet, or they will take the books sometimes as evidence of receipts and payments. The court has power (under 15 and 16 Vict. c. 86, sec. 54) to give special directions as to the mode in which an account shall be taken or vouched; and to direct that the books in which the accounts have been kept shall be taken as *primâ facie* evidence of the truth of the matters contained therein.

11,652. Generally speaking, in cases of that kind, is the business of making up the account done in the chief clerk's office, or is it sent to an accountant?—The account is prepared by the solicitor to the accounting party who brings in the account. I have known cases where it has been so complicated, that the court has allowed the expense of an accountant to frame the account; but that is very seldom done in the case of trustees' accounts.

11,653. After the account is framed and put in, parties may object to it?—Parties may object to any item in the account, or they may bring in a surcharge; that is, they may charge the accounting party with what he has not accounted for; and that is often very much contested.

11,654. Is that carried on in the chief clerk's office?—Entirely in the judge's chambers.

11,655. Without the assistance of an accountant?—Yes, without the assistance of an accountant.

11,656. *Mr. Webster.*—But in presence of the judge only when the parties require that?—Yes; or when the chief clerk requires it.

11,657. *Mr. Adam.*—Are solicitors considered personally responsible to the accountant?—Yes. The judge, before he sanctions the employment of an accountant, requires the solicitor of the party to undertake to pay the accountant's charges, without prejudice to the question by whom they should be ultimately borne.

11,658. *Lord Barcaple.*—Do you think it would considerably increase the expense if the solicitor for the accounting party did not, in the first place, produce an account, but the order were made at once to send it to an accountant?—I never knew such an order made.

11,659. I suppose it would very much increase the expense?—Very much indeed. Drawing the account by the solicitor costs one shilling a folio; but to send it to an accountant might cost five guineas a day.

11,660. But it may go to an accountant?—I have known very rare cases of trustees' accounts in which an accountant was called in.

11,661. Have you accountings, not where parties have been called into court as trustees or partners, but where there have been mutual transactions on open account for a series of years, and these transactions are complicated?—Only when that occurs in a suit against a person to account for sums which he has received. There are no means by which trustees or partners can have their accounts stated or adjusted by officers of the Court of Chancery in England without the institution of a suit, and a decree or order made in such suit, directing the account to be taken. Where such a decree or order is made, the account is taken in the manner described in a former answer.

11,662. It might come in that form?—Yes.

11,663. Is that common?—I remember some few such cases, but they are not common.

11,664. *Mr. Shand.*—Do you find it a great advantage that parties can give evidence in the form of affidavits?—Yes.

11,665. Does it save a great deal of time and expense?—Yes.

11,666. Do you think it would serve the purpose that all examinations should take place before the chief clerk *viva voce*?—No chief clerk could do it.

11,667. Then the system of affidavits is a very great advantage?—Yes, subject to cross-examination.

11,668. *The Lord Justice-General.*—When you say that the chief clerks could not do it, you mean there would not be time?—Yes; it would take much more time than the chief clerk could bestow upon it, consistently with his other duties.

11,669. *Mr. Shand.*—Have you any control over the length of the affidavits?—The chief clerks have power to certify that an affidavit is irrelevant altogether, or that certain parts of it are irrelevant; but the taxing masters do not go into that question unless the court directs it in the order. The judge, however, occasionally refers it back to the chief clerk to state what parts of the affidavit ought not to be allowed.

11,670. And that checks redundancy?—Yes, to a certain extent.

11,671. *The Lord Advocate.*—Is that a frequent occurrence,—the going back to the chief clerk?—No, I believe it is not frequent.

11,672. *The Chairman.*—What is the next point?—Proceedings under the Drainage Act (8 and 9 Vict. c. 56) are practically obsolete, a summary jurisdiction in such cases being exercisable by the General Inclosure Commissioners. Proceedings under the Settled Estates Acts (19 and 20 Vict. c. 120; 21 and 22 Vict. c. 77; and 27 and 28 Vict. c. 45) are by petition to the court; which petition is in the first instance referred to chambers to direct in what newspapers the notices required by the Act are to be inserted, and to appoint guardians to infant petitioners or respondents, and to make orders for leave for such guardians to make or consent to applications under the Act, and to appoint examiners

to ascertain from married women whether they freely desire to make or consent to applications under the Act. After the order is made by the court, the proceedings as to sales or leases of the settled estate directed by the order are carried on in chambers in the same manner as on sales or leases under decrees or orders. The expense of all proceedings under these Acts is borne by the particular estate. There are six conveyancing counsel; and all questions on which the court requires their assistance are sent to them.

11,673. *Mr. Webster.*—Are these proceedings chiefly carried out through the intervention of the chief clerk?—Entirely.

11,674. *The Chairman.*—Have the conveyancing counsel salaries?—They are paid by fees.

11,675. Is there a list of these counsel sanctioned by the court?—They are appointed by the Lord Chancellor, under sec. 41 of 15 and 16 Vict. c. 80.

11,676. *Mr. Webster.*—Are their fees paid by the parties?—By the parties who consult them.

11,677. Is there a tariff?—No, there is no tariff; and sometimes unpleasant questions arise.

11,678. *The Lord Advocate.*—Do you think that a good system?—I think conveyancing counsel a very good system.

11,679. But do you think the system of payment a good one?—I think there is no other way of doing it. The fees often come to a very large proportion of the expense.

11,680. *The Chairman.*—Is it left to the discretion of the solicitor what fee to give?—The solicitor generally arranges the fee with the clerk of the conveyancing counsel; but in case of dispute the 43d section of 15 and 16 Vict. c. 80, provides that the fees of the conveyancing counsel shall be regulated by the taxing master, subject to an appeal to the judge; but the judges are jealous as to our interfering with the fees of counsel.

11,681. The solicitor does it at his own peril in the first instance?—Yes. He may go to the chief clerk and ask if he would sanction such a fee, but very much is left to the solicitor's discretion.

11,682. Are these fees sometimes very heavy?—Yes.

11,683. *The Lord Advocate.*—Has the chief clerk any subordinates in his office?—The Master of the Rolls and Vice-Chancellors have each three chief clerks, and each chief clerk has two junior clerks and an assistant clerk, and in some cases additional junior clerks.

11,684. *Mr. Webster.*—Would you mention the salaries of these clerks?—The chief clerks have a salary of £1500 a year each; the salaries of the junior clerks range from £200 to £500 a year; and those of the assistant clerks from £150 to £250.

11,685. *Mr. Shand.*—What is the qualification for the office of chief clerk?—He must be a solicitor of ten years' practice immediately before his appointment.

11,686. The appointment is not made from the bar?—No.

11,687. *The Chairman.*—Is he appointed by the Lord Chancellor?—He is appointed by the judge, with the approbation of the Lord Chancellor. The Lord Chancellor must give his approval.

11,688. *Mr. Webster.*—Is there any specified qualification for the assistants?—None for the assistants or the juniors. The junior clerks are taken from the best managing clerks of solicitors, and the assistant clerks are taken from solicitors' offices.

11,689. *Mr. Clark.*—Who makes the appointments under the chief clerk?—The judge appoints the junior clerks.

11,690. *Mr. Adam.*—Are there any other clerks?—Not in the judge's chambers.

11,691. They do the whole business?—Yes.

11,692. *The Lord Justice-General.*—What other officers are there connected with the Court of the Master of the Rolls or of a Vice-Chancellor?—The Master of the Rolls and each Vice-Chancellor has a secretary. The Master of the Rolls has also an assistant secretary, and subordinate clerks in his secretary's office, in which much business of a formal nature is transacted. He also appoints the examiners.

11,693. What is the salary of the secretary?—I am not able to say.

11,694. What is the officer called the examiner?—He takes the examination of all witnesses for the purpose of being used in the Court of Chancery. The evidence is taken *viva voce* before him.

11,695. Does he act for all the Courts of Chancery?—Yes.

11,696. *Mr. Clark.*—Is there only one examiner?—There are two examiners.

11,697. What are their salaries?—I think £1500 a year.

11,698. *The Chairman.*—Are the assistant clerks appointed by the judge?—They are appointed by the Lord Chancellor. He has power, under a special Act, to appoint assistant clerks.

11,699. *Mr. Shand.*—Has the examiner any other duty except to examine witnesses *viva voce*?—None.

11,700. Has he no control over the system of affidavits?—None.

11,701. *Mr. Webster.*—Are the examinations before the examiner conducted by counsel?—Usually by counsel.

11,702. *Mr. Shand.*—These examiners fix a time at which both sides, with their witnesses, must appear?—Yes; parties apply to the examiner for an appointment; and he fixes a day, and the parties are bound to attend on that day.

11,703. Does the proceeding go on as at a trial?—Yes.

11,704. And with the same penalties as to the absence of witnesses?—Yes.

11,705. *Mr. Clark.*—From what body are the examiners appointed?—They are barristers.

11,706. Is their time fully employed?—I believe not. Cases constantly go off; parties cannot attend, and the day is lost.

11,707. *The Chairman.*—Is the examiner paid by salary?—Yes; all the officers of the court are paid by salary.

11,708. *Mr. Adam.*—Is the examiner entitled to take other business?—No.

11,709. *The Chairman.*—Are there any other points on which you have any information to give?—One of the points was as to how the judgments of the court are drawn up. They are embodied in decrees and orders, which are drawn up and passed by the registrar in the presence of the parties, and entered in books preserved in the Report Office of the court.

11,710. Does the judge put them upon paper, or does he merely announce his judgment?—He announces his judgment, and the registrar in court takes a note of the decision. In some very special cases the judge himself prepares a minute of his decision. Lord Justice Knight Bruce, when he was Vice-Chancellor, and Lord Justice Turner, were in the habit of preparing their own minutes; and they were very admirable.

11,711. *Mr. Shand.*—But, as a rule, that is not done?—It is not. The counsel indorse on their briefs what the decision of the court is; and if any question arises, the registrar has to apply to the judge, or the parties may apply to the court again to settle the minutes.

11,712. *The Chairman.*—What is the proper province of a registrar?—To attend the judge in court, to take a minute of his decisions, and answer any questions as to practice, and to prepare and settle the orders made by the judge.

11,713. Who appoints him?—The registrars are appointed by the Lord Chancellor. They are appointed clerks at first, and they rise as vacancies occur to be registrars. They must at the time of appointment as clerk be on the roll of Solicitors, or have served five years under articles of clerkship.

11,714. Have they any other duties?—No. Their duties are very laborious.

14,715. Does the registrar attend the judge in chambers?—Not unless specially required by the judge.

11,716. *Mr. Shand.*—Has the registrar a separate

George Hume.

chamber of his own?—Yes; each registrar has a room and a staff of clerks.

11,717. How are the duties so laborious?—He has to attend court during the sittings, and then he has to draw up thirty or forty orders in the course of a week, and to settle them all.

11,718. *Lord Barcaple.*—That is, to settle them out of court?—Yes.

11,719. The parties attending him?—Yes.

11,720. Do counsel attend on these occasions?—No; but the minutes are frequently drawn by the counsel on the one side, and approved by the counsel on the other.

11,721. When the order is signed, do the solicitors attend?—Yes; they attend when the order is finally settled and passed.

11,722. Is that a matter about which they dispute?—There are very often great disputes about the substance of the directions given by the court, and the terms in which they should be expressed.

11,723. Are there frequent adjournments of meetings before the registrar?—Very often.

11,724. *The Chairman.*—What is the salary of the registrar?—It is a graduated salary. They rise by seniority. The senior registrar has £2000 a year, and the junior registrar begins with £1200 and goes up by steps. There is one at £2000, three at £1800, four at £1500, and four at £1200.

11,725. *The Lord Advocate.*—Are all these payments made out of the suitors' fund?—Yes.

11,726. *Mr. Gordon.*—What fees are payable by suitors in Chancery?—The fees are all paid by means of stamps now.

11,727. But on what proceedings are they payable?—On proceedings in the different offices of the court; for example, £3 on every decree, and for every summons issued, 3s.

11,728. Is an order any interlocutory order?—The fee on any interlocutory order drawn by the registrar is £1, and the decree is £3. There is a table showing the fees of court in the regulations subjoined to the Consolidated General Orders of the Court of Chancery.

11,729. *Mr. Clark.*—Does the registrar express at length what the judge has expressed in short?—The order itself embodies the judge's judgment; that is, it directs a certain account to be taken, or declares that A. B. is entitled to certain rights; and the registrar's duty is to embody as shortly as he can, in the decree or order, what the judge has determined.

11,730. The judge expresses his opinion generally?—Yes.

11,731. And the registrar draws it up at length?—Yes, as concisely as he can. I remember when a decree was as thick as a book, but now it rarely exceeds a dozen pages of foolscap, and is frequently only three or four pages.

11,732. *Mr. Gordon.*—Are the documents recited now?—No; it states that there is a certain affidavit without setting it out. We don't, in taxation, allow any affidavit unless it is entered by the registrar in the order.

11,733. And every document also?—Yes, by exhibits, A, B, C, D, and so on.

11,734. The clerk or registrar does not keep the documents which are exhibited?—No.

11,735. The parties keep the documents?—The affidavits are filed, but the exhibits are not filed; they are retained by the parties.

11,736. *Lord Barcaple.*—When the judgment is finally adjusted, where is it recorded?—Every decree or order, when signed by the registrar, is forthwith copied at length into books preserved in the Report Office of the court, which books are open to public inspection on payment of a trifling fee. The decree or order, after it has been thus entered, is handed to the solicitor of the plaintiff or other successful party, and is kept by him, and produced when necessary.

11,737. If a party wishes to enforce against his opponent the judgment which he has got, has he to go to that record?—The officers of the court act upon production of the original decree or order, or if that is lost, or mislaid, or from any cause cannot be produced, upon an office copy of the decree or order from the record of it in the books of the Report Office.

11,738. *The Lord Justice-General.*—Are there any other points which you have not referred to?—There is a question about the higher and lower scales in the Court of Chancery.

11,739. What is the operation of the rules as to taxing accounts according to the value of the cause?—The rule depends on whether the estate in question amounts to £1000 or not. Above that a certain scale of fees is allowed, and below that another scale.

11,740. Are there only two scales?—Only two scales.

11,741. Is there much difference in the scales?—Yes. For example: 6s. 8d. lower scale, and 13s. 4d. higher.

11,742. That is double?—Yes. In some cases it is 2 guineas in the one, and 3 guineas in the other. There is also a difference in other respects in the fees paid to solicitors, and in the court fees; this difference will be seen by referring to the regulations as to fees, subjoined to the Consolidated Orders.

11,743. Is there not a little hardship in fixing a hard line?—Sometimes it is very hard. A very proper litigation arises sometimes with regard to a small property under £1000, and the successful party only recovers the lower scale of fees.

11,744. And that will not pay his account?—It will scarcely remunerate the solicitor; but the solicitor can only charge against his client the fees on the lower scale. The rule works very hardly sometimes, but still it protects small properties.

11,745. *Mr. Adam.*—Is there any limit to the number of counsel allowed as a charge against the opposite party?—Between party and party no more than two counsel are allowed, except for very special causes, such as a heavy examination of witnesses.

11,746. *The Lord Justice-General.*—With reference to the two scales, do you think that an expedient distinction to maintain?—I do.

11,747. For what reason?—I think it is expedient in the case of properties of the value of £300 or £400. We find in Chancery that very frequently the estate would be eaten up by costs if the higher scale were applicable; but undoubtedly there are cases where it works hardly.

11,748. The rule is for the protection of small estates?—Yes.

11,749. But still it operates hardly?—Occasionally.

11,750. In taxing accounts, is there much interference with the amount of fees sent to counsel?—The court is so jealous of our interfering with fees to counsel that we hardly ever touch them, unless it is a case of manifest abuse.

11,751. But the taxing officer has the power to deal with them?—We have the power; but if we exercise it, the party who paid the fees will generally object and go to the court, knowing that the court will be disposed to uphold the fees, so that we feel it is almost useless to interfere. We can limit the number of counsel, and we never allow more than two for the same party, except in very special cases.

11,752. What specialties induce you to allow more than two counsel?—A great many witnesses, or a vast amount of evidence, or a case that lasts perhaps a week in the hearing, where the strength of two men would hardly accomplish it. The Master of the Rolls allowed an extra counsel in a case lately where the junior was promoted to be a Q.C.

11,753. *Mr. Webster.*—What would be deemed to be an excessive fee?—If a solicitor paid 10 guineas for settling a deed of 30 folios, I would consider that very excessive.

11,754. *The Lord Justice-General.*—That is in the case of conveyancing counsel?—Yes; or 10 guineas on a motion to dismiss a bill.

11,755. That last being formal?—Yes; but for Queen's Counsel attending, it would be 2 or 3 guineas.

11,756. *Mr. Webster.*—Is there such a fee as 10 guineas for attending court?—It depends on the nature of the business.

11,757. *Lord Barcaple.*—Suppose a case in which the argument and the judgment occupied one entire day, and there are two counsel on each side, what would you suppose to be the ordinary scale of fees?—The fee is entirely regulated by the amount of paper the counsel has to read, and the nature of the case. It is impossible to say what fee should be given without knowing the nature of the case.

11,758. *The Lord Justice-General.*—In many cases in the Court of Chancery, I presume there is a solicitor in the country who instructs the solicitor here?—Yes; there are what we call agency cases.

11,759. Is there any rule for apportioning the fee between these two?—That is matter entirely of agreement between the principal and the agent; but the ordinary rule is one-half of the net profits.

11,760. If there is no agreement, would it be one-half?—The solicitor in the country would get one-half, and the agent in London would get one-half of such business as the London agent does. He does not share the country solicitor's charges for the business done in the country.

11,761. And the country solicitor receives one-half?—Yes.

11,762. *Mr. Baxter.*—Is the country solicitor's account allowed?—It is treated as if there was one solicitor.

11,763. *The Lord Justice-General.*—The account you examine is the account of the London solicitor?—It is the account prepared by the London solicitor, embracing his own and the country solicitor's charges as one entire account.

11,764. *Lord Barcaple.*—In a country case there has been probably a good deal of expenditure in getting up the evidence, and making preparation for the cause in the country: do these expenses come before you as expenses of the London agent?—They come before us in one bill.

11,765. For all the work done in the country as well as in town?—Yes.

11,766. *Mr. Gordon.*—Supposing the town solicitor writes to the country solicitor for information?—We never allow that. We never allow for correspondence between the principal and agent.

11,767. *The Lord Justice-General.*—Never for correspondence between the London solicitor and the country solicitor?—Never; but the taxing masters have power to allow, according to their discretion, a special fee for any special agency correspondence between the country solicitor and his town agent, beyond the usual fee of £1, 1s. 8d. for term fee and agency letters; and it is usual, in taxing agency bills, to allow £1, 1s. or £2, 2s. a year for special agency correspondence, or even a larger sum if the special circumstances of the case justify it. Any other expense properly incurred by country agents is allowed in the same manner as if done by the town agent—the town and country agents, where the business is conducted as agency business, being treated as one solicitor.

11,768. *Mr. Adam.*—Are agents ever allowed to borrow the principal papers?—They cannot take away papers that are filed.

11,769. They do not get the original bill?—The original bill is filed, and cannot be taken away.

11,770. *Mr. Webster.*—Is there a copy served on the adverse party of all papers that are filed?—That depends on what it is. A bill is served on all the parties who are to answer it; but if an affidavit is made, the solicitor is applied to, and he furnishes a copy of it at 4d. a folio.

11,771. *The Lord Justice-General.*—How does the solicitor for the other party know that there is such an affidavit?—A solicitor is obliged to give notice that he has filed an affidavit, and for that he is allowed a fee of 2s. 6d.

11,772. *Lord Barcaple.*—The witnesses are sometimes examined in court before the Vice-Chancellor?—Very often.

11,773. Have you found that that mode of procedure has any effect on the amount of costs in the cause? Does it increase or diminish them?—I think in contested cases the feeling is in favour of taking evidence *viva voce* in the Court of Chancery. The only objection is the great expense which is incurred, in the case of an appeal, by copies of the shorthand writer's notes of the evidence. By the General Order of the 5th February 1861, Rule 14, upon any appeal or further proceedings, the judge's notes of the *viva voce* evidence shall *prima facie* be deemed a sufficient note thereof; but the judges do not take sufficient notes of *viva voce* examinations before them, and the practice is for a shorthand writer to attend for that purpose; and in case of an appeal or re-hearing, a transcript of his notes (which are generally very voluminous) is furnished to counsel, and also frequently to the court, whereby a large expense is occasioned.

11,774. Is the employment of a shorthand writer the only material respect in which the taking of the evidence before the judge is found to increase the expense?—The bringing up of witnesses sometimes, where they come from a great distance, increases the expense very materially.

11,775. Can they be cross-examined without bringing them up?—You may appoint an examiner in the locality to examine them.

11,776. Suppose a case where the witnesses are in Northumberland?—The court, if it thinks fit, would appoint an examiner to take the evidence in Northumberland, but it would be very unwilling to do so.

11,777. But in ordinary cases the witnesses would be brought before the examiner in London?—Before the court in London, or before the examiner in London.

11,778. Is there a larger employment of counsel at the taking of the evidence before the judge than ordinarily takes place before the examiner?—If it is a very heavy case, three counsel are allowed.

11,779. Are there generally two counsel before the examiner?—No; only one.

11,780. That is the matter in which there is increase of expense?—By examining before the court instead of before an examiner you save the costs of the attendance of counsel before the examiner, and of copies of the depositions to be used in the court below.

11,781. *Mr. Gordon.*—Don't you think the examination of the witnesses is more quickly got through when there is a shorthand writer?—In equity, the judges do not take down the notes sufficiently. The general order of the court provides that the notes of the judge shall *prima facie* be deemed sufficient; but they never do take sufficient notes.

11,782. *The Lord Justice-General.*—Does that not arise very much from its being a novelty?—Very much so. The notes of the common law judges are always sufficient. No doubt it does very much increase the expense of an appeal where the witnesses are examined *viva voce* in the court below, because that involves the necessity of copies of the shorthand writer's notes for the court of appeal, and for each of the counsel engaged.

11,783. *Mr. Gordon.*—When you require so many copies, do you not print the evidence?—I believe printing would be cheaper, but it is not often done.

11,784. Is it the interest of the solicitor not to print?—No; he would be allowed the same per folio.

11,785. *Mr. Shand.*—Are there many appeals on matters of fact in Chancery?—Very few. Appeals in the Court of Chancery mostly arise upon questions of construction of deeds, wills, and other documents.

11,786. Suppose evidence taken, and the Vice-Chancellor or the judge in the first instance to come to a certain conclusion on the fact, is that not frequently appealed?—Yes; for example, when evidence is taken in a will case as to the competency of a party to make the will, that is very often appealed.

11,787. In that case, where the judge has not notes which are available, what do the judges in appeal look at?—They have copies of the shorthand writer's notes. In some cases the shorthand writer's notes are admitted and signed by the solicitors of the respective parties, and entered in the decree or order as evidence.

11,788. Are these notes taken officially?—They are taken by any shorthand writer the parties agree upon.

George Hume.

11,789. And if they do not agree?—Each party employs his own shorthand writer; and if any question arises, they compare the notes. If the *viva voce* system of examination is continued, I believe it would be very desirable to have a shorthand writer attached to each court, as is the case in Ireland, and in the Court of Bankruptcy here.

11,790. *The Lord Justice-General.*—Do you know how the officer you speak of in the Irish courts is paid?—I don't know. He is an officer called the clerk of court. This officer was abolished here, but not abolished in Ireland; and now I understand he is required to learn shorthand writing in order to take the evidence.

11,791. The expense of the shorthand writer's notes must of course be doubled if each party employs a shorthand writer?—They generally agree to employ one particular shorthand writer between them, and they share the expense.

11,792. You say there are not many cases in which appeals are taken on matter of fact in the Court of Chancery?—Not simply on matter of fact.

11,793. When you speak of matters of fact, do you mean mere matters of fact, or also inferences of fact?—Mere matters of fact.

11,794. In what are properly inferences of fact, I suppose there will be many appeals?—Yes.

11,795. And there it is necessary to examine the evidence just as much as if it were an appeal upon a mere matter of fact?—Certainly.

11,796. *Mr. Shand.*—Do you mean that there are many cases appealed in which the appeal judges require to look at the evidence?—Oh, constantly. The whole question may turn on the construction to be put on the evidence, the appeal being taken on the ground that the judge below has put an improper construction upon it.

11,797. *The Lord Justice-General.*—In such cases the judges in appeal read the evidence?—Certainly; unless it is a dry point of law.

11,798. *Mr. Webster.*—But there is no authentic record of the evidence; they merely take the judge's notes, and such notes as have been taken by the shorthand writer?—Yes; but the counsel always agree that the shorthand writer's notes are correct.

11,799. There is nothing on record to test the accuracy of the judge's notes, and the notes of the shorthand writer are not certified?—I don't believe the Lords Justices ever see the notes of the judge below. All they see is the shorthand writer's notes.

11,800. *Mr. Clark.*—Suppose there is a serious dispute as to what the witness has said?—Then they must re-examine the witness.

11,801. Does that frequently happen?—Very seldom, I believe. I remember one case in which Lord Justice Knight Bruce did it.

11,802. *The Lord Justice-General.*—If a witness is directed to be re-examined in such a case, is that done by the examiner?—It is done *viva voce* in the appeal court.

11,803. *Mr. Clark.*—Is it a matter of right to the party to require the re-examination of the witness?—No.

11,804. If he disputes the record of the evidence as it appears in the judge's notes, and says that is not right, can he insist upon the re-examination of the witness?—That is a matter in the discretion of the appeal court. They would not in every case yield to the statement of the party that he was not satisfied with the notes. The court would lean very much to the statement of counsel on the subject.

11,805. But if the counsel said that the judge's notes were altogether wrong?—If the court were satisfied that there was an error, it would order the re-examination.

11,806. The court cannot be satisfied of that except in so far as they receive information from the counsel?—They must be satisfied that there is some presumption that there is an error. But I know very little of that part of the practice of the court.

11,807. *Mr. Justice Willes.*—Does it not come to this, that there is practically no appeal upon a question of the credibility of a witness—that must be decided by the tribunal before which the witness is examined, upon the view that the appeal lies rather upon the proper conclusions to be drawn from the established facts than upon the question of credibility?—Yes; giving certain weight to evidence, the truth of which is doubtful. I am not aware of any appeal upon mere dry fact; the appeal is upon the construction of the evidence.

11,808.—*The Lord Justice-General.*—What is the general feeling of the profession, do you know, as to the advantage of taking evidence *viva voce* before the court?—I am hardly qualified to answer that question. My own opinion is in favour of it; but I am not competent to say what is the general feeling at the bar upon the subject.

11,809. What is the state of feeling as to the advantage of having a power of review within the court itself?—That should only be in cases of error or omission.

11,810. What I mean is not merely by the Vice-Chancellor reviewing his own judgment, but by his judgment being reviewable by the Lords Justices?—Every judgment of a judge of the first instance is reviewable by the court of appeal; but except for the purpose of correcting clerical mistakes, or errors arising from any accidental slip or omission, no review or re-hearing of a case should be allowed before the judge who has made the decree or order; and except by consent of all parties, no appeal to the House of Lords should be allowed until the decision of the judge has been reviewed by the court of appeal in Chancery.

11,811. *Mr. Shand.*—Is the review of the Lord Chancellor or of the Lords Justices the more popular?—I am not able to say; it depends entirely on the feeling of the parties. I think an appeal court consisting of two is too small. I think it ought to consist of at least three judges.

11,812. *Lord Barcaple.*—The parties have not their choice of appealing to the Lord Chancellor or the Lords Justices?—No; it is regulated by the Lord Chancellor and the Lords Justices. They make some arrangement between themselves.

11,813. *Mr. Adam.*—Is it the rule in Chancery not to give a successful appellant the costs of his appeal?—Not of the mere appeal. They attach a certain weight to the judgment of the court below.

11,814. Do you think that system prevents appeals?—I don't think anything prevents appeals.

11,815. *The Lord Justice-General.*—The cost of an appeal is not very great?—I should say, in an ordinary case, from £30 to £50. It depends upon the length of the evidence. No fresh briefs are delivered.

11,816. In what circumstances do you allow refreshing fees to counsel?—Where a brief is properly delivered in one term, but the cause is not heard, and comes into the paper next term, we allow a common refresher.

11,817. What proportion does that bear to the original fee?—The common refresher fee is 2 guineas to the leader, and one guinea to the junior counsel.

11,818. No more?—No more. Now, the practice is rather coming in of allowing daily refreshers in very heavy cases, as they do in the courts of common law. In a very heavy patent case, which lasted nine days, I allowed 5 guineas a day as a daily refresher to the senior counsel after the first day, and 3 guineas to the junior.

11,819. Was that for an entire day?—Yes.

11,820. *Lord Barcaple.*—What might be the amount of the counsel's fee there?—Very likely 100 guineas.

11,821. *The Lord Justice-General.*—That original fee would be a fee involving the reading of a great mass of papers?—Yes.

11,822. And preparing generally for the hearing?—Yes.

11,823. But suppose that the cause, when it comes on for hearing, originally lasts only a fraction of a day, would you then allow a refresher for the next day?—No. It must be an entire day.

11,824. It must be an entire day before the first fee is exhausted?—Exactly. That is the rule in common

law and in Chancery. It must occupy an entire day. At common law the maximum of a daily refresher is, I think, 10 guineas to the leader, and 7 or 5 guineas to the junior counsel.

11,825. Suppose that there is an entire day occupied, but that of the second day there is only a small fragment?—I should not allow a refresher unless on the day on which the refresher is paid the case lasts the day.

11,826. In short, a refresher never represents anything else than an additional entire day's work?—Just so.

11,827. *Mr. Shand.*—If a cause is expected to last more than one day, how is the fee proportioned?—The fee is paid in proportion to the magnitude of the cause, not often with reference to the time it is likely to last, because it may go off very shortly. It is paid according to the magnitude of the cause and the length of the papers counsel has to read.

11,828. *Mr. Adam.*—If the argument in a case is once commenced, does it go on continuously?—Next day may be motion day, and it does not go on till the motions are disposed of.

11,829. *The Lord Justice-General.*—Do I understand that the first fee which you allow bears the same proportion to the length of papers to be read, or rather to the magnitude of the cause?—The real proportion is to the length of the papers to be read.

11,830. Have you anything like a scale or rule about the amount of fees according to the length of the papers?—We have a rule as to the amount of fee according to the length of paper when the counsel prepares the paper. But we have no fixed scale as to the fee on hearing in court, though we know very well what is the fee usually paid. The scale of fees paid to counsel has very much increased during the last twenty-five years, but as a rule I do not think solicitors pay exorbitant fees to counsel; it is not the interest of any solicitor to give an exorbitant fee, because it has to come in the first instance out of his own pocket.

11,831. *Mr. Webster.*—Are the fees for preparing papers sent before or after the paper is prepared?—In some cases the fee is paid when the papers are taken away, but the general rule here is that an account is kept. Some offices pay once a month. In most cases the counsel marks his own fee for drawing a deed. We never, on taxation, allow any fee without a voucher. But it is very seldom that fees are paid at the time.

11,832. *Lord Barcaple.*—Is the amount of the fee not intimated at the time of the instructions being given?—No; but there is a certain scale for preparing papers.

11,833. *The Lord Justice-General.*—What sort of papers do you refer to?—Bills in Chancery and answers.

11,834. Are bills in Chancery always prepared by counsel?—Yes; by the junior counsel.

11,835. By the counsel who afterwards argues the cause?—Yes.

11,836. *Mr. Webster.*—Who prepares the interrogatories?—They are prepared by the plaintiff's counsel.

11,837. And affidavits?—They are generally prepared by the solicitor, unless in special cases.

11,838. *The Lord Justice-General.*—Have you any scale for the fees for preparing papers?—It is usually about 1 guinea for less than 30 folios; for 30 folios, 2 guineas; for 60 folios, 3 guineas; and 1 guinea additional for every additional 30 folios. That is the ordinary fee of the conveyancer for drawing a deed.

11,839. How much is a folio?—Seventy-two words.

11,840. *Mr. Shand.*—What are the fees for bills in Chancery?—They are on very much the same scale. The same scale would apply to pleadings and deeds.

11,841. If counsel spends a great deal of time in condensing the pleading, he gets a smaller fee than when the pleading is diffuse?—And it is the same with the solicitor. The shorter he is, the worse he is paid.

11,842. Do you find that a good system?—No; I think it is a very bad system. Our system of remuneration to solicitors is very bad.

11,843. Do you say the same with reference to the preparation of deeds?—Counsel prepares the deeds.

11,844. Or pleadings?—Well, it is 3 guineas for 60 folios, and the solicitor charges £3 for drawing it. I have known cases where conveyancing houses have lost their clients in the country by getting deeds drawn very shortly. A conveyancer told me the other day, 'I have lost the business of So-and-so; I have got into such a short way of drawing, that he tells me his client in the country will not employ me again.' The worse a man does his work in England, the better he is paid for it.

11,845. *The Lord Justice-General.*—Not in all departments?—At judges' chambers, for instance, if a man comes before the chief clerk fully prepared, one meeting will settle the business; but if he is badly prepared, he will have three or four meetings.

11,846. *Mr. Gordon.*—Is there any remedy you can suggest for that?—It is very difficult indeed to suggest a remedy. I cannot see any way to it at present.

11,847. *Mr. Webster.*—Is there any scale of fees for counsel either for debating cases or for a day's attendance at an examination of witnesses?—The fee for attending and examining witnesses is ordinarily 5 guineas for a day, because the counsel is obliged to give up everything else. That is the ordinary fee. And the fee paid to a special examiner is 5 guineas also; it is a day's work.

11,848. *The Lord Justice-General.*—What do you call a whole day?—From 10 or 11 till 4 o'clock, the hours of the sitting of the court.

11,849. *Mr. Webster.*—Is more than one counsel allowed to each party attending the examination of witnesses?—Only one counsel attending the examiner.

11,850. *Lord Barcaple.*—But not before the judge?—Two are allowed before the judge.

11,851. *Mr. Clark.*—What is the usual fee allowed for counsel attending a hearing for a day?—There is no fee for a day.

11,852. But in the usual run of cases?—There are very few cases in which the leading counsel get less than 10 guineas, and the junior 5 guineas. If there is any argument at all, that would be the lowest fee. Of course interlocutory or simple applications would be less.

11,853. But when the case comes to a serious point for hearing, the average fee would be about 10 guineas?—The average fee would be much more. I am speaking of the lowest fee.

11,854. *The Lord Justice-General.*—For that lowest fee of 10 guineas, what amount of work would be done generally;—I mean how many hours would be occupied if the case goes on?—If the case goes on, it would occupy the whole day.

11,855. *Lord Barcaple.*—Besides the time occupied in reading the papers?—Yes; and there is always a consultation fee of 2 guineas for the leader, and 1 guinea for the junior besides.

11,856. *Mr. Shand.*—Suppose there is to be evidence taken before the court, but not before an examiner?—The fee would be much more. Counsel would have to prepare for an examination.

11,857. The scale of fees you have mentioned only applies to the examiner?—Yes.

11,858. *Mr. Webster.*—Besides the fee to the counsel, does the party pay any fee to the counsel's clerk?—Yes; there is a fee to the counsel's clerk, and that is another growing evil. The fee to the counsel's clerk laid down by an Order of the judges in 1840 is: On every fee under 5 guineas, 2s. 6d.; 5 and under 10 guineas, 5s.; 10 and under 20 guineas, 10s.; 20 and under 30 guineas, 15s.; 30 and under 50 guineas, £1; for a fee of 50 guineas, £1, 5s.; and above 50 guineas, at the taxing master's discretion. That is the rule adopted in the taxing master's office.

11,859. Is the clerk paid for writing in addition to these fees?—He has no fee for writing.

11,860. The paper which counsel prepares is written by the counsel himself?—Yes; except the formal part, which is generally written by his clerk.

11,861. But no fee is paid to the clerk for that?—None whatever.

11,862. *Lord Barcaple.*—That is covered by the fee you have mentioned?—It is.

George Hume.

11,863. He derives no other emolument as clerk?—No.

11,864. *The Lord Justice-General.*—The clerk is not paid in any way by the counsel, is he?—I suppose he is obliged to pay his clerk, if he has not sufficient fees for that purpose.

11,865. *Lord Barcaple.*—Can you state what the fees of the Court of Chancery have ordinarily been each year lately?—There is a return made every year to Parliament, by the Accountant-General, of the state of the suitors' funds of the Court of Chancery, from which the amount of court fees received every year can be ascertained; and from which it appears that the total amount of the court fees paid by suitors in respect of proceedings in the Court of Chancery, for the years 1866, 1867, and 1868, were as follows:—

For the year 1866 . .	£91,558	8	0
„ 1867 . .	98,710	6	8
„ 1868 . .	98,063	19	9

11,866. *The Lord Justice-General.*—Do these returns show the amount of fees paid upon particular classes of suits?—No; they are lumped together.

11,867. Is there any means of ascertaining what is the amount of fees paid upon any particular class of suits on the average?—What sort of suits?

11,868. Suppose an administration suit?—Yes; an average of the court fees payable on these could be made out. In a simple administration suit by bill, where there was only one defendant, the court fees would probably be, on the higher scale, about £12; and, on the lower scale, about £7.

11,869. Could it be extended to other classes of suits, such as partnership accounting?—Court fees are nearly the same in all cases.

11,870. In applications for an injunction, would there be much difference there?—No. The court fees are paid on orders and summonses, filing bills, and other proceedings, which are very much alike in all suits.

11,871. They are paid, in short, upon the steps of proceeding?—Yes; certain steps.

11,872. Then they will vary in particular cases where the proceedings are multifarious?—Only in this way, that the interlocutory orders will be £1, and the decree £3.

11,873. If there are many interlocutory orders, there will be so many more fees?—Yes.

11,874. *Mr. Gordon.*—And there are two scales?—Yes; a higher and a lower scale.

11,875. Depending on the interest involved in the suit?—Depending on whether the value of the entire suit is under £1000 or not.

11,876. *The Lord Justice-General.*—In what shape could we best get information as to the average amount of court fees?—This information can only be obtained by taking any number of causes in which the costs have been taxed in the taxing master's office, and extracting the court fees. I have for this purpose selected, at haphazard, ten litigated causes, of which I have recently taxed the costs; and I find the aggregate amount of the taxed costs of the ten causes was £5546, 13s. 8d., and the aggregate amount of the court fees was £350, 9s. 9d.; which gives £35, 1s., or about 7 per cent. on the taxed costs, as the average amount of court fees for each cause.

11,877. *Mr. Shand.*—What is the ordinary expense of obtaining an interlocutory order?—That depends on whether it is by petition, or by motion, or by summons.

11,878. Suppose it is by motion?—£20 to £30.

11,879. Are counsel always instructed in such cases?—Always in motions and petitions, but not in summonses. In petitions, the expense will depend on the length of the petition. Summonses are much more simple.

11,880. Is a summons a mere formal proceeding?—It is the formal mode of proceeding in the judge's chambers.

11,881. And counsel have nothing to do with it?—No.

11,882. But in every step where counsel do appear in court, they are instructed?—Yes.

11,883. *Mr. Webster.*—In connection with the division of fees in agency cases, can you inform us whether the whole preparation of the cause is practically conducted by the agent in the country where there is one, and whether the fees that are divided are those practically for routine matters done by the London solicitor?—The preparation of the cause is practically conducted by the London agent; the only fees divided are the fees relating to the business done by the London agent.

11,884. What does the London agent do in agency cases?—In some cases he does all the substantial work of the cause itself; but generally he attends only to the routine business transacted in London,—such as attending and communicating with counsel, attending court, and all the proceedings in chambers on the accounts and inquiries, filing and procuring office copies of affidavits, preparing and arranging for the hearing of the cause, settling the minutes of the decree and orders; and he attends the Accountant-General on all the monetary matters in the cause; but he does not negotiate with parties in the country, or get up the evidence, which is generally prepared in the country.

11,885. Is the rate of fee allowed to him different in cases where there is an agent in the country, and where he is the sole solicitor?—The fees are the same in both cases. The only difference is in the term fee. Every term, 6s. 8d. is added for agency correspondence.

11,886. Each term the cause lasts?—Yes; the term fee is 15s. in an ordinary case, and there is an additional fee of 6s. 8d. in agency cases.

11,887. *Lord Barcaple.*—Does the country solicitor frequently come to London to hear the case?—No; that is seldom allowed in party and party costs, and not even against his own client, unless the client sanctioned his coming.

11,888. *Mr. Webster.*—Is the rule the same in common law cases as in Chancery cases with regard to that matter?—As to agency, very much the same.

11,889. *Lord Barcaple.*—Are the fees of counsel which are disallowed as excessive in taxing the account as between party and party, allowed in taxing the account as between agent and client?—Yes; in case the taxing master considers the solicitor exercised a fair discretion in paying the fee.

11,890. *Mr. Morton.*—Suppose you were taxing the London agent's account, would you allow him for correspondence with his client?—No.

11,891. Even in taxing between agent and client?—It would not be allowed.

11,892. Then it would be held to be covered by the one-half of the London agency?—Yes.

11,893. Would anything else be held to be covered by the one-half of the London agency?—No.

11,894. *Mr. Gordon.*—Is there any general fee allowed to the agent?—At the end of the bill there is usually a general charge for letters, postages, messages, etc., amounting to 2 guineas, or 5 guineas, or 10 guineas. That is to cover outlays not included in the bill. Charges for coach hire in London are not allowed.

11,895. *Mr. Morton.*—That is merely to cover outlays?—Only outlays; but we are pretty liberal in allowing that. There was a case the other day in which there was a very important examination of witnesses, and the solicitor in the country was the only person who had the facts in his head; I therefore allowed his journey to London, to be present at the examination. I allowed that against the client.

11,896. *The Lord Justice-General.*—But you would not allow it against the opposite party?—No.

11,897. Can you give us a notion of what proportion of an account is not recovered from the other party?—I had a case the other day as to waste occurring in mines: the principal surveyor's charge was £149; and though I was anxious to be as liberal as I could, I could only allow, as between party and party, £51. Another charge was 40 guineas, and I allowed only 10 guineas. The difference between these sums, of course, the client would have to pay.

11,898. *Mr. Shand.*—Was that a case in which men of great eminence were employed?—Yes.

11,899. *Lord Barcaple.* — Where witnesses are brought up from the country to be examined in court, or before the examiner, and they are not all examined, the party becoming satisfied that he has led a sufficient amount of evidence, are these witnesses who have not been examined universally disallowed against the opposite party?—Yes; between party and party we only allow the evidence actually taken, and entered in the decree or order.

11,900. Do you think that leads parties to examine too large a number of witnesses when they have brought them up?—No man would bring up witnesses unless he was pretty sure of using them, because he knows that he would not get the costs against the opposite party.

11,901. But he may wish *ob majorem cautelam* to be sure that he has sufficient evidence?—That will be allowed against his own client.

11,902. *The Lord Justice-General.*—Supposing that witnesses are brought up to prove a particular fact, and that an admission is made on the opposite side which renders their examination unnecessary?—If the admission was not made until it was too late to countermand the witnesses, the attendance of the witnesses would be allowed as between party and party; and where evidence has been in the course of preparation and the cause is settled by agreement, we allow the evidence which has been prepared. On further considering my answers to the two preceding questions, I beg to be permitted to add, that I think, in cases where the evidence in chief is to be taken *vivâ voce* at the hearing, the Court of Chancery would follow the rule in the courts of common law, and allow, as between party and party, the costs of witnesses *bona fide* brought up for examination in chief, although not actually examined, provided the court was satisfied that the solicitor exercised a reasonable judgment and precaution in being prepared with such witnesses. In *Clark* v *Malpas*, 31 Beavan 554, the Master of the Rolls allowed, as between party and party, the costs of bringing up witnesses to be cross-examined in court, although they were not actually cross-examined.

11,903. *Mr. Shand.*—Is the great bulk of the evidence in Chancery cases taken on affidavit?—The great bulk of it.

11,904. What proportion is taken on affidavit as compared with what is taken before examiners or *viva voce* before a judge?—I am quite unable to say.

11,905. Is it quite a fragmentary part of the evidence that is taken before the examiner or before the judge?—In causes where issue is joined, the parties may verify their case either by affidavit or oral evidence, or both. The oral evidence in chief is taken before the examiner, and the cross-examination thereon and on the affidavit evidence is taken in court, at the hearing of the cause. The common course now is to give notice of motion for decree, in which case the evidence in chief is taken on affidavit, and the deponents may be cross-examined by an examiner, but not in court.

11,906. Is that done far more frequently than having examinations before the examiner?—Yes.

11,907. Is that a saving of expense?—Affidavit evidence is the cheapest evidence you can have. The witness has not to come to London to be examined, and the affidavit is seldom so long as the deposition.

11,908. *Mr. Webster.*—Where a witness has made an affidavit, and a cross-examination takes place, do you find frequently that the truth has been fairly presented in the affidavit, or that it is only brought out in the cross-examination? — I think that generally affidavits are true so far as they go. The cross-examination of deponents who have made affidavits is comparatively infrequent, and I think generally the truth is fairly represented in affidavits. The objection is, that affidavits frequently state only so much of the truth as may be most favourable to the case of the party on whose behalf they are prepared; and in that case the whole truth can only be got at by cross-examination or counter affidavits.

11,909. *Mr. Shand.*—Is the affidavit made under the fear of cross-examination, and in the knowledge that the party may be so tested?—Yes; and I think the terror of cross-examination is very great.

George Hume.

11,910. *Mr. Shand.*—Is there not such a thing as filing cross-interrogatories? — A defendant may file interrogatories for the plaintiff to answer.

11,911. But for witnesses, is there no filing of cross-interrogatories?—No.

11,912. *Mr. Gordon.*—Are there many cases in which witnesses are examined in the Court of Chancery? Would you say that that is done in one-fourth of the number of cases?—Oh no.

11,913. I mean in court?—It is not encouraged by anybody.

11,914. *Mr. Shand.*—Suppose a party to insist on having a *viva voce* examination after an affidavit, and the witness subsequently adheres to his original affidavit, what would be done about the expense?—Any party summoning a witness to be examined *vivâ voce* must in the first instance pay the witness's expenses; and any party on whose behalf an affidavit has been filed is bound, if so required, to produce the deponent for cross-examination by the opposite party, and the party requiring such production must in the first instance pay the expenses thereof; but all such expenses are ultimately borne as the judge, on the hearing of the cause, shall direct.

11,915. *Mr. Gordon.*—Has it been found that witnesses were kept in London for some time before they could be examined?—I cannot answer that. No doubt there are cases where the cause is expected to be on, but is adjourned from time to time, and the witnesses are brought up and sent down again and again. That does happen sometimes.

DOCUMENTS PRODUCED AND REFERRED TO BY MR. HUME.

No. I.

THE RETURN of the CHIEF CLERKS of the Master of the Rolls, and Vice-Chancellors Sir Richard Torin Kindersley, Sir John Stuart, and Sir William Page Wood, to the Requisitions of Her Majesty's Commissioners for inquiring into the Superior Courts of Common Law and the Courts of Chancery in England and Ireland, contained in a letter from H. R. Vaughan Johnson, Esq., the Secretary to the Commissioners, dated the 12th day of November 1862.

The Master of the Rolls and each of the Vice-Chancellors has attached to his Court two Chief Clerks, and two junior clerks to each Chief Clerk, and also two assistant clerks; and the Master of the Rolls has also attached to his Court Mr. Buckley, as an additional clerk to assist the Chief Clerks, and one assistant clerk to such additional clerk.

Requisition I.—The nature and extent of the duties performed by the Chief Clerks and each officer under them.

As to the Chief Clerks.

1st.—With reference to interlocutory applications.

To hear and dispose of the following applications:—

1. For time to plead, answer, or demur.
2. For enlarging time for filing voluntary answers.
3. For leave to file interrogatories.
4. For leave to withdraw replication and amend bills and interrogatories; and for enlarging the time for amending bills and interrogatories under orders to amend.
5. For plaintiff to give security for costs.
6. For time to file affidavits in answer, or in reply, on motions for decrees.
7. For payment into Court of moneys admitted by defendants' answers.

George Hume.

8. For production and inspection of documents admitted by defendants' answers.
9. For production by Plaintiffs or Defendants of documents upon oath, under 15 and 16 Vict. c. 86, ss. 18, 20.
10. To consider the sufficiency of affidavits as to production of the documents.
11. For leave to serve bill and interrogatories out of the jurisdiction of the Court.
12. For the appointment of special examiners.
13. For the appointment of Commissioners to take the examination of married women.
14. For enlarging time for closing evidence.
15. For the oral examination and cross-examination of witnesses, under rule 11 of the General Order of 5th February 1861.
16. For enlarging the time prescribed for taking other proceedings in causes or matters.

2d.—With reference to applications originating in Chambers, and matters adjourned from Court into Chambers, before decree or order made.

1. To hear and dispose of applications for orders to administer the personal and real estate of deceased persons, under 15 and 16 Vict. c. 86, ss. 45 and 47.
2. To examine the evidence in support of applications for guardianship and maintenance of infants and persons of unsound mind, not found so by inquisition, and to attend the Judge thereon.
3. Similar duties on applications for sanction of the Judge to the marriage of wards of Court.
4. Similar duties on applications for placing infants out in trades or professions, and for leave for infants to quit the jurisdiction of the Court.
5. To approve settlements on marriages of wards, in accordance with proposals approved by the Judge; and to approve indentures of apprenticeship of wards, and to certify the approval of such settlements and indentures.
6. To examine the statements in petitions and the evidence adduced in support thereof, when adjourned by the Judge into Chambers for that purpose, and to report the result thereof.

3d.—With reference to proceedings in Chambers under decrees and orders.

First.—As to taking accounts and making inquiries under decrees and orders.

1. To determine what parties are entitled to attend on the several accounts and inquiries directed by decrees or orders, and who shall have the conduct of the proceedings.
2. To direct what persons, not being parties to the suit, are to be served with notice of decrees or orders, and in what cases service of such notice may be dispensed with.
3. To hear and dispose of applications for service of notice of decrees or orders upon infants, or persons of unsound mind.
4. To hear and dispose of applications for substituted service of decrees or orders, where the proceedings are pending in chambers.
5. To issue advertisements for creditors, encumbrancers, heirs at law, next of kin, and other classes of persons as to whom inquiries are directed by decrees or orders.
6. To approve and appoint persons to be receivers under orders directing such appointment, to fix the amount of security to be given by them, to ascertain the sufficiency of the proposed sureties, and to fix the times for bringing in the receivers' accounts, and for paying their balances into Court.
7. To settle and sign receivers' recognisances.
8. To approve and appoint persons as trustees under orders directing trustees to be appointed, and to approve the necessary deeds of conveyance and transfer.
9. To give directions as to the bringing in of accounts by executors, administrators, or other accounting parties, or as between partners, and to adjudicate upon all disputed or doubtful items of such accounts.
10. To investigate pedigrees under inquiries as to heirs at law, next of kin, or other classes of persons.
11. To adjudicate upon claims by creditors; also upon claims by encumbrancers, and, when required, to take the account of their claims, and settle their priorities.
12. To hear the several parties and their solicitors on the various accounts, inquiries, and directions contained in all decrees and orders brought into Chambers, and consider the evidence in support thereof.
13. To hear and dispose of applications for payment into Court of balances appearing on accounts brought in by executors and other accounting parties.
14. To revise and settle the certificates of result of proceedings under decrees or orders.

Second.—As to sales of estates by decrees or orders directed to be sold.

1. To refer to the conveyancing counsel the abstracts of title to the estates directed to be sold.
2. To appoint auctioneers to conduct sales, and fix their remuneration, and the mode, time, and place of sale.
3. To settle the particulars and conditions of sale.
4. To approve and sign the advertisements of sales.
5. To fix the amount of the reserved biddings.
6. To hear and dispose of applications for leave to parties to bid at sales, and as to the parties to have the conduct of sales.
7. To revise and settle certificates of the result of sales.
8. To approve of conditional contracts for sales by private contract.
9. To hear and dispose of applications to substitute purchasers.
10. To open the biddings.[1]
11. For payment in and investment of purchase moneys and deposits.
12. To pay off mortgagees or other encumbrancers out of purchase moneys.
13. For delivery of title deeds to purchasers or parties.
14. For compensation for misdescription, or on other grounds.
15. To discharge purchasers and for re-sale, etc.
16. To settle and approve conveyances, when directed by the decree or order.

Third.—As to matters connected with the management of property.

To hear and dispose of the following applications (that is to say):—

1. For getting in assets.
2. For suing or compounding for, or paying off debts and claims.
3. For defending suits or actions.
4. For granting or renewing leases.
5. For expenditure in repairing buildings and in draining land.
6. For cutting and selling timber.
7. For leave to trustees to employ an agent or bailiff, or to appoint a valuer.
8. For liberty to enfranchise copyholds.
9. For liberty for executors or trustees to concur in sale of mortgaged estates.

[1] Opening biddings are now abolished by 30 and 31 Vict. c. 48, s. 7.

10. To compel receivers to bring in accounts and pay balances.
11. To dispose of doubtful and disputed items in receivers' accounts.
12. For leave to put receivers' recognisances in suit.
13. For leave for executors of deceased receiver to pass his account and pay any balance due.
14. To discharge a receiver (not being an adverse application), and to vacate receiver's recognisance.

Fourth.—Miscellaneous proceedings under decrees and orders.

1. To summon parties and witnesses.
2. To administer oaths, and take affidavits and receive affirmations, and to take acknowledgments, other than acknowledgments of married women.
3. To examine parties and witnesses either upon interrogatories or *viva voce*.
4. To settle written interrogatories for the examination of parties.
5. To investigate the value and desirability of purchases under orders of the Court, and to refer the titles to property comprised in such purchases to the conveyancing counsel, and approve the conveyances thereof, and settle the certificates of approval of the titles and conveyances, and as to the parties to execute the conveyances and receive the purchase moneys.
6. To investigate the objections to titles under decrees or orders, and settle the certificates of the result of such investigations, and to approve the deeds of conveyance when required.
7. To prepare minutes of orders made in Chambers on further consideration in suits for administration of real and personal estate originating in Chambers.

4th.—With reference to proceedings under particular Acts of Parliament.

First. Under the Settled Estates Acts, 19 and 20 Vict. c. 120, and 21 and 22 Vict. c. 77.

1. To direct in what newspapers the notices required by the Acts are to be inserted.
2. To hear and dispose of applications for the appointment of guardians to infant petitioners or respondents, and for leave for such guardians to make or consent to applications under the Act, and for the appointment of examiners to take the examination of married women.
3. Similar duties on sales of settled estates when ordered by the Court, as on sales under decrees.
4. To settle leases of settled estates, when directed by the order.

Second.—Under the Infants' Marriage Settlement Act, 18 and 19 Vict. c. 43.

1. To examine the evidence produced in support of petition when adjourned into chambers.
2. To settle marriage settlements in conformity with the proposals approved of by the judge.
3. To settle minutes of orders approving settlements, for the Registrar.

Third.—Under the Legacy Duty Act, 36 Geo. 3, c. 52, s. 32, and the 35th Consolidated General Order, Rule 1.

To hear and dispose of applications for transfer and payment to legatee, where the fund does not exceed £300.

Fourth.—Under the Trustee Relief Acts, 10 and 11 Vict. c. 96, and 12 and 13 Vict. c. 74, and the 35th Consolidated General Order, Rule 1.

To hear and dispose of applications for transfer and payment out of Court, where the trust fund does not exceed £300.

Fifth.—Under the Trustee Act, 1850, and Trustee Extension Act, 15 and 16 Vict. c. 55, and the 35th Consolidated General Order, Rule 1.

1. To hear and dispose of applications for vesting orders in cases of sales or conveyances directed by the Court.
2. For the appointment of persons to convey land, or to execute deeds in the like cases.
3. To appoint new trustees in the like cases.

Sixth.—Under the Charitable Trusts Acts, 1853, 1855, and 1860.

1. To hear and dispose of applications to appoint trustees, to settle schemes, and to vest charity lands and funds in official trustees.
2. To settle schemes for the regulation and management of charities.
3. To settle minutes of orders approving schemes, and directing same to be carried into effect, for the Registrar.

Seventh.—Under 1 Will. 4, c. 65, ss. 12, 16, 17, and the 35th Consolidated General Order, Rule 1.

To investigate proposals for and settle leases of infants' estates.

Eighth.—Under the Defence Act, 1842, and sec. 23 of the Defence Act, 1860.

To hear and dispose of applications for the investment of, and for the payment of the dividends or interest on, or otherwise in relation to, moneys paid into the Bank of England in the name and with the privity of the Accountant-General of the Court of Chancery, under the said Acts.

Ninth.—Under the Drainage Act, 8 and 9 Vict. c. 56, and Acts amending the same.

To proceed with applications for draining lands, and for charging the expense thereof on the inheritance of the said lands, under the provisions of the said Act, when referred to Chambers.

Tenth.—Under the Acts for winding up of Joint Stock Companies, namely, 11 and 12 Vict. c. 45 (1848); 12 and 13 Vict. c. 108 (1849); 19 and 20 Vict. c. 47 (1856); 20 and 21 Vict. cc. 14, 49, 78 (1857); 21 and 22 Vict. c. 60 (1858); and 25 and 26 Vict. c. 89 (1862).

1. To appoint interim or official managers or liquidators, and fix the amount of their recognisances, and approve of their sureties, and fix the time for passing their accounts.
2. To fix the remuneration of official managers or liquidators.
3. To examine and pass official managers' or liquidators' accounts.
4. To approve and sign advertisements for creditors to bring in their claims.
5. To appoint creditors' representatives.
6. To adjudicate upon debts and claims not allowed upon the affidavit of the official liquidators.
7. To revise and settle certificates of the result of adjudication upon debts and claims.
8. To settle the lists of contributories.
9. To settle certificates of the result of the settlement of lists of contributories.
10. To hear and dispose of applications to vary the list of contributories.
11. Similar duties on sales of property belonging to the Company, where sold with the approbation of the Judge, as on sales under decrees.
12. To make calls upon the contributories of the company.
13. To examine and sign directions to the Bank of England to open an account with the official manager or liquidator.
14. To examine all cheques upon the accounts at the Bank of England to be countersigned by

George Hume.

the Judge, or by the Chief Clerk in case the proceedings are under the Companies Act, 1862.

15. To consider and allow compromises with the contributories.
16. To adjust the rights of contributories *inter se.*
17. To examine contributories and witnesses *vivâ voce.*

N.B.—No proceedings have at present been taken in Chambers under the Land Registry Act, 25 and 26 Vict. c. 53, or under the Declaration of Title Act (1862), 25 and 26 Vict. c. 67.[1]

5th.—With reference to incidental and miscellaneous proceedings.

To hear and dispose of the following applications (that is to say):—

1. For payment of income of real or personal property to parties interested therein, pending the proceedings in a cause.
2. For payment out of Court of legacies or funds carried to separate accounts.
3. For payment to any persons of the dividends or interest of any funds standing to the credit of any cause or matter to the separate account of such person; and
4. For stop orders, where assignor concurs.
5. To discharge stop orders.
6. To appoint a person to represent the estate of a deceased person, pending inquiries in Chambers.

Also—

7. To investigate the evidence on special applications to be disposed of by the Judge.
8. To attend upon the Judge in Chambers and in Court, when required by him.
9. To settle the minutes of orders made by the Judge in Chambers, and which are to be drawn up by the Registrar, including a short statement of the evidence read in support of the order.
10. To moderate bills of costs, and fix amounts to be allowed on applications by summons for guardian and maintenance, and on other special applications.

6th.—Meetings of Chief Clerks, pursuant to Rule 34 of the 1st Consolidated General Order.

The Chief Clerks meet on the first day of Michaelmas term, and the first day after the Christmas, Easter, and Whitsun vacations, to consider such orders, rules, or regulations as may appear to them calculated to expedite and facilitate the satisfactory transaction of the business of the suitors in the Judges' Chambers.

As to the Junior Clerks.

1. To examine all summonses required to be issued; to appoint a time for the return thereof, and to affix the seal of the Chambers thereto, and cancel the stamps.
2. To prepare from the Chief Clerk's notes a minute of every order made at Chambers, of the class drawn up by the Registrars, and a statement of the evidence read thereon, and obtain the Chief Clerk's signature thereto.
3. To draw up from the Chief Clerk's notes all orders made at Chambers of the class drawn up there, and obtain the Chief Clerk's signature thereto.
4. To make a short abstract of the accounts, inquiries, and directions contained in all decrees and orders brought into Chambers, for the use of the Chief Clerk.
5. To examine all advertisements required to be issued, and to obtain the Chief Clerk's signature thereto, and afterwards see that they have been inserted in the proper papers.
6. To examine the vouchers produced in support of the items of all accounts left in Chambers, and to reserve all doubtful or disputed items for the Chief Clerk to dispose thereof.
7. To settle the ordinary costs on passing receivers' accounts, and see that such accounts are duly entered and verified.
8. To examine and check computations of interest, apportionments, and other similar matters.
9. To examine schedules of creditors' and encumbrancers' claims brought in, and to compare the same with the Claim-book kept at the Judge's Chambers, and with the Chief Clerk's notes of the claims allowed and disallowed.
10. To examine other schedules and statements with documents adduced in support thereof, where specially directed by the Chief Clerk.
11. To prepare a minute for the conveyancing counsel of any matter referred to him on a sale, purchase, or otherwise.
12. To prepare requests to taxing masters to tax costs forming items in accounts being taken in Chambers.
13. To prepare requests to examiners to take the examination of parties or witnesses on proceedings pending in Chambers.
14. To examine the drafts of all recognisances, and the formal parts of the drafts of deeds, and particulars and conditions of sale, before the same are settled by the Chief Clerk.
15. To obtain the Chief Clerk's signature to a memorandum of approval of all recognisances and deeds settled in Chambers, on the engrossments thereof.
16. To prepare from the Chief Clerk's notes a minute of the biddings reserved on any sale, and the instructions to the person appointed to sell.
17. To prepare from the Chief Clerk's notes and instructions the drafts of the Chief Clerk's certificates, under decrees and orders, preparatory to the same being revised and settled by the Chief Clerk.
18. To examine the engrossments of such certificates, and obtain the signature of the Chief Clerk, and afterwards of the Judge thereto.
19. To file such certificates and the accounts or other documents therein referred to at the Report Office, and to transmit all recognisances to the Enrolment Office.
20. To collect, by means of stamps, all fees of Court payable in respect of proceedings in Chambers, to keep an account thereof, and to furnish annually an abstract of such account to the solicitor to the suitor's fund.
21. To attend upon the Chief Clerk at the commencement of business, daily, with such documents as require his examination and signature, and with reference to other matters that require his attention or direction.
22. To keep, with the assistance of the assistant clerks, books for the purpose of preparing the annual return of proceedings had in Chambers, required by the Secretary of State for the Home Department for insertion in the 'Judicial Statistics,' and to prepare such annual return, and to collect from the official managers and liquidators returns of proceedings in winding-up matters, and to transmit all returns to the said Secretary of State.
23. To attend to and answer applications by parties for information as to the state of any proceeding or matter in which they may be interested.
24. To keep a general supervision over the state and progress of all matters pending in Chambers; and, under the directions of the Chief Clerk, to apply to the solicitors con-

[1] Such proceedings have since been taken.

cerned for explanation as to matters that have not been duly prosecuted.

25. And generally to assist the Chief Clerks in any way they may require in the discharge of their duties.

As to the Assistant Clerks.

1. To enter in 'The Summons and Appointment Book' a minute of the date on which every summons is issued or appointment made; the name of the cause or matter, and by what party, and, shortly, for what purpose such summons or appointment is obtained, and at what time such summons is returnable, and for what time such appointment is made.
2. To enter in the 'Register of Proceedings' a minute of every proceeding in Chambers in each cause or matter, consecutively and in chronological order, with a short statement, extracted from the Chief Clerk's notes, of the result of the proceedings at every hearing.
3. To receive and register all accounts, statements, and other documents directed to be brought into Chambers.
4. To keep an alphabetical index of all causes and matters disposed of or pending in Chambers, and of the place of deposit of the papers therein, and a like index of the name of every deceased person whose estate is or has been the subject-matter of proceedings in Chambers.
5. To keep diaries of all appointments, and various other books required in the transaction of Chamber business.
6. To prepare lists of matters appointed for each day, and to see that the same are duly affixed in the Chambers and outside the doors thereof.
7. To furnish the Chief Clerk with a copy of such list, and to select and arrange such papers as he may require during the day.
8. To prepare lists of cases adjourned for hearing before the Judge.
9. To prepare from the Chief Clerk's notes a certificate for the taxing master of the fees and allowances to solicitors for attendances in Chambers in any cause or matter, and get same signed by the Chief Clerk.
10. To put away and keep in proper order for immediate reference, all papers relating to proceedings in Chambers.
11. To fair copy the Chief Clerk's notes and other papers, when required.
12. To assist the junior clerks in keeping the books for the purpose of preparing the annual return required by the Secretary of State.
13. And generally to assist in the discharge of the business of the Chambers.

General Note.

The duties of the Chief Clerks are performed under the immediate superintendence of the Judge, with whom the Chief Clerks communicate upon all questions of difficulty.

The business transacted by the Chief Clerks and by the junior and assistant clerks varies in the respective Chambers of the Master of the Rolls and Vice-Chancellors, and the above is the best general return the Chief Clerks are able to make, without specifying in minute detail the variations in the performance of such duties in the different Chambers.

No. 2.

George Hume.

FIRST PART.

Examples of the Expedition and Cost at which Estates of Deceased Persons may be administered in Chancery.

Master of the Rolls at Chambers.

In the matter of the Estate of F. Watson, deceased.

Watson v. *Marshall.*

1. Testator died in August, and will proved in September 1852.
2. Property, £4694.
3. Summons issued 17th November, and order made 1st December 1852. Usual directions and inquiries, with an additional inquiry who were the residuary legatees of the testator.
4. Chief Clerk's certificate, 10th March 1853.
5. Order, on further consideration, made in Court 20th April 1853.
6. Costs of suit, £155, 15s. 10d.
7. The pecuniary legacies paid by the Accountant-General, and the residue paid to eleven parties in June 1853.
8. The proceedings were hostile on the part of one of the defendants.

Master of the Rolls at Chambers.

In the matter of the estate of Harvey, deceased.

Bulley v. *Thompson.*

1. Testatrix died 14th December 1858. Will proved 4th February 1859.
2. Property, £13,628.
3. Summons issued 12th, and order made 25th January 1861.
4. Usual directions and inquiries, and also inquiries whether testatrix had entered into a contract for sale of a leasehold house, and what children there were of five persons named in the will.
5. Chief Clerk's certificate, 1st May 1861.
6. Order, on further consideration, made in Court 29th May 1861, containing a direction for payment of the income of the funds in Court to the parent of the infants entitled.
7. Costs of suit, £156, 18s.
8. In August 1861 the suit was wound up, the Accountant-General paying over to the separate accounts of nine infants, £666, 17s. each.
9. One of the infants entitled to £667, 18s. came of age, and an order was thereupon made at Chambers for the transfer of the fund to him, the costs of which order amounted to £5, 9s. 10d.

Master of the Rolls at Chambers.

In the matter of the estate of John Cramp, deceased.

Cramp v. *Bryant.*

1. Intestate died 19th May 1854.
2. Summons issued 8th, and order made on 14th July 1854, directing usual accounts and inquiries, including an inquiry for next of kin.
3. Chief Clerk's certificate, 30th November 1855.
4. Order, on further consideration in Court, 5th April 1856, directing, *inter alia*, sale of estates.
5. Final certificate, including result of sale, dated the 23d April 1858, and property amounting to upwards of £70,000 thereupon divided amongst the parties.
6. Costs of all parties (seven solicitors) taxed at £1131, 1s. 1d.

George Hume.

SECOND PART.

Amount of Assets and Taxed Costs in the twelve undermentioned Administration Suits.

Name of Suit.	Amount of Assets.	Amount of Taxed Costs.
1. *Re* Cramp—Cramp *v.* Bryant	£70,000	£1,131
2. *Re* Dixon—Hale *v.* Swinburne	1,554	148
3. *Re* Fitzgerald—Fitzgerald *v.* Mackintosh	44,590	1,113
4. *Re* Jones—Geister *v.* Jones .	3,677	376
5. *Re* Murphy—Greenwood *v.* Sturgis	1,304	193
6. *Re* Maybery—May *v.* Smerdon	1,192	291
7. *Re* Harvey—Bulley *v.* Thompson	13,628	156
8. *Re* Playford—Horth *v.* Playford	933	118
9. *Re* Poole—Stevenson *v.* Wilton	12,332	502
10. *Re* Smith—Smith *v.* Smith .	2,500	119
11. *Re* Williams—Garrod *v.* Garrod	3,000	234
12. *Re* Watson—Watson *v.* Marshall	4,694	155
	£158,404	$\frac{1}{12}$)4536
	$\frac{1}{12}$th of £4,536 . . .	£378

Being about 3 per cent. on $\frac{1}{12}$th of £158,404.

No. 3.

SCALE OF REMUNERATION TO LIQUIDATORS.

Liquidators.

			Per day of 8 hours.
Group A.	*Class* 1. Where the assets divisible among the unsecured creditors shall not amount to	£500	£1
	,, 2. Where they shall amount to £500, and not to	2,000	2
	,, 3. Where they shall amount to £2,000, and not to	5,000	3
Group B.	*Class* 4. Where they shall amount to £5,000, and not to	10,000	4
	,, 5. Where they shall amount to £10,000, and not to	50,000	6
Group C.	*Class* 6. Where they shall amount to £50,000, and not to	100,000	8
	,, 7. Where they shall amount to £100,000, and not to	500,000	10
	,, 8. Where they shall amount to over £500,000 . .		12

Clerks.

	1st Class.	2d Class.	3d Class.	
Group A.	2s.	1s. 6d.	1s.	per hour.
,, B.	3s.	2s. 6d.	1s.	,,
,, C.	3s. 6d.	2s. 6d.	1s.	,,

FRIDAY, 30TH APRIL 1869.

Members present:—

LORD COLONSAY.
THE LORD JUSTICE-GENERAL.
LORD BARCAPLE.
MR. JUSTICE WILLES.
SIR EDWARD COLEBROOKE.
E. S. GORDON, Esq., Q.C.
A. R. CLARK, Esq.
JAMES CAMPBELL, Esq.
JAMES ADAM, Esq.
A. B. SHAND, Esq.
JAMES WEBSTER, Esq.
J. B. BAXTER, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

The Hon. Baron Bramwell.

THE HON. BARON BRAMWELL, examined.

11,916. *The Chairman.*—The Commissioners are desirous of having some information as to the system of procedure in the English courts, with a view to their present inquiry with regard to the Scotch courts. You are aware, I suppose, that in our courts there is no separation of law and equity. The cases are almost all considered, in the first instance, by a single judge, under whose eye the record is prepared, and his judgment is subject to review by one of the chambers or divisions of the court, consisting of four judges. Some causes, which turn upon facts, are tried by juries, but in others the evidence is taken before a single judge, and his judgment is reviewable. Now, have you in your courts a system of taking evidence before a single judge without a jury?—Our cases are tried by jury, but they may be tried before a single judge if the parties give their consent in writing.

11,917. But generally you try the cases by jury?—Yes. I should say there is not one case in a hundred that is tried by a judge without a jury; I mean where the *viva voce* evidence of witnesses is given.

11,918. Is the verdict generally 'in favour of the plaintiff' or 'in favour of the defendant,' or do you require the jury to pronounce upon certain issues, or special matters that you put to them?—Both practices prevail. I should say the more common course is to state to the jury what are the questions which they have to consider, and to tell them to say whether they find for the plaintiff or the defendant. But there are very frequently cases in which it is desirable that they should answer particular questions, either with reference to the actual disposal of the issues at the time, or with reference to the court adjudicating upon the matter afterwards. For instance, take a case in which an issue is raised for a jury, which involves several distinct matters. Suppose an action on a bill of exchange, the defence being that the defendant did not accept it, there might be several questions involved. It might be said that the alleged acceptance was by an alleged partner of the defendant, and upon that the defendant might make two propositions. He might say, first of all, he never was my partner; or he might say, in fact, that is not his handwriting, even if he was; and he might say, thirdly, moreover, if he did accept it, he did not accept it in respect of a partnership debt, as was known to the plaintiff when he drew the bill. All these would be involved in the question whether the defendant accepted the bill of exchange; and there might be considerations inducing the judge to tell the jury to find for the plaintiff or the defendant, or to find whether it was the handwriting of the party—whether there was a partnership, and whether it was for a partnership debt. In some cases, and indeed very frequently, the jury are asked to answer specific questions in that way. It is a practice which varies a good deal, according to the disposition of different judges.

11,919. Where the question is sought to be brought under review, does the judge who tried the case report to the court the different points that have been raised?—Yes, he would report the findings. If he had left it generally to the jury, he would say, I told the jury, that if they thought there was a partnership subsisting, and that this was the handwriting of a partner, and that either it was not given for a private debt, or if it was, that the plaintiff was not affected by notice of it, they ought to find for the plaintiff; or I told them to answer the following questions, and they answered them in such and such a way, and thereupon the verdict was entered up for the plaintiff or the defendant, as the case might

be; in short, he would report precisely what took place.

11,920. Is the evidence taken down by the judge, or is it taken in shorthand?—The judge takes the note himself.

11,921. And is that the only record that can be appealed to?—That is the authoritative record. Any other can be objected to, but it is continually permitted; for instance, a shorthand writer's notes. For my own part, when there is a shorthand writer's note that contradicts mine, I rather rebel against its being listened to; but if it has something in it which mine has not, I think it possible that he may have taken down something which I did not hear, or forgot to take down, and I make no objection to its being stated. If there were a general concurrence of the counsel on both sides, and the shorthand writer's note also showed, that I had got down something wrong, I suppose I would say I was wrong; but I am not aware that that has happened. I have known the late Chief Baron peremptorily refuse to listen to a shorthand writer's note.

11,922. Is the matter brought under the consideration of the court by a bill of exceptions to the judge's charge, or is it generally done by a motion for a new trial?—The bill of exceptions is a very rare proceeding indeed, and it is never brought before the court in which the record originally was. For instance, in a cause tried in the metropolis, if a bill of exceptions is tendered to a judge of the Court of Exchequer, it would inevitably go before the Court of Exchequer Chamber, consisting of the judges of the Queen's Bench and Common Pleas. If it was tried at *nisi prius* in the country, it might be a record in Exchequer, but tried by a Common Pleas judge, and it would go before the Common Pleas and Queen's Bench, and the judge who tried it would also sit; but I don't suppose there are four bills of exceptions in a year. The common way of objecting to that which has been done at *nisi prius* is to apply to the court for a new trial; or where leave has been reserved to correct any error that may have been made in entering the verdict, by the party for the time decided against applying for leave to enter the verdict differently.

11,923. And that would be so, whether the ground of challenge was wrong law laid down, or evidence wrongly admitted or wrongly rejected?—Yes. The motion for a new trial or to enter a verdict may be upon the ground that the law laid down was wrong; or a new trial may be asked on the ground that improper evidence was admitted; and where, if that evidence had not been admitted, there would really be no evidence, you may get leave to enter a verdict or a nonsuit. But, generally speaking, in the case of an improper admission of evidence, as there is always, or at least generally, some other evidence, you cannot enter a verdict; because the party in whose favour the improper admission of evidence had taken place would say, No, I cannot consent to your entering a verdict against me, because even though that evidence had been rejected, there was enough for the jury to find a verdict for me.

11,924. The court deal with that question?—Yes; then they would have to grant a new trial. I remember a case in which I was counsel—Lady Wenman's case—in which the evidence was very strong against us, but the other side pertinaciously would give a little bit of bad evidence in addition. We applied for a new trial; and the court were compelled to admit that that evidence had been improperly received, but they could not take upon themselves to say that even without it the plaintiff ought to have recovered, and the result was that a new trial was granted.

11,925. Have the court the power to say that the evidence so improperly received is wholly immaterial, and that therefore the verdict ought not to be disturbed?—That can only be done by consent. Suppose a plaintiff tenders a piece of evidence, and the defendant objects to it as not admissible, the judge may say, 'It is very doubtful, but will you agree that I shall receive it? and if the verdict goes against you, and the court shall consider that it was not admissible, but still that the verdict ought to have been for the plaintiff, it shall so stand.' If the opposing party chooses to agree to that, it may be done; but that is not a very common occurrence, where the jury are to express an opinion on the evidence, for the objecting counsel would naturally say, 'I will not agree to that, because I cannot tell how far the jury may be influenced by it;' but where it is in truth a matter of law for the determination of the judge at the trial, or of the court afterwards, although in form an issue for the jury, I think such agreements as that are not very uncommon.

11,926. Of course, if evidence is improperly rejected, one cannot tell what effect it might have had?—No; nor where it is improperly admitted. But I may mention that I have known persons of great eminence who held the opinion, and I confess it is my own opinion, that the court should not be bound hand and foot to grant a new trial where they find that an idle piece of evidence has been improperly admitted, and that without it the verdict ought to have been the same as it was. I think the court should have a discretion in that matter.

11,927. *Mr. Justice Willes.*—You are aware that at the Common Law Commission it was considered whether we should not adopt the rule which prevails in Scotland—and which, I understand, is limited to documentary evidence—that the wrong admission of a document which the court is satisfied had no effect on the verdict shall not be prejudicial to the trial?—Yes. Perhaps I might state that I imagine that originally the bill of exceptions was the proper remedy for a mistake on the part of a judge at *nisi prius*, or the judge at the trial. Then the court of appeal had nothing but a written record before them, and they could scarcely exercise a discretion perhaps. It has always been said that what the court of appeal must do on a bill of exceptions, the court before whom the motion is made must do also, otherwise you would drive people to bills of exception. I think that is the origin of the court considering that they had no discretion where an error had been committed in the reception or rejection of evidence.

11,928. *The Chairman.*—What are the pleadings upon which the case goes before a jury?—The first proceeding is the writ of summons. That is a call on the defendant to give him an opportunity of appearing and making his defence. Then there is a declaration by the plaintiff, which is supposed to be a narrative of the cause of action. Next we have the pleas which constitute the defence. If the plaintiff has any new matter to state in consequence of these pleas, he replies. I may mention to you a case which I drew when I was a pupil of Sir F. Kelly, though I did not draw it as his pupil. The plaintiff complained that the defendant had assaulted him; the defendant pleaded that the plaintiff assaulted him first; the plaintiff replied that it was in defence of certain chattels of his own which the defendant was improperly removing; the defendant rejoined that these chattels were affixed to the house of him, the defendant; the plaintiff surrejoined that the shop of the house had been let by the defendant to him, the plaintiff, and that the goods were on the demised premises; the defendant's rebutter was a denial that they were on the demised premises; the plaintiff's sur-rebutter denied that, and on that issue they went to trial.

11,929. Is there a certain time allowed for each of these statements?—Yes; they are made alternately. First, the plaintiff makes his complaint. Eight days are allowed for the defendant to plead. I think the plaintiff, if called on, must reply in four, and I think the defender must rejoin in four.

11,930. *Mr. Clark.*—In the case you have mentioned, did each of the statements form separate issues?—That might be so now; but at the time I am speaking of, each pleading admitted the truth of the antecedent pleading, but said, in our language, 'I confess and avoid.' The defendant says, I confess I beat you, but you beat me first; the plaintiff says, I confess I beat you first, but you were running away with my chattels; and so on. At that time a plaintiff might put his complaint in a variety of ways, and the defendant might plead double, but he could neither reply, nor rejoin, nor

The Hon. Baron Bramwell.

rebut, nor sur-rebut double; but, under the auspices of the Common Law Commissioners, the privilege of making a double pleading was extended to all pleadings; and now the defendant might have said, I did not beat you at all, and, moreover, you beat me first; and the plaintiff might have said, I did not beat you first, and, moreover, you were taking away my chattels; and so on.

11,931. *The Chairman.*—There is no issue framed out of these pleadings before the case goes to trial?—They are self-producing. According to the true rule of pleading, they must ultimately come to an affirmative and negative. Ultimately, if one man keeps confessing the other's case, and avoiding, they must come to an issue.

11,932. But there is no paper in the cause which is the essence extracted out of the pleadings, and forming the issue which the jury is to try?—Our theory is, that they extract their own issue, as it were. It is not the case that our pleadings do evolve precise issues; that is, on account of the pleading rule, which permits a man not to state the absolute facts of the case, but the legal implications from them,—suppose a man brings an action against me on a bill of exchange, which he says I accepted: he means it was accepted by a man who was my partner, and that it is in that man's handwriting; so that though in one sense the precise issue is evolved, in another sense it is not evolved in a great many cases.

11,933. In the case which you have mentioned as to the assault, how would the jury deal with it? Would they find upon the separate matters, or would they simply find for the plaintiff or for the defendant?—The case I mention was tried by Chief Justice Tindal, and he said, Gentlemen, a long record makes a short issue: the question you have to consider is, whether these things were on that part of the premises which had been demised to the plaintiff. He did not say, You have to consider whether the plaintiff beat the defendant; but what you have to consider is, Were these chattels on that part of the premises demised to the plaintiff?

11,934. *Mr. Shand.*—Suppose there had been double pleading in that case?—If there had been a denial that he beat the plaintiff at all, he would have told the jury, You have to say first, whether the plaintiff assaulted the defendant: if you determine that one way, then you will determine whose the chattels were; if you find the one for the defendant and the other for the plaintiff, you must say so, that the verdict may be entered properly; but you will find no damages due to the plaintiff.

11,935. Does that system still prevail?—That system still prevails; but whereas formerly the power of pleading double stopped at that plea, it now goes on as long as an issue is not evolved between the parties.

11,936. Is it an answer to a general issue, or an answer to each of the inquiries?—I must give rather a long answer to that, I am afraid. The party against whom issues are found has to pay the costs of them, so that it is always, or at least very frequently, a relevant inquiry what issues are particularly found, as well as whether there is a general verdict for the plaintiff or defendant. For instance, in an action upon a bill of exchange there may be two pleas: 1st, I paid the bill; and next, I have a set-off against it. The judge says to the jury, Gentlemen, you have to consider two questions: 1st, Was the bill paid? next, Was there a set-off? If you find either of these for the defendant, he is entitled to your verdict; if you find both for the plaintiff, the plaintiff is entitled to your verdict, and you will say what damages you give. Then the counsel might get up and say, Will your Lordship ask the jury to say, if they find for the defendant, whether they find both pleas proved, or only one? He might ask that, in order that if one plea were found in favour of the defendant, the plaintiff might get the costs occasioned by the improper pleading of the other plea, which was affirmed in his favour.

11,937. In that case there would be a special verdict?—Not what we call a special verdict. That has a technical meaning with us. It would be what I would call a particularized verdict.

11,938. *Mr. Clark.*—In the case which your Lordship has supposed, of a bill of exchange involving so many issues, does the defendant get any notice of the particular point which the plaintiff intends to raise when he goes to trial?—None.

11,939. Nor *vice versa?*—Nor *vice versa.*

11,940. So that it may be any case such as will raise the legal implication, however different the facts may be?—Precisely. I cannot better express it.

11,941. *Mr. Shand.*—Do you think that a satisfactory system of pleading?—Most unsatisfactory.

11,942. In what respect?—My opinion is, that pleadings ought to state the absolute facts; and the Judicature Commission have so recommended. That has always been my opinion strongly; but the difficulty suggested is, that you will have pleadings as long as a bill in Chancery. That would be wrong, no doubt; and they ought not to be so. What I have always hoped is, that they might be no longer than the proceedings in the Admiralty or Divorce Court, where they are very concise. Some pleadings are quite free from any objections of that sort,—for instance, an action on a covenant in a lease: the plaintiff may say, A. B. granted a lease to the defendant, and assigned the reversion to C. D., and C. D. assigned it to me: I complain that the defendant did not pay the rent due on such a quarter-day. Nothing can be more specific than that: all the facts are stated; but there are very few cases that you can put in pleading in which there may not be some very different thing involved from that which is commonly supposed. In the well-known case of Marston *v.* Allen, the defendant denied that he indorsed a bill: the bill was produced bearing his handwriting; he said, That is very true, but 'indorse' in point of law means not only to write your name, but hand it over to another, with intent to pass the property; I gave it to a rogue to get it discounted; he handed it to you, who knew he was a rogue, and you gave no value for it: therefore you cannot rely on your being the *bona fide* holder of a negotiable instrument *de facto* made by me.

11,943. *Mr. Clark.*—Could he, under such a plea, have raised this: 'I was drunk when I indorsed it?'—Speaking off-hand, I should say not.

11,944. Or that the plaintiff by fraud induced him to indorse it?—No, I think not. In all these cases he would have to avoid his act by showing that he was wrongly made to do it.

11,945. *Mr. Shand.*—Under the system of pleading which you have suggested, of stating the facts distinctly, but shortly, would you contemplate that the issue should be raised by the statement, or that the statement should itself form the issue for the jury?—That is a question which we considered at the Judicature Commission. I don't think you could very well lay down any absolute rule. There might be some statements and answers so long that there would be some difficulty in saying that anybody could tell the precise controversy; and it might be desirable in a case of that sort that issues should be specially stated. I think we made a recommendation to that effect; but I am not quite sure.

11,946. *Mr. Gordon.*—Would there not be an advantage in having such special questions put in cases where there are several points left for the determination of the jury? Suppose the case involved three points, and in respect of one of which the plaintiff would be entitled to a verdict, and four of the jury took one view and eight the other view on one of these points, and there was on all the points a majority against the plaintiff, who obtained the general verdict in respect of the ultimate concurrence of the twelve in a general verdict for the plaintiff upon opposite grounds, would it not be an advantage to put the special questions to the jury there?—I think that is a very difficult thing. I have often thought of it. Take the case of four judges, and four points for the plaintiff. Three of the judges say, We think he is wrong on point A; the other says, But I think he is right; then two of the first three and the dissenting fourth say, We think he is wrong on point B, but No.

1 of the first three says, I think he is right; and so on with the other points: the result is, that you will have four judges pronouncing judgment in favour of the plaintiff, though there are three to one against every proposition. I think that is a very recondite question. I don't know whether one ought to settle it according to any metaphysical consideration, or according to the doctrine of chance.

11,947. But in regard to separate questions of fact, would there not be an advantage in getting separate answers from the jury?—It may very well happen that there are three facts brought forward, each of which, if true, would prove the plaintiff's case; and four jurymen might think one fact proved, and four another, and four the third, and there might be eight against each fact. I don't know at all that the plaintiff ought not to recover in that case. I don't know but what the probabilities are that he is right.

11,948. *Mr. Shand.*—Reverting to the pleadings, does it come to this in your view, that if the points of fact raised are simple, the record itself might go to the jury without a separate question, but that if the facts are involved and refer to numerous points, questions should be adjusted in the shape of issues?—I should say generally, from knowing what takes place in common law courts, that you might present the case to the juries without any particular agreement on the issues beforehand, because there is the written statement of the plaintiff and of the defendant; and although the pleaders with much ingenuity cram into both of them everything that could be serviceable, when the counsel have examined the evidence, they open their case, and what the jury decide upon is the case opened to them, and not what is on the record. I think that is an elimination of the true issues by word of mouth by the counsel at the time, and I have never known any difficulty from it either as judge or as counsel. I don't know how many issues I have counted as having been raised in one case. For instance, there are half a dozen pleas, and issues are taken on each; then there are three replications to each plea,—that is, eighteen replications,—and an issue is taken on every one of them; to a dozen of these there are two rejoinders, which make twenty-four rejoinders. Now, you would say that that would cause inextricable confusion; and so it might; but the counsel in addressing the jury say, 'Gentlemen, you have heard a great many pleadings which you will not understand, but the question in the case is so and so.'

11,949. *Mr. Clark.*—In the trial of the 'Alexandra,' there were 98 issues or counts: was that in the least necessary?—That is a very difficult question to answer. In our system of pleading, no alternative pleading is allowed. For instance, you never can say to a man, 'I found my case against you on this, that you did so and so, or if you did not, you did so and so.' You must have two counts, and first of all say, 'You did so and so;' and then in another count, you must say, 'You did so and so.' In the 'Alexandra' case, instead of its being allowed to the Crown to say, 'We charge against the defendants that they did this, that, or the other, and we say that is an infringement of such and such a section of the Foreign Enlistment Act,' they were obliged to say, 'You wrongfully did this, and wrongfully did the other,' taking the particular words out of the Act, and making each particular word a separate offence, though in point of fact only one thing was done.

11,950. *Mr. Webster.*—Has the defendant to come prepared to meet each of the 98 alternatives?—Yes; but he is always entitled to particulars.

11,951. But in the 'Alexandra' case, would he have got any further particulars under any form, than that he was charged with these 98 offences?—He would, I have no doubt, if he had applied for them; which I think is a condemnation of the pleading system, because it never can be a right system in which you must say, 'I want to know what this means in plain language.' But he applies for particulars; and the particulars given are, 'I say that on or about such a date you did such a thing.'

11,952. *Mr. Clark.*—With regard to the issues in the 'Alexandra' case, have the Judicature Commission of England recommended anything which would lead to a different system of pleading in such a case?—I think so. I hope our recommendation is that there should be a short narrative of the facts.

11,953. A short and simple narrative of the facts which are alleged to be a contravention of the Act?—Yes.

11,954. *Mr. Shand.*—In the case where a number of points go to the jury in the pleadings, are the verdicts most commonly general verdicts, or particularized verdicts?—It is a general verdict for the plaintiff; and what takes place is this: If it is important afterwards to settle the issues, the counsel say to the judge, 'This is a verdict for the plaintiff, but he is not to have a verdict on such and such a count;' and then he says, 'I pleaded a release, and the jury have found against me; but there is a replication of fraud, and he is not to have a verdict on that.' The judge says, 'Certainly not.'

11,955. Is that so minuted?—In the records of the court, it is entered as if the jury had found according to the direction of the judge; but that is with a view to costs.

11,956. *Mr. Gordon.*—The judges seem to exercise considerable control over the verdicts; they put a verdict in shape although it has been received from the jury as a general verdict?—Quite so. That is a great deal owing to the good-fellowship that there is, if I may so say, between the judges and the bar, because if counsel chose to say, 'The jury found a verdict for the defendant, but your Lordship has not asked them upon such an issue,' the judge would say, 'I shall take on myself to do that,' and the counsel might say, 'I shan't allow that;' or the judge might say, 'There is no evidence on such a point.' But it is practically done without any objection, and it is no real exercise of power. Suppose a man brings an action on a bill of exchange, and the defendant says, 'I did not accept the bill, and moreover I have paid it;' at the trial it is obvious that the only question is, whether he has paid the bill; he is liable on his acceptance, no doubt, and nobody says a word about that. The counsel for the plaintiff don't open it, and the judge says to the jury, 'The question is, whether you believe that this bill was paid.' The jury find for the defendant, and the counsel for the plaintiff says, 'We must have the first issue entered for us;' the counsel for the defendant says, 'Of course you must,' and that is done.

11,957. *Mr. Clark.*—In point of fact, the verdict exhausts all the issues that are raised?—The verdict must exhaust all the issues that are raised, because if there is no evidence on any issue, the judge ought so to direct the jury; and if there is, the jury ought so to decide it.

11,958. *Mr. Gordon.*—If there is no evidence, is it a case for non-suit?—Properly speaking, a judge has no power to non-suit a party. All he can do is to direct the jury to find a verdict for the defendant; but in point of fact, a plaintiff is entitled to be present when the jury give their verdict; and if he withdraws, then he is non-suited, because the jury give no verdict. Therefore, when a judge says, 'I will non-suit you,' that means, 'I will direct the jury to find a verdict against you, unless you choose to pretend to leave the court, and so be non-suited.'

11,959. What is the difference to the plaintiff?—The difference to the plaintiff is, that if he is non-suited, he may bring a fresh action; and in the other case, estoppel takes place. A defendant of course never can be non-suited.

11,960. *Mr. Webster.*—Has the defendant not a right to insist on the jury answering the issue, even on points where no evidence has been led; or has the plaintiff the right to withdraw these?—A plaintiff cannot be partially non-suited. He must be non-suited altogether, or not at all. Each party has a right to call on the jury to return a verdict upon every issue; but the judge may say to them, 'On such and such issues you are bound in point of law to return a verdict in such a way, because there is no evidence.'

11,961. *Mr. Clark.*—Could not the plaintiff insist on

The Hon. Baron Bramwell.

trying the question over and over again by electing to be non-suited?—He can.

11,962. Has the defendant no power to prevent that?—I rather think there is a proceeding in the Court of Equity, what they call a bill of peace, to stop a man from doing that.

11,963. *The Chairman.*—But a court of law has no power?—A court of law has no power; but it has this sort of power, that if he don't pay his costs, and vexatiously brings a second action, they may stop him.

11,964. *Mr. Gordon.*—Then I understand that bills of exception are very seldom resorted to?—Very seldom.

11,965. There is great difficulty in stating objections to a judge's charge in the hurried way in which jury trials are conducted?—Yes; and it is an inelastic proceeding; and you have to put it all down on paper.

11,966. *The Lord Justice-General.*—You cannot get beyond the record of the bill of exceptions in discussing a point of law?—Not at all. In the case of a bill of exceptions, you have nothing but the record at *nisi prius;* that is to say, the pleadings and the evidence given at the trial, the direction of the judge, and the exception taken to it.

11,967. In the case of a motion for a new trial upon a misdirection, is there any appeal against the judgment of the court refusing or granting the new trial?—There is, in certain cases. There was not until the year 1854; and then by virtue of the Common Law Procedure Act, in consequence of the commission of which my brother Willes and myself were members, an appeal was given either in cases where the question had been reserved by the judge, or, though it had not been reserved, in cases where there was a difference of opinion in the court; but still at this moment, when there is no leave reserved, and where there is no difference of opinion, there is no appeal. That power of appeal went a great way towards abolishing bills of exception.

11,968. *Mr. Clark.*—Does the judge in all cases keep a note of his direction at the trial?—Well, I cannot say that every judge does. I very rarely do. I believe I trust to my memory; but when there is anything of any difficulty, and I am afraid that I may forget the precise terms I use, I write it down that I told the jury, 'If you are of opinion, so and so,' stating it as briefly as I can.

11,969. But does the judge who tried the case always form a member of the court that disposes of the rule for a new trial?—No; he need not ever do so. In London, at Westminster and at Guildhall, the motions for new trials are always made before the court of which he is a member; but where the trials have taken place at the assizes, he may or may not be a member of the court in which the record is.

11,970. And if he is not, and the question is raised whether the direction is good in law, how is the court informed of his direction?—The counsel tell them.

11,971. But if the counsel dispute as to what the direction was?—Then they appeal to the judge as to what he said.

11,972. What record is before the court when the counsel make the motion for a new trial?—None when the motion is originally made. When the rule *nisi* is applied for, there is no record. The counsel says, 'In the case of So-and-so, tried at the assizes, and in which there was a verdict for the plaintiff, I crave, on behalf of the defendant, to move to set aside the verdict, and that a new trial shall be granted on the ground of misdirection: it was an action for dismissing the plaintiff, and it appeared that a month afterwards they found out their mistake, and offered to take him back to his situation, and he said he would not go: the judge said, You cannot recover after that offer.' There is nothing but the counsel's statement; he states the question and the pleadings, and what he holds to be the misdirection. I must say it is loose; but it works well, and I find no fault with it.

11,973. Suppose you grant a rule to show cause?—Then we write to the judge for his notes.

11,974. If his Lordship has not kept a note of his direction, what takes place?—We do not ask notes of his direction. We ask him for any note he has got, and perhaps he will send us a note of the evidence only, or he may go on to say, 'I told the jury so and so.' If counsel agree as to the direction, we then discuss whether it was a right one; but if they don't agree, we appeal to the judge.

11,975. *Mr. Shand.*—And what he says is accepted as final?—Yes.

11,976. *Mr. Clark.*—Then the judge is not under any obligation to keep a note?—Not of his direction.

11,977. The counsel could not say to him, 'You will be good enough to keep a note?'—I don't know that counsel ever say to the judge, 'I wish you to take a note of the direction.' I rather think they prefer not to awaken his attention to his going wrong, but take a careful note themselves; but if they take an objection to evidence, they ask him to take a note of it.

11,978. Do the counsel ask for directions from the judge?—Occasionally. They get up and say, 'Would your Lordship be good enough to say so and so to the jury?' or, 'You have not explained what such a witness has said.'

11,979. At the end of the charge, does the counsel ever ask the judge to give a particular direction in point of law?—It is quite open to them to do that, and they do it whenever there is occasion for it. It is not always done; because the counsel on both sides having presented their views, the judge knows what points of law are relied on, and very likely says that he thinks there is nothing in such and such a point. The counsel then says, 'I hope your Lordship will take a note that I have made it;' or perhaps the counsel may say, 'Would your Lordship ask the jury so and so?'

11,980. On the motion for a new trial, can the counsel move to set aside the verdict on the ground that the direction is imperfect as well as erroneous?—Oh yes; that is to say, he can object that the judge did not leave the right question to the jury.

11,981. But can he make that motion without having brought the matter under the notice of the judge at the trial?—It is not very easy to give a direct answer to that. He would be told, 'If you had such a point as that to make, why did you not make it at the trial? because, if you had, the opposite side might have called a witness to prove so and so;' and where it appears that the party may have been lying in wait for a misdirection, he would probably take very little by his motion. But if the objection he took was one that the judge ought to have been aware of, and it was an incurable objection, and it was not uncandid to take it, it is very likely that the rule would be granted.

11,982. *Mr. Shand.*—Then it is one ground of a new trial that a direction has been refused which the party thought essential to the justice of his case?—It is not a very frequent occurrence.

11,983. And you do not find it necessary to present a bill of exceptions, but it is done under the ordinary form of a motion for a new trial?—Yes.

11,984. *Mr Gordon.*—If the court is unanimous, there is no appeal?—There is no appeal unless the point has been reserved.

11,985. *Mr. Shand.*—You said that the judge's notes were transmitted when asked: are they simply in manuscript?—They are always copied out by his clerk.

11,986. Is there ever such a thing as the printing of these notes?—No. We only send one copy made by our clerks, and it is read by one of the judges when the case is called on.

11,987.—Is it the passages which are thought important that are read?—The whole of the evidence is read as a rule; but perhaps at a particular passage the counsel may say, 'You need not read about that.'

11,988. Does it not occupy a long time if you have to read the notes of a whole day's trial?—No; the notes are generally very short.

11,989. *Mr. Clark.*—How long would it take to read the notes in the case of *Saurin* v *Starr*?—I should not at all wonder if they could all be read in a couple of hours.

11,990. *Mr. Shand.*—And a good deal is omitted by

arrangement?—Supposing it is an action against a railway company for negligence, and half a dozen doctors are called to prove that the party sustained great damage, and the defendant denies that there was negligence, directly the judge comes to the evidence of the medical men, the counsel say, 'You need not read that,' and in that way time is saved. I don't remember any case which it took an hour to read.

11,991. *Mr. Webster.*—In point of fact, the court get over a great many cases of that kind in a single day—hearing a motion or a new trial?—No; of discussions when rules are granted, I should say that three or four a day would be a fair average, speaking of my own court.

11,992. *Mr. Shand.*—You may grant a good many rules in one day?—Oh yes; because there you have an *ex parte* statement, and all you have to consider is, whether a doubt is made out to justify you in having it discussed.

11,993.—Suppose the ground of objection to be that the verdict is contrary to evidence, is it an absolute rule that where the judge who tried the case is satisfied with the verdict, the verdict shall stand?—I say no; but I have heard a very distinguished person say the contrary, though I always thought he was very considerably influenced by a desire to find a certain road to a decision. But I think it is a very objectionable rule; and I think it is absurd, because if it were so, you had better have the rule for a new trial granted or refused by the judge at the time he hears it. It would be a farce to go through the form of moving for a new trial if it is to be disposed of according to the opinion of the judge who tried the case. But there is no doubt that the opinion of the judge at the trial as to whether the verdict was against evidence or not, generally receives the very greatest weight, and indeed is almost decisive. There are some cases where it certainly ought to be so; for instance where the question is upon the credibility of the witnesses from their manner and demeanour—a thing that cannot be reported to the court in which the motion is made.

11,994. *Mr. Clark.*—Do you think it desirable that the judge who has tried the case should be a member of the court which disposes of the motion for a new trial?—I think so. It is true he is to a certain extent appealed against and impeached,—what has happened before him is in controversy; but still the assistance he could give is of such use that it is better he should be present, if there were not inconveniences attending his being so.

11,995. *Mr. Shand.* — You have mentioned that though there is power to try cases before a judge instead of before a jury, a very large proportion are tried by juries. Do you infer from that that the system of trial by jury works satisfactorily, and gives satisfaction in England?—I think trial by jury works satisfactorily and gives satisfaction, but I do not infer that from what you have mentioned. I think that more causes would be tried before the judge alone, if instead of its being necessary that there should be a consent to the case being tried before the judge, it were necessary that there should be a consent to its being tried before a jury. In the first place there is an affirmative act, and people don't take the trouble to do things affirmatively which are not necessary; in the second place, the supposition is that you must get the plaintiff and the defendant, who are of the most unconsenting disposition in the world to each other, to consent. I think if the law was, that the case must be tried before the judge unless the parties consented to its being tried before a jury, you would have nearly as many tried before the judge as are now tried before a jury.

11,996. There is no review of trials before a judge to any greater extent than trials before a jury?—To a less extent. You cannot impeach a judge's finding on the ground that it is against evidence; you can move for a new trial on the ground that the jury have found against the evidence.

11,997. In the majority of cases, do you think that trial before a jury or before a judge is to be preferred?—That is a very large question indeed. I think if I wanted the truth to be ascertained in the particular case, I should prefer an intelligent man who had been in the habit of exercising his faculties all his life on such questions, to twelve men who had not been in the habit of exercising theirs, who might not be so intelligent men, who certainly have not been in the habit of exercising them together,—farmers and others, who are very much fatigued from being taken and shut up in a hot court. If I wanted nothing but the truth in the particular case, I should prefer the verdict of the judge; and it seems to me impossible to doubt that he is the preferable tribunal. When I was first made a judge myself, I was very strong in favour of trials being before a judge; but I am afraid that the jury is a crutch that I have been leaning on for so long a time that I have now got used to it, and I don't think I am as good a judge of the question now as I was thirteen years ago. Moreover, there is no doubt that trial by a jury popularizes the law. I remember a case before the House of Lords in which I was contending for a particular construction of a covenant, and my brother Willes was contending the other way, and the question put to me was, How was it possible that people should enter into so stringent a covenant as you contend for? I said, 'My Lords, they will trust to that true court of equity, a jury, which, disregarding men's bargains and the law, will decide what is right in spite of all you say to them.' And it is so; I don't say that they do not regard the law, for I believe they do; but every man must feel that although he may have the law on his side, he is in some peril if the justice of the case is not with him also. I think it would be difficult to discriminate between civil and criminal cases; and in criminal cases I think it is better that the judge should not be the man to find the prisoner guilty. But it is a very large question; and I feel some hesitation in offering an opinion about it.

11,998. *Mr. Clark.*—What do you mean by saying that it is difficult to distinguish between civil and criminal cases?—I mean that it is difficult to say that the one should be tried differently from the other.

11,999. *Mr. Shand.*—You have had no cause from your great experience to be dissatisfied with jury trials?—No. There are cases in which juries go wrong: for instance, in an action against a railway company—they generally go wrong there; in actions for discharging a servant they generally go wrong; in actions by a tradesman against a gentleman in questions of whether articles supplied were necessary to an infant or wife, they are sure to go wrong; in actions as to malicious prosecution, they are always wrong. You may say to them, 'The question is not whether the man is innocent, but whether there is absence of reasonable cause and malice,' but in vain. They find for the innocent man.

12,000. *Mr. Justice Willes.*—And cases of running down?—There they generally find for the plaintiff; so much so, that a man who has run down another, if he is wise, will bring the action first. I have been in cases myself where each party has brought an action, and each plaintiff has recovered. I remember one case particularly, in which the question was, whether the man that recovered was free from blame, and there was blame in the other; and each recovered in the action where he was plaintiff.

12,001. *Mr. Shand.*—Do you think it satisfactory that a party should be bound to accept the decision of one judge on matters of fact, it may be involving property of very large value: take as an illustration a case which has been mentioned once or twice before this Commission,—the Breadalbane case,—where the succession to the Breadalbane estates depended upon questions of fact only, and that, under the system suggested, the verdict or decision of the single judge should be final?—Perhaps it is no answer to the question, but that exists at present in Chancery.

12,002. There is review on matter of fact in Chancery, I understand?—Yes; and I should say that if you confided the jurisdiction to a judge, as a matter of course it would be right that there should be some review of his finding. I don't know that I am capable of giving the Commission any information on that point.

The Hon. Baron Bramwell.

12,003. *The Lord Justice-General.*—In any event, you would not set aside the verdict of a single judge except upon the same ground that you would set aside the verdict of a jury?—I should say not, certainly.

12,004. *Mr. Gordon.*—Probably the absence of any power of challenge of the verdict of a single common law judge in England may arise from the consent of both parties being required to his acting without a jury?—Yes. The law doesn't impose him upon them; and if they select him, they take him for better or for worse.

12,005. *The Lord Advocate.*—I suppose the defendant in a running down case would never consent to its going to a jury?—Not if he could help it; that is to say, if he were wise, he would not.

12,006. *Lord Barcaple.*—You were asked just now about the case of Lord Breadalbane; but let me put to you the Douglas cause, where Lord Mansfield and Lord Camden upset the judgment of the Court of Session, the only question being whether two children, twins apparently, were the children of a particular lady, or were supposititious children, who had been smuggled by that lady and her husband into the house, and made to pass as the heirs. Do you think that, in a case like that, it would be right to give finality to the opinion of a single judge on point of fact?—I think I gave a very hesitating answer before; but if you wanted nothing but the actual truth in that particular case, without reference to the system, I think the probabilities are, that the trained intellect of a man accustomed to weigh evidence all his life would be worth more than the opinion of one who was not so accustomed, or than any dozen; because, though you augment their number, you do not necessarily augment their capacity.

12,007. But my question was as to the judge, assuming there was no jury?—I cannot see why there should not be review of the judge's decision on matter of fact.

12,008. *Mr. Shand.*—That necessarily introduces a new discussion and a great deal of expense, if the evidence has to be laid before a court composed of three or four persons, and that has to be set against the advantage of jury trial. Don't you think the expense incurred in cases of comparatively small value, by leaving review open upon questions of fact, is a very serious disadvantage?—I think it would be a very reasonable thing to limit almost all appeals where the amount in question was small.

12,009. *Mr. Webster.*—As against the expense of the further discussion, which Mr. Shand has alluded to in the case of the decision of a single judge, you have, where the case goes before a jury, motions for new trial, and discussions as to setting aside the verdict?—Yes.

12,010. *Mr. Gordon.*—Whereas, in the case of the review of a judge's verdict, the court are enabled to pronounce a correct judgment upon the evidence adduced before the judge without a new trial?—That may be. We have no such proceeding; and therefore all I can say is, that the one thing might be, or the other. You might either say that the court of appeal should direct a new trial, or that they should of new try it themselves.

12,011. *Mr. Clark.*—Do you think it safe to leave it in the hands of the judge, in the first instance, to decide whether there should be an appeal from his judgment or not?—The Commission must forgive me if I say that it is rather an impertinence in me to offer an opinion on matters upon which I have not reflected much; but I don't see why, if you once admit the principle of appeal, you should confine it to any particular tribunal. If you once admit the principle of appeal, you must suppose the possibility of error either in point of fact or in point of law; and I cannot see why there should not be an appeal from the judge except for this, which ought always to be borne in mind, that he has had the witnesses before him, and has had the means of judging of their conduct and demeanour. If he were to say, 'I don't believe such and such a witness,' and the court of appeal were to say, 'You ought to have done so,' I think they would make a very great mistake.

12,012. *Mr. Gordon.*—And his being a member of the court of appeal would give him the advantage of stating these views before them?—Yes.

12,013. *Mr. Shand.*—If you had such an appeal on matters of fact in the courts of common law in England, would it not add very seriously to the labours of your appeal courts?—I think not. I don't suppose we should have so many motions for new trials on the ground that the judge has decided wrong, as we have on the ground that the jury has decided wrong.

12,014. *The Lord Justice-General.*—Are there many motions for new trial on the ground of the verdict being contrary to evidence?—Yes. I should say there are a good many.

12,015. What proportion should you say of the total number moved?—I am speaking very off-hand, but, perhaps, one in six; and very frequently there are affidavits of new matter discovered.

12,016. *Mr. Webster.*—Are there many instances in which the verdict is set aside as being contrary to evidence?—Yes.

12,017. *Lord Barcaple.*—Does the motion to set aside the verdict as contrary to evidence not sometimes involve matter of law in this way, that the party moving alleges that the evidence proves something short of the issue in point of law?—We had such a case the other day, where there was a motion for a new trial on the ground that the verdict was against evidence; and when we came to consider the case, we said we were of opinion that the judge who tried it should not have left it to the jury, but should have said that the jury must find in the way the objectors said they ought to have found. That was an action for dismissing a servant.

12,018. You gave the remedy on a motion for a new trial on the ground that the verdict was contrary to evidence?—All we could do was to say, 'There must be a new trial;' though, when the cause went down for trial, we knew that the judge must tell the jury that they must find a verdict for the defendant.

12,019. *Mr Clark.*—The same facts being proved?—Yes.

12,020. *The Lord Justice-General.*—You spoke some time ago of the circumstances in which a party is entitled to demand particulars before going to trial: is that in every case?—Yes; I may say in every case, but with a qualification. It has been very much extended of late years. Formerly the particulars used to be granted principally for money demands. A man brought his action for goods sold and delivered, and the defendant asked the particulars; but now, in all cases, if the defendant will make an affidavit that he doesn't know what the plaintiff is going for, particulars will be ordered unless it can be shown that the application is vexatious or unnecessary. Take such a case as slander. I am charged with having slandered you, and I don't know what is meant; the plaintiff objects to give particulars there, because he says, 'You will find out my witnesses and corrupt them;' but in such a case as that he is ordered to give particulars as to what month it was in, or at what place.

12,021. *Mr. Gordon.*—Or in whose presence?—No. I think they generally say they will not ask you to state that.

12,022. *The Lord Justice-General.*—Time and place?—Yes.

12,023. But is the defendant entitled in any case to demand particulars, or is it in the discretion of the court?—It is in the discretion of a judge in chambers. They seldom come to the court about it. Injury to a mine or damage to a house are very common cases for particulars.

12,024. I suppose the only case in which a note of particulars is absolutely required is in patent cases?—There there is some statutory enactment which I have not the precise particulars of.

12,025. The clause in Lord Brougham's Act?—Yes.

12,026. *Mr. Clark.*—If the facts as proved are different from the particulars delivered, what is the consequence?—I was going to use an inaccurate expression, and to say that the plaintiff ought to be non-suited, but

the judge ought to tell the jury that he has not made out his case.

12,027. In a case of slander, suppose the plaintiff says it took place in such a street on such a day, and he proves that it took place in the same street, but on another day?—Then there is this sort of rule, that if the defendant cannot have been misled, the error ought not to prejudice the plaintiff. That is the general rule, and we endeavour to do justice as well as we can. Properly speaking, he has not proved the case; but we consider whether the defendant has sustained any damage, or has been misled.

12,028. *Mr. Gordon.*—Would you allow the plaintiff to amend the particulars, or would you take a verdict without that?—A verdict would be taken without that. The object of the particulars was to give the defendant information, and they did give him information.

12,029. The note of particulars is not treated as part of the record?—No; technically it is not on the record.

12,030. *Mr. Shand.*—And evidence is admitted, although it may be subject to objection afterwards, on the ground of surprise?—No. Suppose the plaintiff, in giving particulars, says, 'To a coat sold on such a day,' and 'trousers sold on such a day,' and he has given the wrong year for the trousers, he gets into the box, and says, 'There can be no mistake, because he never had but one pair from me, and that was in the month of October, though the wrong year has been stated.' The judge then says that the defendant has not been misled. It is got through somehow or other, if the defendant has not been misled, and no harm has been done.

12,031. If it is the other way, would the evidence be excluded?—If there was any appearance of *mala fides* on the part of the person giving the particulars, or if there was any prejudice suffered by the defendant.

12,032. *Mr. Clark.*—In the case of an action on a bill of exchange, raising three possible issues, can the defendant demand particularly to know what is the issue truly to be raised?—I don't think I have ever known such a case as that. I think I have known it tried, and I think the answer generally given is, 'You should interrogate him, and know what his case is.'

12,033. And how does he do it?—There is a power of administering interrogatories.

12,034. *Mr. Justice Willes.*—Discovery?—Yes.

12,035. *The Chairman.*—A good deal of work is done in chambers?—An immense deal.

12,036. And that clears away a great deal of business?—Without that, we should require to have the number of the judges almost doubled. Probably the Commission will be surprised when I tell them that I have had 66 cases in one day which were to be attended by counsel, besides as many more not to be attended by counsel at chambers.

12,037. *Mr. Gordon.*—These are motions on points of order or form?—Of late years a great quantity of very serious business has been sent to chambers. You may say almost all the important business, except new trials. For instance, discovery and interrogatories are always asked for at chambers, and particulars are always asked for there.

12,038. Arranging interrogatories?—The power to administer them. The plaintiff says, 'I want to interrogate the defendant;' the defendant says, 'Your questions are improper,' or, 'This is not a proper case for interrogatories;' and the judge has to examine into that, and make an order or not, as he thinks proper.

12,039. *The Chairman.*—Do you attend on certain days? or how do you arrange that?—We attend daily during the business year, and three Masters now attend. In the long vacation there is an attendance twice a week.

12,040. An attendance by some judge, or by every judge?—No; one judge now attends for all the three courts.

12,041. *Mr. Shand.*—Besides discovering and ordering particulars, would you mention any other illustrations of what is done at chambers?—The best answer I could make to that would be to say that all the business of the court is done there, unless certain excepted cases. The exceptions are much fewer than the cases that go to the chambers.

12,042. Are they not minor matters in the progress of the case, or do they ever embrace matters of important discussion?—They are interlocutory proceedings. New trials are never heard or moved for at chambers, except you want to dispose of a case, and the parties agree to it. Demurrers—that is, questions of law—and special cases are never heard at chambers. Motions for attachments for contempt of court are never heard at chambers.

12,043. *Mr. Justice Willes.*—Except in cases of injunctions?—Except in cases of injunctions; there is statutory power to do that.

12,044. *The Chairman.*—You have mentioned some classes of cases in which you think that juries almost always go wrong. Are there frequent motions for new trials in those cases?—That is very common.

12,045. And all you can do is to grant the new trial?—Yes.

12,046. They are not so glaring as to suggest the remedy of giving a power to the court to order the verdict to be entered the other way?—No; I think not. I may say that I think juries are habitually wrong in certain cases. Take the case of an action by a discharged servant against his master. Common juries have a strong tendency to find against the master; and in malicious prosecutions, it is in vain to say that there is no public prosecutor here, and therefore the law protects a private person acting *bona fide*, or that in this case there is some trumpery matter which makes it necessary to leave it to the jury. What malice can this person have against a man whom he never knew? They just shake their heads, and turn round and say, 'Verdict for the plaintiff.'

12,047. *Mr. Clark.*—How do they do in landlord and tenant cases?—The tenant always tries to get before the farmers, and the landlord before the squires. The landlord can always get a special jury.

12,048. *Mr. Shand.*—Are you attended by counsel at chambers?—Sometimes. I have seen Sir William Follet at chambers; but sometimes there is only a little boy, whose nose you can just see over the table.

12,049. But, as a rule, is the business at chambers before the judges transacted by counsel or agents?—The greater part of the business is transacted by the attorneys and their managing clerks.

12,050. How long does it take the judge?—It varies with the judge. I daresay my brother Willes will be surprised when I say that it takes me three or four hours in the day. I daresay it takes him less.

12,051. *Lord Barcaple.*—Every day of the week?—Every day in the week during the business time; but a great deal of the business is of the most trifling character. Sometimes it is a question of giving time to plead. One of the parties refuses to give a week, and they take four days.

12,052. Are the chambers open to the public?—I rather think my brother Willes says that chambers are a public court.

12,053. *Mr. Shand.*—What hours of the day are devoted to that work by the judge?—We go at eleven o'clock, and sit till the business is over.

12,054. And then you take the sittings in the other courts?—No; after we have done our work at chambers, we are free for the day.

12,055. Are there certain days in the week for chamber work?—Every day.

12,056. When is the business done in banc?—The other judges do the banc business.

12,057. *Lord Barcaple.*—Then every judge does not sit in chambers every day?—Oh no. Every day there is a judge attending at chambers; but it is one judge only.

12,058. *The Lord Justice-General.*—That is one judge of the five who constitute the court?—It is one from the eighteen judges now. The three courts send only one judge to chambers.

12,059. *Lord Barcaple.*—Then you are making orders in causes that are depending in the other courts?—Yes.

12,060. *Mr. Gordon.*—There is a system of taking proof by affidavits in the equity courts. Has your

The Hon. Baron Bramwell.

Lordship had any experience of it in the common law courts?—We have affidavits in our courts.

12,061. For formal matters?—For what we call interlocutory matters. For instance, if a man wanted a new trial on the ground that he had discovered new evidence, he would have to make an affidavit; if he wanted particulars of demand, he might make an affidavit, and say that he did not know what the plaintiff was going for; or if he wanted a commission for examining witnesses abroad. In fact, an affidavit is always wanted where extrinsic facts are to be acted upon; by which I mean, if a man wants time to plead, he will probably want nothing more than the declaration, and he will show it to the judge, and say he wants more time; but if an extrinsic fact is to be acted on, it has to be proved by affidavit. But the business is so creditably conducted by the attorneys and their clerks at chambers, that where there is no doubt about a fact, they do not ask for an affidavit.

12,062. *Mr. Shand.*—Then affidavits are practically unknown as part of a cause?—At the trial all evidence is *viva voce* before the jury or before the judge.

12,063. *Mr. Gordon.*—Does your Lordship think that it would produce any bad effects to allow proof by affidavit, at all events where the case is to be tried before a judge?—I should say not, either before a judge or before a jury; but my opinion on this point is not worth nearly so much—indeed if it is worth anything at all—as the opinion of Mr. Hollams, a very sagacious gentleman, who is a member of the Judicature Commission, and who, though strongly in favour of *viva voce* examination in all cases of controverted facts, has expressed an opinion that there are formal things which you cannot call upon a man to admit, because he cannot tell exactly how they stand; but in such cases as that, he thinks it very reasonable that the party wanting to give the evidence should give it by affidavit, to prove those facts which, though not admitted, are not disputed.

12,064. Where there is not likely to be a conflict of testimony upon them?—Yes.

12,065. *The Lord Advocate.*—What has been the effect of the Common Law Procedure Act as regards the course followed in the trial of causes, and with regard to the average time which an ordinary common law suit occupies in court?—I don't think the Common Law Procedure Act made much difference in the trial of causes.

12,066. What was the particular difference that that Act introduced as compared with the former law on the subject?—It abrogated all unnecessary steps; it got rid of all fictions; and, if I may so say, it made everything as simple as the nature of the case would admit of. That is not a very satisfactory description of it; but I don't know that I can give a better one. For instance, suppose a man had brought an action for assault and battery, and had begun his declaration, 'For that whereas the defendant with force and arms, on the first June, assaulted and beat the plaintiff,' etc., that was a bad declaration, because, instead of being a direct averment that he had beaten him, it was only by way of recital, 'That whereas he had beaten him.'

12,067. *Mr. Justice Willes.*—And there was another objection to that, that it did not state whether the year was the year from the Hegira, or what year it was?—Yes. Well, the Common Law Procedure Act got rid of such things as these.

12,068. *The Lord Advocate.*—How long, on an average, does it take, after a cause comes into court, before it reaches trial?—It is very difficult to make an average. Some causes are tried in the country, and some in London; some before special juries, and some before common juries; some in courts that have a great deal to do, and some in courts that have less to do. But the ordinary writ of summons requires the defendant to appear in 8 days, I think; after he has appeared, you declare, and he has to plead in 8 days more, that is, 16 days; you may then deliver him notice of trial, which requires 10 days, that is, 26 days; so that in a month the cause may be ripe for trial; and then if the court is not blocked up with business, it will be tried.

12,069. *Mr. Gordon.*—But if there is further pleading?—If the defendant's plea requires a replication of new matter from the plaintiff, the defendant has time to rejoin to that.

12,070. *The Lord Advocate.*—Is the average of causes tried within two or three months?—I should think, on the average, the causes are not tried within two or three months. It would be very difficult to try all the causes at the assizes in that time; and even in London the courts are not sitting for the trial of *nisi prius* between 10th July and 2d November. They are not sitting for the trial of *nisi prius* in London between the last day of February and 16th April, and special juries are not taken except at three periods of the year; that is to say, in December, in February, and in the end of June and July.

12,071. *Mr. Justice Willes.*—The defendant has 8 days to appear, and as soon as he appears the plaintiff may declare. Then the defendant has 8 days to plead; and if he does not plead within these 8 days, he is tied down to take notice of trial for the next practicable sittings, which may be either in London or in the country. If they are in town, the vacation may intervene; but, taking the speediest proceeding that could be had, the 24th October is the first day of the legal year for delivering pleadings; if the defendant were served 8 days before that and appeared, and it was a common action, the defendant could declare on 24th October, and the time would expire on 1st November. The defendant would have to go to trial if it were a town cause, in November, at the third sitting; that would allow 10 days' notice of trial. Or if he obtained time, on condition of taking short notice of trial, he would have to go to trial some time before 25th November—so that it is just possible that an action might be over in five weeks; and I have noticed over and over again, in trying causes in term, that actions of a common kind are over in six weeks. The judge has a power of giving speedy execution; and in undefended actions he gives execution immediately?—That is so.

12,072. *The Lord Advocate.*—What is the proportion of cases that never go farther than the verdict of a jury; and what is the proportion in which a rule is moved for?—That is a very difficult question to answer. I think the last returns showed that 2 per cent. come to trial; but how many that come to trial are afterwards heard of in the court, I don't remember.

12,073. *Mr. Clark.*—What is the smallest sum of money that can be sued for in the superior courts?—You may sue for the smallest possible amount; but if it is under 40s., and there is no question of principle involved, but only the question of whether it is owing or not, the court will stay proceedings on the ground that it is contrary to their dignity to entertain such a case.

12,074. Are there many cases of small amount, say under £25, before the superior courts?—Yes, there are a good many cases of that kind.

12,075. *Mr. Gordon.*—By an Act passed last session, I think costs cannot be recovered if the case is below £50?—Below £20.

12,076. *Mr. Clark.*—Has the county court, to a certain extent, co-ordinate jurisdiction with the supreme courts up to £50?—Yes; they can entertain cases up to £50 of the same quality and description that we can; but they cannot try cases of libel, or slander, or malicious prosecution, or seduction.

12,077. What are the grounds on which you give delay to a defendant?—It is almost impossible to give an easy answer to that. A man will come forward and say he wants more time to plead; we generally say to him, 'You must take short notice of trial, and make an equivalent to your opponent for this;' if he says, 'I cannot take short notice of trial,' or if the defendant is ill, or the attorney himself is ill, or if there is a long declaration, and it is a difficult case, he will say that he cannot get ready; and sometimes he will say, 'Before I can plead, I must interrogate the plaintiff, and ascertain certain facts from him.' A variety of reasons of that sort may be given. Sometimes he will say simply, 'Really, my Lord, I have been very busy, and it is two months to the assizes, and the other party will have plenty of time.'

12,078. Suppose a man brings an action to recover an estate on the ground that he is the true heir, and a question of pedigree arises in that way, would the defendant, as matter of course, have a long time to prepare, or would the case go to trial immediately?—Not as matter of course. It would come on for trial immediately, unless he applied to postpone it.

12,079. Would the judge, as matter of course, give him a long time?—He would have to make an affidavit, and make out a good case for postponement. If he said, 'I pledge my oath, as a respectable member of this profession, that I cannot get ready,' I suppose delay would be granted.

12,080. *Mr. Gordon.*—Would you give him months?—I have given a man six months to plead, on the ground that his client was in New South Wales.

12,081. *Mr. Clark.*—Is that a matter entirely in the discretion of the judge?—Yes.

12,082. He is not bound down to a statutory rule?—No, there is no hard and fast line.

12,083. *Mr. Gordon.*—In the statistics it is stated that so many thousand summonses are disposed of in chambers: that does not mean suits?—Oh no.

12,084. A summons may be a proceeding after the cause has come before the court?—A summons is either the name of the writ commencing the action, or it is a judge's summons calling on the defendant or his attorney to attend at chambers, to show cause why the party issuing it should not get something that he wants.

12,085. How many causes are set down for trial each day at the assizes or at the Guildhall? or is there just a list which the judges go through continuously?—The parties enter as many causes as they have to try. Every plaintiff enters his cause, or in some cases the defendant may enter it. That is what we call the printed list, and day by day the judge appoints so many to be in the paper for hearing next day; and in doing so he will be governed by the appearance of the causes.

12,086. I suppose witnesses are sometimes kept in attendance for days?—Cruelly.

12,087. Is that often the case?—Very often.

12,088. *The Lord Justice-General.*—Do you see any remedy for that grievance?—The only remedy I see is a very doubtful one, namely, to take care not to put out any more cases than can be tried; but the judge does not like that, because a case may go off, and he may have to rise at twelve o'clock in the forenoon, and instead of finishing the cases in a week, he may have to sit for a fortnight. The juries and the officers of court also complain. I don't know that there is a remedy.

12,089. Are there sometimes remanets which cannot be disposed of at the sittings?—Either the parties have agreed to make them remanets, or there has been no time to try them, and they are made compulsory remanets.

12,090. When are they tried?—They wait till the next assizes or sittings. If it is a remanet at the assizes, it remains over till next assizes; if it is a remanet in the metropolis, it remains over till next sittings.

12,091. *Mr. Adam.*—In the case of a criminal trial, supposing there was a variance between the facts proved and the facts charged, is there any remedy?—There is a small power of amendment at common law. There is a larger power of amendment, the precise terms of which I do not remember, in an Act of Lord Abinger's, but it is an amendment of variances in names more than anything else. Otherwise there would be an acquittal.

12,092. *The Chairman.*—Suppose a man was tried for the slaughter of A. B. C., and it turned out that the true name of the party was A. B. D., and the prisoner was acquitted, could he be tried again for the slaughter of A. B. D.?—I should say so. I remember a case very many years ago in which an Irishman named Shee, who lived in Whitechapel, London, cut off the head of his child. He was indicted for the murder of the child, the indictment giving the child a name; and he was acquitted on the ground that it had no name. They then tried him on a second indictment for cutting off the head of a child without a name, and a set of friendly witnesses proved that it had a name, and he was again acquitted.

The Hon. Baron Bramwell.

12,093. *Mr. Gordon.*—Does your Lordship think that important cases are better tried in London or on circuit, with reference to the expense of counsel being taken down to them?—Well, there are circuits and circuits. The Guildhall juries are very good. As to county juries, they vary; some very good; in others the juries, especially common juries, are often very inferior.

12,094. I was alluding to the expense?—The expense is greater at the assizes than it is in London, certainly, because it is only in Liverpool and the Surrey towns that there is anything like a list made out. The consequence is, that every plaintiff and defendant has to be at the assize town, and to wait till his cause is tried. All the attorneys and witnesses and parties have to go to some hotel in the assize town, and that adds considerably to the expense. The attendance is longer; but I don't know that the fees to counsel are higher.

12,095. Unless in important cases where special retainers are given?—Yes. There is a fixed fee for Queen's counsel.

12,096. *Mr. Clark.*—Is the special retainer allowed against the opposite party?—It is not allowed against the opponent.

William Henry Walton; Henry John Hodgson; William Morgan Benett.

William Henry Walton, Esq., *Queen's Remembrancer;*
Henry John Hodgson, Esq., *Master in the Court of Queen's Bench;*
William Morgan Benett, Esq., *Master in the Court of Common Pleas;*
examined.

12,097. *The Chairman.*—Mr. Walton, you are a Master in the Court of Exchequer? *Mr. Walton.*—I am.

12,098. You have been so for a considerable time? *Mr. Walton.*—Upwards of thirty years.

12,099. We are desirous to know generally from you the nature of the duties that are performed in the Masters' office? *Mr. Walton.*—Their principal duty is that of taxing costs in the suits, taking references, and superintending the whole of the business of the office, which embraces all the proceedings in a suit from the issue of the process till the final execution. We have also to attend the courts, and take any references that may be made from the courts, and we have to be present during the proceedings in court to record them.

12,100. Would you state as shortly as you can the procedure in a cause from its origin, till it goes to trial? *Mr. Walton.*—The first step is a writ of summons under the Common Law Procedure Act. Do I understand your Lordship to refer to a defended suit?

12,101. Yes; a defended suit. *Mr. Walton.*—Having been served with the writ, the defendant appears; then the plaintiff delivers his declaration, and calls upon the defendant to plead.

12,102. *The Lord Justice-General.*—Within what time must the defendant appear? *Mr. Walton.*—Within eight days from the service of the writ.

12,103. *Mr. Webster.*—Within what time must the plaintiff make his declaration? *Mr. Walton.*—He must declare within a year; and if he does not do so, he is supposed to be out of court. Having declared, he calls on the defendant to plead within eight days; and the defendant having pleaded, if it is a plea which merely traverses the declaration, and does not raise any fresh matter in confession and avoidance, as it is called, the plaintiff may join issue on that, and give notice of trial. I have described the simplest case.

12,104. *The Chairman.*—If the plaintiff does not make his declaration for a length of time, can he be forced to make it? *Mr. Walton.*—He can; there may be a notice to declare, but it is very seldom that that takes place.

12,105. Then the case goes to trial? *Mr. Walton.*—Then the issue is delivered, and the notice of trial is to try at the next assizes or the next sittings; and

Messrs. Walton, Hodgson, and Benett.

generally speaking, the notice of trial is ten days. The plaintiff must give ten days' notice of trial.

12,106. Are these steps all taken in your presence as Master? *Mr. Walton.*—No; all formal proceedings are delivered by the attorneys.

12,107. Without the intervention of any officer? *Mr. Walton.*—In our office, we merely issue the writs and file the proceedings; but the steps which belong to the duty of an attorney are taken by him.

12,108. And the time is absolutely fixed by the Procedure Act? *Mr. Walton.*—Yes; but there are many occasions on which the time is altered by application to a judge. When the defendant asks for time to plead, he is generally put under terms to take a shorter notice of trial, or he gets it on any terms the judge pleases to impose.

12,109. *Mr. Webster.*—When the plaintiff joins issue, what notice does he give to the other party? *Mr. Walton.*—He joins issue and delivers the issue itself to the opposite side.

12,110. *The Lord Justice-General.*—What is the issue? *Mr. Walton.*—A paper transcript of the declaration and pleadings. The defendant then knows what the issues are.

12,111. *Mr. Gordon.*—Does the attorney for the plaintiff hand the declaration into your office? *Mr. Walton.*—No; he hands it to the defendant's attorney.

12,112. When does the declaration come into your office? *Mr. Walton.*—It does not come at all to our office.

12,113. Do you get a copy of it? *Mr. Walton.*—No.

12,114. In whose custody are the principal documents kept,—the declaration and pleas? *Mr. Walton.*—The attorneys have them.

12,115. Each has his own? *Mr. Walton.*—Yes; and each has his adversaries'.

12,116. How are the papers identified? Are they subscribed by any person?—*Mr. Benett.*—The attorney's name is put on the back.

12,117. *Mr. Baxter.*—Are they subscribed by counsel? *Mr. Benett.*—No; there were pleadings signed by counsel before the Common Law Procedure Act; but that has been abolished.

12,118. *Mr. Gordon.*—Does it only come into your office after there has been a trial and a judgment? *Mr. Hodgson.*—Yes.

12,119. And there may be some other proceedings to be taken by way of review? *Mr. Hodgson.*—Yes. *Mr. Benett.*—It never comes into our office unless there are other proceedings. When a judgment is signed, the attorney simply gives in the first three words of the first proceeding; and we don't keep even that.

12,120. *The Chairman.*—Nobody can find these proceedings anywhere? *Mr. Benett.*—No; only the parties themselves. *Mr. Hodgson.*—We have the præcipe for the writ, which is the authority for issuing the writ. We have the appearance entered in our book, and nothing else till it comes to a judgment roll.

12,121. *Mr. Baxter.*—Then the issue to be tried is a copy of the declaration? *Mr. Hodgson.*—The issue is a copy of the declaration, the plea, and the replication.

12,122. Who prepares that copy? *Mr. Hodgson.*—The attorney for the plaintiff delivers it to the attorney for the defendant. The record made up on parchment is substantially the same thing.

12,123. *The Chairman.*—When there is time asked, or any application of that kind, does it come before you? *Mr. Walton.*—No; it goes before the judge. *Mr. Benett.*—But under a new Act the Masters sit as judges at chambers, and hear all applications of that kind—almost everything except matters affecting the liberty of the subject. *Mr. Hodgson.*—And other matters which may be done by consent.

12,124. If any matter arises attended with difficulty, do you refer it to the judge? *Mr. Benett.*—We may; but it is not often that we do. Either party may appeal to the judge from a Master's decision.

12,125. Are these appeals frequent? *Mr. Benett.*—No; I fancy not. *Mr. Hodgson.*—We have no means of knowing.

12,126. You know if there has been an alteration of your judgment? *Mr. Hodgson.*—No; not always.

12,127. *Mr. Clark.*—Can you increase the time that is given to plead by statute? *Mr. Benett.*—Yes, we do that every hour. I have done it in more than twenty causes this morning.

12,128. *Mr. Gordon.*—In fact the general rule is to give additional time, is it not? *Mr. Hodgson.*—Yes; always taking care that the plaintiff does not lose his sitting or assizes.

12,129. *Mr. Webster.*—Do you make formal orders? *Mr. Hodgson.*—A summons is taken out by the defendant's attorney: 'Let the attorney for the plaintiff attend and show cause why defendant shall not have a month's time to plead.' That is initialed by the Master; and when further time to plead is ordered, he has usually to take short notice of trial,—that is, four days' notice.

12,130. *Mr. Clark.*—Where does that summons remain? *Mr. Hodgson.*—It is filed in the judge's chambers. The order remains in the possession of the party who obtains it.

12,131. *Mr. Gordon.*—Who takes charge of the summons at the judge's chambers? *Mr. Hodgson.*—The judge's clerks.

12,132. *Mr. Shand.*—In what year was the additional power given to the Masters? *Mr. Hodgson.*—1st January 1868.

12,133. Has that power relieved the judges very much of work? *Mr. Hodgson.*—Yes. Formerly one judge from each court used to attend chambers; now one judge attends for the three courts, the Masters doing the ordinary work.

12,134. *Mr. Clark.*—Is it practically the same kind of work that comes before the judge at chambers and before the Master at chambers? *Mr. Benett.*—Yes; excepting matters affecting the liberty of the subject. All other matters can be heard by a Master, with consent; but without consent they cannot hear interpleader orders, and some other matters.

12,135. *Mr. Shand.*—Is there any rule of court or any statutory rule defining the class of things that the Masters may take up, as distinguished from those which the judges take up at chambers? *Mr. Benett.*—The Masters may do all matters done at chambers by a judge, except those I have mentioned.

12,136. Is that rule to be had?—*Mr. Benett.*—Yes; it is published. They are the rules of Michaelmas term 1867, and they came into operation on 1st January 1868. It is as follows:—

'As to the Jurisdiction of the Common Law Masters at Chambers.

'Michaelmas Term, 1867.

'Whereas by the statute made and passed in the session of Parliament held in the 30th and 31st years of the reign of her Majesty, intituled "An Act to provide for the better Dispatch of Business in the Chambers of the Judges of the Superior Courts of Common Law," it is enacted that it shall be lawful for a majority of all the judges of the said courts, which majority shall include the two Chief Justices, or one of the Chief Justices, and the Chief Baron, from time to time to make and publish general rules for certain purposes therein mentioned: It is therefore ordered that the Masters of the said courts of common law at Westminster be, and each of them is hereby, empowered and required to do all such things, and transact all such business, and exercise all such authority and jurisdiction in respect of the same, as by virtue of any statute or custom, or by the rules and practice of the said courts, or any of them respectively, were at the time of the passing of the said Act, and are now done, transacted, or exercised by any judge of the said courts sitting at chambers, except in respect of matters relating to the liberty of the subject, and except (unless by consent of the parties) in respect of the following proceedings and matters; that is to say:

All matters relating to criminal proceedings.

The removal of causes from inferior courts, other than the removal of judgments for the purpose of having execution.

Prohibitions and injunctions.

The referring of causes under the Common Law Procedure Act, 1854.

The rectifying of omissions or mistakes in the register under the Joint Stock Companies Acts.

Interpleader—other than such matters arising in Interpleader, as relate to practice only.

Discovery—whether by inspection of documents, interrogatories, or otherwise.

Reviewing taxation of costs.

Staying proceedings after verdict.

Acknowledgments of married women.

Leave to sue *in forma pauperis*.

Orders charging stock, funds, annuities, or share, or dividend, or annual produce thereof.

'That in case any matter shall appear to the Master to be proper for the decision of a judge, the Master may refer the same to a judge, and the judge may either dispose of the matter, or refer the same back to the Master, with such directions as he may think fit.

'That appeals from the Master's order or decision shall be made by summons, such summons to be taken out within four days after the decision complained of, or such further time as may be allowed by a judge or Master.

'The appeal to be no stay, unless so ordered by a judge or Master.

'The costs of such appeal shall be in the discretion of the judge.

'That all summonses be issued by a judge as heretofore; but that orders by the Masters be made in their own names.

'That the scale of costs for all matters done by and before the Masters shall be the same as are fixed for business done by and before the judges.

'That the same fees shall be taken in respect of business transacted before the said Masters at chambers as are now taken when the same business is transacted before a judge.

'That these rules take effect on the 1st January 1868.'

12,137. *The Chairman.*—Is there a very large proportion of writs issued that never reappear in the form of judgments? *Mr. Walton.*—I think an answer to that question will be found in the judicial statistics of 1867, the last year published. In that year there were in the Court of Exchequer 50,181 writs, and the judgments only amounted to 12,057; and these were judgments merely on affidavit of service of the writ, where there was no defence; but in *posteas* and trials the judgments were 759, that is, 759 contested cases out of 50,181 writs.

12,138. *The Lord Justice-General.*—It was only in these 759 cases that any contentious litigation arose? *Mr. Walton.*—Contentious so far as trials went before a jury.

12,139. *The Chairman.*—That is only 1½ per cent.? *Mr. Walton.*—Yes; but since 1867, when this return was made, the last County Courts Act has diminished the number of writs by at least one-third.

12,140. *Mr. Gordon.*—That is the Act which provides that a party cannot recover more costs in the superior courts than in the county courts in certain cases? *Mr. Walton.*—They cannot recover any.

12,141. Does that apply to cases up to £50? *Mr. Walton.*—£20.

12,142. So that between £50 and £20 there is a co-ordinate jurisdiction between the County Court and the Supreme Court, and the party may recover full costs? *Mr. Walton.*—Yes. *Mr. Benett.*—But if the plaintiff issues his writ in the superior court, the other party may apply to get it sent to the inferior court.

12,143. Of the 729 cases which went to trial, there would probably be a considerable number in which evidence was led in the absence of the defendant. *Mr. Benett.*—Some might be undefended.

12,144. Where a plea is given in, you cannot get judgment without going before a jury? *Mr. Benett.*—Not unless the plea is withdrawn.

12,145. But you cannot get the judgment of a judge without going before a jury? *Mr. Hodgson.*—It is very common that a plea is put in to gain time; and when that object is gained, the plea is withdrawn.

12,146. *The Chairman.*—When cases are defended, and go to trial, can you give us any idea of the time which usually elapses between the issuing of the writ and the return of the judgment? *Mr. Hodgson.*—Supposing the writ issued on 1st January, and served within a reasonable time, the defendant has eight days to appear, and the plaintiff can declare immediately; and on an average a fortnight's time is given to plead. It would be tried by the end of January probably. That is a simple case.

12,147. *Mr. Clark.*—But take a difficult case? *Mr. Hodgson.*—In a difficult case longer time is required to prepare the pleadings. They must go before counsel, and probably it might be a month or two months longer.

12,148. But do you think a case has been long in court if it was raised in January and not tried in three months? *Mr. Hodgson.*—It depends on whether it is a country case.

12,149. But take a London case? *Mr. Hodgson.*—Yes; I should say three months is a long time.

12,150. But the plaintiff will usually be able to get his judgment in three months from the date of his writ? *Mr. Hodgson.*—Yes. *Mr. Benett.*—Assuming that the autumn does not interfere. It takes 26 days, supposing the court is sitting; 8 days to appear, and then the plaintiff may declare immediately; 8 to plead; and 10 days' notice of trial. *Mr. Hodgson.*—It depends a little on whether it is in London or Middlesex. If the case is set down, it has to wait till it is reached, and there may be longer time occupied in that way.

12,151. *Mr. Adam.*—Supposing there is a motion for a new trial after the verdict, when will the case be ultimately disposed of upon the average? *Mr. Hodgson.*—In the Court of Queen's Bench I should say it is pretty nearly a year from the time when the rule to show cause is obtained before it comes on for argument. That is probably getting shorter now, in consequence of the diminution of causes. *Mr. Walton.*—It is not near so much as that in Exchequer. *Mr. Benett.*—It is not nearly so much in the Court of Common Pleas.

12,152. *Mr. Webster.*—Is that the amount of time required for a decision whether there is to be a new trial or not? *Mr. Hodgson.*—Yes; but it depends on the amount of business.

12,153. *Mr. Clark.*—Can a defendant stay the execution of the judgment for a year by merely intimating that he is to move for a new trial? *Mr. Hodgson.*—No; he must make out a *prima facie* case, and get a rule to show cause. *Mr. Benett.*—And he must get that within the first four days of the term after the trial.

12,154. *Mr. Gordon.*—Is it not also the rule that the judge trying the cause may issue judgment, and indeed does issue judgment, unless he thinks it a proper case in which to give time? *Mr. Benett.*—Yes; he may certify for speedy execution.

12,155. And that can only be prevented by the party finding security? *Mr. Benett.*—It could not be prevented even by that means unless the judge thought fit. The judge would frequently order the money to be paid into court. *Mr. Hodgson.*—The ordinary rule is execution within fourteen days of the verdict, unless the judge gives longer time; and he may also certify to give immediate execution.

12,156. When is that determined? Is it when the verdict is given, or do you wait for the fourteen days? *Mr. Hodgson.*—Sometimes when the verdict is given, they apply to the judge to stay execution. If not, they can go to judge's chambers and get execution stayed.

12,157. *The Chairman.*—The matter of taxing accounts comes before you? *Mr. Walton.*—Yes; taxing costs. *Mr. Benett.*—We try referred causes involving matters of account, and in fact involving questions that have nothing to do with accounts. If the cause involves, in whole or in part, matters of account, it may be sent to the Master; and many of the cases so sent do not involve matters of account. Sometimes they come to us by consent of the parties.

12,158. In these proceedings you have the parties before you by their solicitors? *Mr. Benett.*—Yes, and their witnesses and counsel usually.

Messrs. Walton, Hodgson, and Benett.

12,159. And they bring all their vouchers before you? *Mr. Benett.*—Yes.

12,160. Have you sometimes to take evidence? *Mr. Benett.*—Always. *Mr. Hodgson.*—The case is heard exactly as before a jury, except that we are judge and jury.

12,161. Is there an opening by counsel? *Mr. Hodgson.*—Yes; but counsel don't make speeches in the same way that they would to a jury, and time is saved in that way.

12,162. *Mr. Shand.*—Are the examinations *viva voce?* *Mr. Hodgson.*—Yes.

12,163. Is any part of the examination taken in any other way than *viva voce?* *Mr. Benett.*—Not in a reference.

12,164. Do you fix a day on which the witnesses must attend? *Mr. Benett.*—Yes.

12,165. Supposing witnesses don't appear, do you allow adjournments? *Mr. Benett.*—We allow adjournments if it is reasonably necessary that we should do so.

12,166. But you restrict that? *Mr. Benett.*—Yes. We don't allow a defendant an adjournment merely to gain time to pay; otherwise, the applications would be endless. *Mr. Hodgson.*—And in our courts we are very much disinclined to adjourn, because counsel cannot attend. The object is to get on as fast as we can; and in consequence of the speediness and inexpensiveness of that mode of procedure, we find it is very popular. I have made an extract from the judicial statistics of the number of these references, in all the three courts, from 1858 to 1867. In 1858 the number of causes referred to the Masters in all the courts was 413, and in 1867, 887, or more than double. In the same years the total number of causes tried at *nisi prius* in London and Middlesex and on circuits was: 1858, 2153; and 1857, 2895,—showing nothing like the same increase. And it is very remarkable that they have progressively increased, with the exception of one year in each case; but it is not the same year. The list is as follows:—Number of causes referred to Masters in all the courts: 1858, 413; 1859, 550; 1860, 501; 1861, 592; 1862, 646; 1863, 656; 1864, 664; 1865, 729; 1866, 799; 1867, 887. Number of causes tried at *nisi prius* in London and Middlesex, and on the circuits: 1858, 2153; 1859, 1964; 1860, 2138; 1861, 2192; 1862, 2238; 1863, 2159; 1864, 2205; 1865, 2563; 1866, 2593; 1867, 2895.

12,167. How many Masters are there? *Mr. Hodgson.*—Five in each court; and there are three courts.

12,168. Then the numbers you have mentioned were before fifteen Masters? *Mr. Hodgson.*—Yes.

12,169. Is any part of that work done by assistants of Masters? *Mr. Hodgson.*—No.

12,170. Have you no assistance in that work? *Mr. Hodgson.*—We have a great many cases of building accounts: a man employs a builder to build a house, and he gets into difficulty with him, and a litigation ensues. It generally comes to be a question of the value of work. We find that it is perfectly useless to attempt to dispose of that by scientific witnesses—by surveyors called for the plaintiff and for the defendant—for they speak from totally different points of view. The plaintiff's surveyor bases his valuation on what the plaintiff tells him of the facts, and the defendant's surveyor speaks on what the defendant tells him, which are two different sides of the shield, and we find we cannot contrast them: therefore we deprecate their calling any of these witnesses; and by consent of parties we nominate an independent person to make the valuation. That saves time and expense, and gives satisfaction.

12,171. But suppose a question of fact to arise as to the state in which the premises were when the tenant entered, as contrasted with the state in which they were when the litigation arises, what do you do?—That we get evidence of, and decide ourselves.

12,172. You take evidence? *Mr. Hodgson.*—Yes.

12,173. And you have a surveyor besides? *Mr. Hodgson.*—There is no use of having a surveyor, except where the work is in the same state.

12,174. It is only where it is a mere question of value of work? *Mr. Hodgson.*—Yes. *Mr. Walton.*—I can only say that we follow the same practice in our court. I have never known an instance where the parties refused to adopt a suggestion of the Master, and I have never known an instance where the report of the surveyor has been objected to. *Mr. Hodgson.*—That is my experience also. *Mr. Benett.*—I may mention a case in which I did the same. It was an action by an engraver for engraving a picture by Gustave Doré. The sole question I had to determine was whether the engraving was so done as to ensure success on publication. I suppose there were a dozen first-rate artists in London to swear that it would never be sold, and another dozen to swear that it would be bought immediately. I sent the matter to another engraver by consent, and he gave judgment that it was well done. My own impression would have been that it was not well done.

12,175. *Mr. Shand.*—Are partnership accounts brought before you? *Mr. Hodgson.*—No; they are Chancery matters. *Mr. Benett.*—Unless they have been agreed to by the parties.

12,176. Besides building contracts, what other references have you? *Mr. Benett.*—The judge has power to refer to the Master any action which consists wholly or in part of matters of mere account; but a matter of account may involve questions of liability. I can hardly say that a case ever came to us merely as matter of an account. *Mr. Walton.*—The other day I had a case referred to me as to the proper making of a steam-engine for a gentleman's yacht. There were witnesses on both sides, and I found myself very incompetent to decide. I accordingly called in Mr. Braithwaite, by consent of parties, and he decided the case in a very short time. *Mr. Benett.*—I tried a case for a collision between a barge and a dolphin, in building a bridge over the river.

12,177. *The Chairman.*—Was there cross-swearing there? *Mr. Benett.*—A great deal. But these are the things the Masters try; and they dispose of them, I think, to the satisfaction of the parties.

12,178. *Mr. Gordon.*—Is there any review? *Mr. Benett.*—You may go to the court to refer back to the Master; but that is rarely done. *Mr. Hodgson.*—I have known a few applications in my experience, but I have never known one that has been successful.

12,179. *Mr. Shand.*—Your decisions are treated in the same way as awards by an arbiter? *Mr. Hodgson.*—Yes.

12,180. *Mr. Gordon.*—You seem to depute your powers to a person of skill, and adopt his opinion? *Mr. Hodgson.*—That is, by consent of parties. *Mr. Benett.*—It is ensuring a disinterested witness.

12,181. *The Chairman.*—When you examine witnesses before you, does it frequently occur that the trial lasts beyond a day? *Mr. Hodgson.*—My own experience is, that the majority of cases are disposed of at one sitting. There are cases that go over a longer time; but the majority of cases are got over in three or four hours.

12,182. After you have heard all the evidence, you take your own time to consider your judgment? *Mr. Hodgson.*—I generally decide at the time; and one advantage of this tribunal is, that we are often enabled, instead of giving a strict decision at law, if we see that it is a case that ought to be arranged between the parties, to make a suggestion that the parties agree to, and it is commonly settled in that way to the satisfaction of both.

12,183. *Mr. Gordon.*—How is the judgment written out? *Mr. Hodgson.*—The form of it is a certificate. We in our court have a printed form: 'In pursuance of the order of reference of Mr. Justice So-and-so, I find, certify, and award for the plaintiff for the sum of so-and-so.' The costs of the reference are left to our discretion; the costs of the cause abide the event. Unless there is some reason against it, I always make the costs of the reference abide the event.

12,184. Is that reported to the court? *Mr. Hodgson.*—No. Our clerk gives it out to the party who comes and pays the office fees, which are very small.

He is entitled, after a lapse of seven days, to go to a judge and ask leave to sign judgment on that certificate.

12,185. That is the judge at chambers? *Mr. Hodgson.*—Yes; but if he chooses to wait till seven days of next term, he may sign judgment as matter of course.

12,186. *The Chairman.*—If you are attended by counsel, does that form part of the cost of the proceedings? *Mr. Hodgson.*—Yes.

12,187. Do you exercise control over the amount of fees paid to counsel? *Mr. Hodgson.*—Yes; we do so in all cases. *Mr. Benett.*—But more in references than anything else. We have fixed a scale for that. *Mr. Hodgson.*—It depends on the time. We consider a single meeting to be three hours, and a double meeting not exceeding five hours. Supposing a counsel has a fee on his brief and papers, we allow him 3 guineas for a single meeting, and 5 guineas for a double meeting. That is for mere attendance before us, in addition to the fee on the brief.

12,188. Do you exercise any control over the fee on the brief? *Mr. Hodgson.*—Yes; if it was exorbitant we should reduce it.

12,189. *Mr. Clark.*—Can you give us any notion of the amount contained in your decrees? *Mr. Hodgson.*—From £10 to thousands. *Mr. Benett.*—I remember one case in which I gave a certificate for more than £8000.

12,190. What kind of a case was that? *Mr. Benett.*—An action on a bond. I forget the circumstances on which the amount due on the bond depended.

12,191. *Lord Barcaple.*—Suppose that the amount had been five times £8000, would that have prevented the case from coming before you in the same circumstances? *Mr. Benett.*—No; we are not limited by any amount. *Mr. Hodgson.*—That might have an effect on the discretion of the judge sending it.

12,192. *Mr. Justice Willes.*—The mere amount would make no difference. *Mr. Benett.*—I had a question between the owners and the captain of a ship, and the accounts involved enormous sums. The captain claimed the expense of repairing the ship at Calcutta, and the owners had set-offs.

12,193. *Mr. Clark.*—Do you find that many cases come before you for small amounts? *Mr. Benett.*—Oh yes. I have had a great many under £20. In fact, the amounts vary just as much as trials at *nisi prius*.

12,194. *Mr. Webster.*—Can you inform us on what principle you judge of the brief fee? *Mr. Benett.*—It is by the amount of labour involved. *Mr. Hodgson.*—A brief may consist of a comparatively small number of sheets, and matters may be very complicated. We judge of the matter by our own experience.

12,195. *The Chairman.*—You give what you consider reasonable? *Mr. Hodgson.*—Yes.

12,196. *The Lord Justice-General.*—What are the extremes? From what to what does the counsel's fee on the brief vary? *Mr. Hodgson.*—In a common jury case, I would say from 8 to 10 guineas was about the fee for leading counsel, and from 4 to 6 for the junior.

12,197. That is in a cause that goes to trial by a jury? *Mr. Hodgson.*—Yes. *Mr. Benett.*—In causes referred to the Master, it is very seldom more than 5 guineas.

12,198. *Mr. Shand.*—Are these consultation fees? *Mr. Hodgson.*—We don't allow in arbitrations more than one counsel.

12,199. Is there a consultation fee, a brief fee, and an attendance fee? *Mr. Hodgson.*—Not ordinarily. The ordinary case is, that the fee put on the brief covers both the attendance and the brief. In most cases 6 or 8 guineas would cover everything.

12,200. *Mr. Webster.*—As to the attorney's part of the bill of costs, would you inform us as to what is usually done in agency cases? *Mr. Hodgson.*—The agency cases are these: Attorneys who take out a certificate to practise in London must carry on business within twelve miles of London. The country attorney does no part of the business done in London: he employs a town agent to do all the work which necessarily is done in London, and the practice is to divide the profits equally; but sometimes there is a special arrangement.

12,201. So that a division of the whole attorney's fees in the bill is a division of the town agent's charges only? *Mr. Benett.*—It is only the work that the town agent does that is divided. In 9 cases out of 10, the most profitable part of the work is drawing the brief, which is done by the country agent; and the town agent has nothing but one-half the charges of handing the papers backwards and forwards in London, and entering the cause, if that is done in London.

12,202. Is the work done by the town agent routine work, or must he take the trouble of mastering the case? *Mr. Hodgson.*—It is generally routine work.

12,203. The country agents who participate have town certificates? *Mr. Hodgson.*—Yes; they must have town certificates.

12,204. *Mr. Shand.*—Suppose the agent in the country to prepare the brief, and to see all the witnesses, and to write out details of what they are to say, does he receive the whole rumuneration for that? *Mr. Benett.*—If he is the attorney properly employed by the party, he keeps the whole remuneration for that himself.

12,205. And the London agent has no share of it? *Mr. Benett.*—No.

12,206. But the fees for the London agent are divided between him and the country agent? *Mr. Benett.*—Yes.

12,207. And the work done by the London agent is of a formal character? *Mr. Hodgson.*—It is of a formal and routine character.

12,208. Does it involve time?—*Mr. Hodgson.* It involves the time of clerks; for instance, attending a summons at chambers, 6s. 8d.

12,209. That is done by clerks? *Mr. Hodgson.*—Almost entirely; the town agent will get 3s. 4d. of that.

12,210. Suppose a case comes on for discussion before you, do you allow for the attendance of either, or both of these agents? *Mr. Benett.*—Only the London agent. We don't usually allow for the country attorney coming up to town.

12,211. *Mr. Justice Willes.*—What are the circumstances in which you do allow that? *Mr. Benett.*—In an action of ejectment involving a long investigation of title-deeds, with which the country attorney is well acquainted and the London agent is not, we should allow it; or in complicated matters of account. Each case must depend on its own circumstances. If it is a case which can be attended to by the London agent reasonably well, we don't allow for the attendance of the country attorney. It is only done in extreme cases.

12,212. *The Lord Justice-General.*—In rare cases? *Mr. Benett.*—Very rare. I don't think that on an average a country attorney is allowed costs for attending at a trial in London once a year.

12,213. *The Chairman.*—When a London solicitor attends a trial before you, are his charges for that attendance divided between him and the country agent? *Mr. Benett.*—Yes.

12,214. In equal proportions? *Mr. Benett.*—Yes. They do make different arrangements between themselves. I believe some country attorneys stipulate that they shall have two-thirds of the profit; but the recognised rule is equal division.

12.215. *Mr. Webster.*—When a town solicitor is the proper attorney of the party, and he requires assistance in the country, how is it regulated? *Mr. Benett.*—Then the country attorney charges his whole fee.

12,216. *Mr. Shand.*—And the town solicitor gets his own charge? *Mr. Benett.*—Yes. *Mr. Hodgson.*—There is no case of a country attorney being an agent. The ordinary notion of agency does not apply where the principal attorney is the town attorney.

12,217. Where a case is from a distance, have you not frequently the local agent from that distant place in attendance? *Mr. Hodgson.*—Yes; that will occur at the assizes. Suppose a Sheffield attorney has a cause tried at York, he will go to York.

12,218. *The Lord Justice-General.*—And the London

Messrs. Walton, Hodgson, and Benett.

attorney will not go to the trial? *Mr. Hodgson.*—If it is a Sheffield attorney, and the cause is tried at Lewes, he will go to it.

12,219. *Mr. Shand.*—Is correspondence between the attorney and his client in any case allowed against the opposite party? *Mr. Benett.*—Very rarely. Where it leads to the settlement of the cause, and saves other expense, it is allowed within restricted limits.

12,220. Is it allowed between the attorney and client? *Mr. Benett.*—Yes; we allow all communications necessarily had between the attorney and his client. *Mr. Hodgson.*—But we don't allow communications between the town and country attorney. We don't allow two attorneys in the same cause, as far as costs are concerned.

12,221. *Mr. Gordon.*—Don't you allow a slump sum at the end of the term? *Mr. Hodgson.*—Yes; there is a term fee.

12,222. How much is that? *Mr. Hodgson.*—In cases above £20, 13s. on proper business, and 15s. on agency business. That term fee does not attach till after declaration is delivered in a case.

12,223. How many term fees may there be in the course of a case? *Mr. Hodgson.*—There may be a great many. The case goes on to trial, and there may be a motion for a new trial, and an appeal to the Exchequer Chamber; it may go on for two years, and there are four terms in the year. We only allow a term fee where a step is taken in the cause that term.

12,224. *The Chairman.*—What staff have you in your office? *Mr. Hodgson.*—In the Court of Queen's Bench there are 5 Masters, and we have 23 clerks. There is a certain number of clerks in the department of issuing the writ. *Mr. Benett.*—In the Court of Common Pleas there are 5 Masters, and I think we have 16 or 18 clerks. *Mr. Walton.*—We have five Masters, and 16 or 17 clerks. *Mr. Hodgson.*—The reason why the Queen's Bench has a larger staff is, that there is some peculiar business belonging to it. We have the whole enrolment and admission of attorneys. We have the registration of bills of sale, occupying 3 or 4 clerks exclusively, and warrants of attorney.

12,225. Are your clerks all on the same footing? *Mr. Hodgson.*—No; they are in different classes with reference to salary. Our chief clerk receives from £600 to £700 a year, and the junior clerks £100.

12,226. Is there one chief clerk? *Mr. Hodgson.*—Yes. Then there are three first-class clerks at from £500 to £600; and there is a certain number in the second class.

12,227. The Master's own payment is by salary? *Mr. Hodgson.*—Yes,—£1500 a year; there is an exception introduced into the Act, that a Master appointed since our increase has only £1200 a year for the first three years.

12,228. *The Lord Justice-General.*—What is the qualification for a Master? *Mr. Hodgson.*—He must be a barrister, a special pleader, or an attorney of five years' standing.

12,229. *The Chairman.*—Who appoints them? *Mr. Hodgson.*—The Chief Justice of each court; he appoints the Masters of his own court.

12,230. *Mr. Webster.*—Do they hold office for life? *Mr. Hodgson.*—Yes.

12,231. *The Chairman.*—Who appoints the clerks? *Mr. Walton.*—The appointment is by the Masters, subject to the approbation of the chief of the court.

12,232. *Mr. Shand.*—Is the registrar of each court a separate officer? *Mr. Walton.*—We have no registrar. *Mr. Hodgson.*—I may say the Masters in the common law courts perform all the duties that are performed by all the officers connected with the Court of Chancery,—chief clerks, examiners, registrars, and taxing masters. We perform them all.

12,233. Do you write out the orders of court? *Mr. Walton.*—Our clerks do.

12,234. Who attends the judges in court? *Mr. Walton.*—We attend the judges.

12,235. By whom are the orders written out? *Mr. Hodgson.*—The rules are written out by our clerk, and given out to the parties.

12,236. *Mr. Gordon.*—The orders by the common law courts are merely formal; they do not recite documents? *Mr. Hodgson.*—No.

12,237. *Mr. Shand.*—Does the judge sign anything in court? *Mr. Hodgson.*—No; it is all signed by the Master or the Master's clerk. *Mr. Walton.*—The counsel, after hearing the decision, indorse on the back of their briefs what the judgment is, and that is handed to the Master. If their notes differ from the Master's, he settles the rule from his own notes, or, if necessary, applies to the court for directions.

12,238. *Lord Barcaple.*—Is the Master present in court? *Mr. Walton.*—Yes.

12,239. And he makes a note of it? *Mr. Walton.*—Yes.

12,240. *Mr. Shand.*—When you have references and other matters, can you attend court? *Mr. Hodgson.*—Yes; one Master has to be at court, and one at judge's chambers; that leaves three. We generally keep one Master clear for taxation of costs.

12,241. *The Chairman.*—Are there any fees payable into your offices? *Mr. Hodgson.*—Very large fees. Almost everything pays fees, and they are now received in stamps. The amount of them appears in the judicial statistics.

12,242. *Mr. Shand.*—What is the average usual amount of fees? *Mr. Benett.*—You pay 5s. on a writ; 2s. for the appearance. The plaintiff pays £2 to the associate for entering the cause, and when it is heard he pays £1 more for the *postea*. Judgment is entered on that; and he pays 10s. in the Master's office for that judgment. All the payments necessarily made by the plaintiff are then at an end. He may have to pay 5s. more for the execution.

12,243. If there are interlocutory orders made?—*Mr. Benett.*—They are made at judge's chambers, and there is a fee of 2s. on every matter of course order; 5s. for a special order; 2s. on the summons issued when the order is made; and 1s. on every affidavit filed in support of the summons.

12,244. *Mr. Webster.*—By each party? *Mr. Benett.*—Each party who files an affidavit pays 1s. for filing it, and 1s. for swearing it.

12,245. What are the fees paid on the part of the defendant? *Mr. Benett.*—He pays 2s. when he enters appearance, and that is all he need do as matter of course in the Master's office. He then rests on his oars till the plaintiff has got his judgment; but if he wants time to plead, or makes any other application, that is made at the judge's chambers, and he pays 2s. for the summons, and 2s. or 5s. for the order. *Mr. Walton.*—I think £5 will cover all fees paid on both sides in our office up to a trial. The fee at trial is about £3.

12,246. *Lord Barcaple.*—In addition? *Mr. Walton.*—Yes.

12,247. *Mr. Gordon.*—Have you fees depending on the amount, or is it the same fee on everything? *Mr. Walton.*—It is the same fee on everything.

12,248. *Mr. Justice Willes.*—The reason for the heavy fees on trial was that so many causes come to an end before trial, and it was thought more reasonable that those who took up less of the time of the court should pay less? *Mr. Benett.*—I believe the real reason was the difficulty of getting the fees paid.

12,249. *The Lord Justice-General.*—You have mentioned an officer called the associate. Tell us what he is? *Mr. Walton.*—He attends the judge at *nisi prius* when the case is tried, and he has the care of the list in which it is entered before it is tried; and after it is tried he prepares the *postea*, and gives it to the party in whose favour it is. He is the officer of the *nisi prius* judge.

12,250. *Mr. Justice Willes.*—He enters the verdict? *Mr. Walton.*—Yes.

12,251. *The Lord Justice-General.*—Has he any duties except in connection with the trial? *Mr. Walton.*—No.

12,252. *The Chairman.*—He is an officer of court? *Mr. Walton.*—Yes.

12,253. Is there one in each court? *Mr. Walton.*—Yes.

12,254. Who appoints him? *Mr. Walton.*—The Chief Justice.

12,255. *Mr. Shand.*—How many associates are there altogether? *Mr. Walton.*—Only one in each court in London, and he has a deputy when two courts are sitting.

12,256. What salary have they? *Mr. Walton.*—£1000 a year.

12,257. These are officers besides those you mentioned before? *Mr. Walton.*—Yes.

12,258. *The Lord Justice-General.*—The associate does not go on circuit? *Mr. Walton.*—Not the London associate.

12,259. Who discharges the corresponding duties on circuit? *Mr. Walton.*—There are clerks of assize, and judges' marshals generally receive the records. *Mr. Justice Willes.*—Not now; the clerk of assize now receives the records.

12,260. *Mr. Gordon.*—How many clerks of assize are there? *Mr. Hodgson.*—One for each county.

12,261. What salary has he? *Mr. Benett.*—The salaries vary.

12,262. *Mr. Shand.*—Besides the masters, the associates, and clerks whom you have mentioned, are there any other officers assisting in the judicial duties? *Mr. Benett.*—Not in London. *Mr. Walton.*—There are the judges' clerks at chambers.

12,263. These are in addition to those you have mentioned? *Mr. Walton.*—Yes.

12,264. How many of these are there? *Mr. Hodgson.*—Each judge has two clerks, and the Chief Justice has three.

12,265. How many is that altogether in the London courts? *Mr. Benett.*—There are now six judges in each court. *Mr. Hodgson.*—There are thirty-nine judges' clerks altogether.

12,266. What are their salaries? *Mr. Walton.*—I think the highest is £600 a year.

12,267. *Mr. Justice Willes.*—The Chief Justice's chief clerk gets £700 a year, and his other two clerks £400. What is the practice as to the allowance to witnesses who have been subpœnaed, but not examined? *Mr. Benett.*—We don't disallow them merely because they have not been examined. We inquire into the necessity of having them present. If it appears that it was reasonable to have them present, and the attorney swears that they were material and necessary, we allow them.

12,268. The rule in the common law courts, I think, is the same as in Chancery as to affidavits,—only the affidavits read are allowed? *Mr. Benett.*—Yes.

12,269. But as to witnesses, you allow them if they are reasonable witnesses to have present, even though they have not actually been examined? *Mr. Walton.*—Just so.

12,270. *The Lord Justice-General.*—Have you two scales of costs, or only one? *Mr. Benett.*—Now there is only one. Before the last County Court Act there were two,—one for actions under £20, and one for actions over £20.

12,271. Is there a practice of allowing refreshing fees to counsel where a cause is heard on more days than one? *Mr. Benett.*—No, not *eo nomine*. If, as the result of the whole matter, we think the first fee was not enough, we let it be increased; but we don't let them be called refreshers. *Mr. Hodgson.*—I think what we agreed to is that we allow refreshers in a case which is really more than a single day case. If the cause begins to-day, and goes into to-morrow, that is not necessarily a second day cause. We allow a limited fee—10 guineas being the highest—to the leader, 7 guineas to the second, and 5 guineas to the junior, as refreshers, supposing there are three counsel. But the Master is at liberty to take into consideration the fee originally marked on the brief, and if he considers that the fee marked on the brief is sufficient to cover all, he disallows the refreshers; but if the fee originally marked on the brief was such as was proper in contemplation of the cause only lasting one day, we should allow a refresher. That is our practice. *Mr. Benett.*—That is not exactly our practice.

12,272. What is the length of a day; how many hours? *Mr. Benett.*—At *nisi prius*, from 10 to 5 or 6. That is the longest day.

12,273. Supposing the case goes into a second day, but lasts only a small portion of it? *Mr. Hodgson.*—Then I should not allow a refresher. It is matter of discretion.

12,274. Then the refresher you speak of—10 guineas, 7, and 5—is only in case of the cause occupying two whole days? *Mr. Hodgson.*—Yes; and those fees are the maximum.

12,275. *Lord Barcaple.*—Do you apply that in the event of a case lasting eight or ten days? *Mr. Hodgson.*—I don't think any of us have taxed *Saurin* v *Starr* yet.

12,276. *The Lord Justice-General.*—But you must have had occasion to tax causes lasting for more than two days? *Mr. Benett.*—Yes.

12,277. *Mr. Shand.*—Suppose the case lasts a substantial part of the second day? *Mr. Hodgson.*—I should allow a refresher, provided the fee on the brief is not marked as for a case that would last two days.

12,278. *Mr. Webster.*—As between party and party, what is the highest fee you allow for junior counsel for a case likely to last one day? *Mr. Hodgson.*—That depends entirely on the nature of the case and the quantity of documents. Sometimes cases involve masses of documents. Sometimes 25 or 30 guineas are allowed on the brief.

12,279. *Mr. Adam.*—How many counsel are allowed as a charge against the opposite party? *Mr. Hodgson.*—We don't allow more than two counsel on each side, unless there are a great number of witnesses or documents. Generally we say that under ten witnesses we will not allow three counsel. I don't mean to say that we should allow three because of there being ten witnesses, unless it were an ejectment case or a pedigree case.

12,280. *The Lord Justice-General.*—There seems to be some difference in the Court of Common Pleas as to the matter of refreshers? *Mr. Benett.*—It comes nearly to the same thing. When refreshers are paid, we don't allow them as refreshers; but if we think the fee at first paid for the work done is not sufficient, we increase it. Whenever a fee is paid, the attorney is entitled to a fee for attendance himself, and we don't allow the subsequent attendances of the attorney to pay the refreshers. Suppose a brief marked 20 guineas, and 10 guineas are afterwards paid as refreshers, and I thought 30 guineas was no more than ought to have been paid to counsel in the first instance, I should allow the 30, but only one attorney's attendance, in place of two. *Mr. Walton.*—The reason why we allowed fees of the nature of refreshers was this, that it was rather an inducement to the attorney not to assume to himself marking a very high fee, on the assumption that the cause would last five or six days. We said, we will rather give you something in the shape of a refresher, if, when the case is tried, we have ascertained that the fee is deserved; but you must not yourself discriminate, and say this cause will last five days, and therefore we will give a hundred guineas. *Mr. Hodgson.*—I believe the whole system of refreshers has grown up gradually. I think I have heard it said that the late Mr. Justice Cresswell used to have a very strong opinion against refreshers, and thought they were wrong. They have grown up gradually.

12,281. *Mr. Clark.*—That was when he was on the bench, I presume? *Mr. Hodgson.*—No; when he was at the bar.

12,282. *Mr. Justice Willes.*—I think I recollect a time when more refreshers were allowed in the Queen's Bench,—when a cause did not come on for two years, and there ought to have been refreshers for every term during these two years? *Mr. Hodgson.*—The question has not been asked as to these refreshers.

12,283. When I was first called to the bar there were ridiculous refreshers from term to term. *Mr. Hodgson.*—These go on now. Supposing a cause is set down for trial one term, and from the multitude of

Messrs. Walton, Hodgson, and Benett.

causes it is made a remanet, and goes into Easter term, a refreshing fee is paid to counsel; and if it goes on to Trinity term, another refresher is paid; and again, supposing a new trial is moved for, and the case goes over a year, there is to the leader 2 guineas and to the junior 1 guinea refresher for every term, the reason being that he had prepared himself for one term, and the case has gone out of his mind.

12,284. *The Lord Justice-General.*—That fee is a fixed sum, without considering the weight or difficulty of the cause? *Mr. Hodgson.*—Yes. *Mr. Benett.*—That is not if a cause goes over from one assize to another. The Master must use his discretion. *Mr. Hodgson.*—It is very seldom that they go from one assize to the other.

12,285. *Mr. Shand.*—It may sometimes lead to change of counsel? *Mr. Hodgson.*—Yes.

12,286. *The Lord Justice-General.*—With reference to arguments in banc, does the same remark apply as to refreshers *de die in diem*? *Mr. Hodgson.*—No.

12,287. What is the rule there? *Mr. Hodgson.*—Only from term to term.

12,288. Then there are no refreshers *de die in diem* in such cases—in arguments? *Mr. Hodgson.*—No.

12,289. Suppose a brief is delivered, with a fee marked upon it, and the argument lasts over the first day and occupies an entire second day, is that a ground for a refresher? *Mr. Hodgson.*—No; I should say not. *Mr. Benett.*—Exactly in the same way as refreshers on the trial: if the Master does not think the first fee sufficient, he increases it.

12,290. Then they look on an argument in court as the same as a trial? *Mr. Hodgson.*—I never knew a case in which it was increased. *Mr. Benett.*—I have known several.

12,291. *Mr. Shand.*—Suppose an argument has been longer than was anticipated, and lasts two days? *Mr. Hodgson.*—It is not often these things occur. Of course the Master has a general discretion in the matter.

12,292. *The Chairman.*—What is the rule in regard to the fees of scientific witnesses? *Mr. Hodgson.*—The allowance to witnesses between party and party is taxed upon a scale sanctioned by the judges. For professional witnesses, if they are living in town, it is a guinea a day; if it is a country case, it is from 1 guinea to 3. That is the limit.

12,293. Do you, in taxing the accounts, exercise any control as to the number of such witnesses that you will allow to either side? *Mr. Hodgson.*—Certainly. If you are satisfied that they have had too many witnesses, you will disallow them; but one is always liberal. If it was outrageously too many—more than was reasonably necessary—you would disallow them.

12,294. *Mr. Webster.*—Is there any allowance to them for preparation? *Mr. Hodgson.*—No, not between party and party. If a witness qualifies to give evidence, it must be done at the expense of the party.

12,295. *Mr. Adam.*—Does any case come before the public court in which only one counsel is allowed against the opposite party? *Mr. Hodgson.*—Very often only one counsel is employed. In undefended cases we should not allow a second counsel.

12,296. But there is no particular class of cases to which that applies? *Mr. Hodgson.*—Do you mean with reference to the subject-matter?

12,297. I mean in appeals from the County Court? *Mr. Hodgson.*—Only one counsel can be heard in the special paper—on demurrers.

12,298. *Mr. Webster.*—After the argument in a cause has commenced, is it the custom of the court to hear out that cause before taking any other; or does it allow the argument to be interrupted, and take up other cases? *Mr. Hodgson.*—A list is made out of the cases before the court; and if a case is called on, it is heard and finished, but sometimes the court take time to consider. *Mr. Benett.*—But there may be a special paper day intervening, and then the argument on the new trial would go over that special paper day.

12,299. *Lord Barcaple.*—Is there not an interval of time in the morning, when motions are taken? *Mr. Benett.*—Yes; on all open days, as they are termed, they begin with unopposed motions; and as soon as all the unopposed motions are heard, they take the opposed motions.

12,300. Then the unopposed motions would come before the continued cause? *Mr. Benett.*—Yes.

12,301. And nothing else? *Mr. Benett.*—Nothing else. It does happen that an opposed motion takes an immense time. I have known it take the greater part of the morning.

12,302. *Mr. Shand.*—Does it happen often in your experience, that a cause is continued three, four, or five times before it is disposed of? *Mr. Benett.*—Do you mean adjourned over certain days?

12,303. Yes; partly heard to-day, to-morrow, and a third day? *Mr. Benett.*—I remember one which was partly heard on seven different days. That was the case of Mr. Kennedy. *Mr. Hodgson.*—This not unfrequently happens, that an argument in a case, either on special paper days, or in a new trial case, commences to-day at two, and the court rises at four, and it may be some considerable time before it comes on, because next day one of the judges has to be away; and I have known it go on over a term in consequence. But when it is called on, it generally finishes at the second hearing. *Mr. Benett.*—We had one case in the Common Pleas this term, which was heard on three days.

12,304. But that is not very usual? *Mr. Benett.*—No.

12,305. *Mr. Justice Willes.*—You said just now, that, with the exception of special paper days, the unopposed motions are taken first; but an argument for a new trial is liable to be interrupted, not only by the unopposed motions, but also by the round of opposed motions taken after the unopposed motions. That is so, is it not? *Mr. Benett.*—Yes; the opposed motions would also be taken before the argument.

12,306. I have known the argument on a new trial taken up in bits, on several days? *Mr. Benett.*—That is so. *Mr. Walton.*—That sometimes happens in our court. *Mr. Benett.*—There was a case this term which went on one day, half an hour on a second day, and another a third day.

MONDAY, 3D MAY 1869.

Members present:—

THE LORD JUSTICE-GENERAL.
MR. JUSTICE WILLES.
LORD BARCAPLE.
SIR EDWARD COLEBROOKE.
MR. E. S. GORDON, Q.C.
MR. A. R. CLARK.
MR. JAMES CAMPBELL.
MR. A. ORR EWING.
MR. JAMES ADAM.
MR. JAMES WEBSTER.
MR. J. B. BAXTER.

THE LORD JUSTICE-GENERAL IN THE CHAIR.

ROBERT CHEERE, Esq., examined.

Robert Cheere.

12,307. *The Chairman.*—What office do you hold?—I am registrar of Clerkenwell County Court of Middlesex.

12,308. How long has that court been in existence?—Since 1847—since the General County Court Act.

12,309. Have you been registrar long?—For the whole time.

12,310. You have had a great deal of experience, then, of the working of that jurisdiction?—I have not been absent one day.

12,311. Will you explain to us, in the first place, what are the limits of the jurisdiction?—It was originally for debts up to £20; but now £50 is the extreme limit.

12,312. Within the term 'debts' what is included?—All money obligations and rents to the amount of £50.

12,313. Not actions for damages?—Yes; actions for damages to the amount of £50.

12,314. In short, all money claims up to £50?—Yes.

12,315. Is there any other jurisdiction they have, which is not measured by money?—We have a qualified jurisdiction in ejectments. Where the term has expired, and possession has not been given up, we have power to order it to be given up; and where rent has not been paid, and there is a right of re-entry in the contract of hiring, we can, on non-payment of the rent, order possession to be given up.

12,316. What is the limit of that?—£50 of rent; but the jurisdiction is unqualified up to £20 annual value.

12,317. Is there any other common law jurisdiction?—None that immediately occurs to me.

12,318. You have also an equitable jurisdiction?—Yes; the equity jurisdiction has been put on us now for two or three years.

12,319. *Mr. Justice Willes.*—You have replevin?—Yes; but that is a remnant of the old shrievalty duty that is cast on me as registrar; and the people who bring actions of replevin, have the option of taking them to the court at Westminster, or the local court. I simply do the duty of taking the sureties.

12,320. *The Chairman.*—Would you explain what that is?—It is where a distress for rent is made, and the person disputes the right to make the distress. It is part of my official duty, upon their giving me security for the rent, to order the person distraining to re-deliver the goods, and then they bring an action for the distress, or rather to try the right of the distress.

12,321. *Mr. Justice Willes.*—There are certain exceptions to the common law jurisdiction of the County Courts; for instance, you don't take actions of slander?—We do not; nor actions for criminal conversation. There are some few exceptions that we do not take any cognisance of.

12,322. Slander, libel, seduction, and breach of promise of marriage?—Yes; we don't take these.

12,323. Nor malicious prosecution?—Nor malicious prosecution. I think we would take an action of damages for false imprisonment.

12,324. You don't take actions in which the title to land is involved?—Where the title to land is involved, we have no jurisdiction, except where the annual value does not exceed £20.

12,325. *Mr. Adam.*—In a case of ejectment, if the title to land was raised, would you go on to decide the case?—No; we could not proceed. We are expressly prohibited from doing so. The parties would have to go to one of the courts at Westminster. Or if the action were more than the £50, we could not proceed.

12,326. *Mr. Clark.*—How do you ascertain the amount?—The parties allege it in taking out their proceedings, or the objection would be taken on the hearing.

12,327. But if the defendant says it is worth £60?—He must prove it.

12,328. If there is a dispute, do you go into evidence of value?—I suppose we should be obliged to do so if it was raised; but it is seldom raised.

12,329. *Mr. Justice Willes.*—A plaintiff may say, 'The defendant owes me £1,000. I abandon £950, and proceed for the £50 rather than go to another court?'—Yes.

12,330. *The Chairman.*—What is the equitable jurisdiction?—It is a very curious thing that it was expected that that would be a very large jurisdiction; but though it has been in vogue for three years, we have only had twenty-nine cases, of which about ten or twelve have been disputed. Our jurisdiction in matters of an equitable character extends up to £500.

12,331. What sort of suits would be brought under that jurisdiction?—Partnership accounts, trusteeships, and ordinary equitable rights and interests. There are very few exceptions.

12,332. Interests in land?—Not in interests in land directly. They would not necessarily be the subject of an equity suit.

12,333. *Mr. Campbell.*—In questions between executors and beneficiaries under an ordinary will, would you have jurisdiction?—Yes, we should take the account of an estate; and that is one of the principal businesses we have. A creditor alleges that the estate is wasted, and files his bill to take the account, and we take it.

12,334. *The Chairman.*—And that up to £500?—Yes.

12,335. But suppose, when the suit is in existence, it turns out, on the account being made, that the estate exceeds £500?—We take fright immediately, and send it to the Court of Chancery. But sometimes the Court of Chancery send it back again, and say, 'You are going on so well that we will remit it to you in another point of view.' They have power to send back anything they like to us.

12,336. *Mr. Campbell.*—In such a case are the proceedings which have taken place before you up to the point when it is ascertained that the amount exceeds £500, lost altogether; or have you the power of transferring the proceeding to the Court of Chancery, that they may take it up where you have stopped?—That depends on the feeling of the Court of Chancery. We should take up the proceedings where they leave them, if it were under £500, and there had been an investigation by the Court of Chancery; but we cannot say what they would do with us. They would probably think that we had not done it quite properly.

12,337. *Mr. Webster.*—What do you do when you stop your proceedings, so as to send what you have

Robert Cheere.

done to the Court of Chancery?—The registrar certifies that the subject-matter is beyond the jurisdiction, and the court sends the proceedings to the Court of Chancery. We refuse to go on. We say, 'This is beyond our jurisdiction, and you must take such steps as the law entitles you to do.'

12,338. *The Chairman.*—You say that this jurisdiction has belonged to the County Court for three years?—Yes, for two or three years; but it is very little resorted to in London. It is much more useful in the country.

12,339. *Mr. Gordon.*—How far is the jurisdiction of the County Courts exclusive of or concurrent with the jurisdiction of the Supreme Courts?—In what respect?

12,340. May you not bring your suit before the common law courts as well as before the County Courts?—I think not. At any rate, it would be at the risk of getting no costs; and that has a very deterring influence. If an equity suit in which we had jurisdiction was brought in the Court of Chancery, I believe it would be sent to us.

12,341. *The Chairman.*—The question rather referred to the common law jurisdiction, I think?—A judge may say that a thing is proper to be tried before one of the courts at Westminster.

12,342. Up to what point?—£20.

12,343. Then if any man brings a suit in the common law courts at Westminster for a sum under £20, would he not succeed in getting his costs?—That would depend on the character of the action. If he could induce the judge at chambers to say it was fit to be tried there, he would get his costs.

12,344. In an action involving character, for instance?—That would hardly come to us.

12,345. *Lord Barcaple.*—Or it may rule other cases?—It is a discretionary power.

12,346. *Mr. Baxter.*—If he does not get a certificate, he would not get his costs?—No.

12,347. *Lord Barcaple.*—Is there not a peculiarity in cases between £20 and £50?—There is a larger power of appeal.

12,348. But is there no difference as to the jurisdiction of the court?—None that I know of.

12,349. *Mr. Justice Willes.*—Before the last County Court Act, up to £20 there were no costs in an action brought in the superior court, unless the court, in the special circumstances, thought that there ought to be costs?—That is so.

12,350. I am under the impression that the last County Court Act left a concurrent jurisdiction between £20 and £50?—That is my impression.

12,351. There was a distinction between the London and the other courts. In the London courts it required an order for costs up to £20?—Yes; but I think that is altered now.

12,352. *The Chairman.*—What, in your opinion, is the cause of the County Courts being so little resorted to under their equitable jurisdiction?—It is of course only an individual opinion, but my impression is, that it is because the expense of it is so great. I will give you the figures accurately. In an estate not exceeding £300 in the whole, I think I taxed the costs of the two parties that were before me at over £60. Now, that is a very serious matter. It was not the fees that did it, though the fees are high, but there are certain allowances made to the profession in the shape of costs; and unless one is very particular in saying, 'We must go on from hour to hour investigating these accounts,' they will say, 'We have not evidence to prove that this was of a particular value.' They delay, and get repeated appointments; and being paid by the hour, that swells up the account. The estate which I mentioned was not over £300, and the taxed costs were £60 or thereabouts.

12,353. *Lord Barcaple.*—Is there another remedy that the party can seek which is cheaper?—None that is cheaper; but I think the procedure before the chief clerks at chambers is somewhat cheaper than ours would be. As far as I could judge, it was the object to make the County Courts in a measure pay themselves.

12,354. The result of parties not coming to you is that they go to Chancery?—I take it for granted that they do.

12,355. *The Chairman.*—And such suits as you would have had in the County Court will generally, I suppose, go to the chief clerks?—All of them, no doubt. They would hardly be heard before the judge.

12,356. *Mr. Campbell.*—Do you think that in the country it is probable that the County Courts may be considerably more resorted to than the court of Clerkenwell, to suit the convenience of parties?—Exactly; that is the reason.

12,357. *The Chairman.*—You have no particular knowledge of that yourself, I suppose?—I have not; but I incline to think that the equitable jurisdiction has not been appreciated by litigants generally.

12,358. But you think it has been more resorted to in the country than in London?—I think so; though I cannot give positive evidence of that.

12,359. *Mr. Campbell.*—There is one other department of duty devolving on the County Court judges—namely, bankruptcy?—We have none of that in London.

12,360. But the County Courts in England generally entertain such questions?—They do.

12,361. You know nothing about the extent of their interference in these questions?—I do not; but I believe it is identical with the jurisdiction of the Commissioners in London. The reason is that there is the Bankruptcy Court here, and there is no necessity for the interference of the County Courts in that matter.

12,362. *Mr. Gordon.*—What constitutes jurisdiction in favour of a County Court judge—that is to say, suppose the plaintiff resides in his jurisdiction, and the defendant does not?—You follow the defendant. The primary jurisdiction is where the defendant resides or carries on his business. But by leave of the judge or registrar, on stating that the cause of action arose in the jurisdiction of the plaintiff, we can give leave if we see fit; and I am bound to tell the Commission that the decisions recently in the courts at Westminster have been that a very small part of the cause of action is enough. For instance, a man orders goods in the country to be sent by railway, and the question is, Where is the jurisdiction? There is a decision, I think, in the Common Pleas, to the effect that if a railway carrier's cart calls on its ordinary rounds, in gathering up the goods, at the plaintiff's residence for them, that is the delivery of them in London, and gives the jurisdiction; and I am also bound to say that that decision has been most beneficial to the trading community, and they have availed themselves largely of it.

12,363. *The Chairman.*—That is very much for the convenience of plaintiffs?—It is.

12,364. Is it equally so for the convenience of the defendant?—I suppose not, but one-fourth part of the cases are not really disputed.

12,365. They are chiefly undefended cases?—Yes.

12,366. *Mr. Gordon.*—Suppose the plaintiff resides at some distance from the defendant, is he obliged to bring his action before the County Court of the defendant's residence, or is he not entitled to go to the Supreme Court?—Not now; he must go to the defendant's residence.

12,367. Within what amount?—£20, certainly.

12,368. And above that?—I believe he would go to the courts at Westminster.

12,369. And in that case he would recover costs?—I presume he would.

12,370. *The Chairman.*—Would you explain how a case is proceeded with in the County Court?—Any person having a debt due to him would come to my office, and there would be handed to him a paper to fill up, containing a space for the name of the plaintiff and his occupation, the name of the defendant and his occupation, and the amount of the claim. That would be handed to the clerk, who would give him what we call a plaint note, which would contain the day on which he was to appear to prosecute the suit. That plaint would be entered in a book called the plaint-book, and we should draw a summons and a copy of that plaint for the defendant. The summons would contain just a short statement of what was the alleged

grievance. If it was above £2, it would be something that the plaintiff had left with us in his own handwriting: if it was under £2, it would be the duty of my clerk shortly to say in the summons, 'For goods sold,' or 'For rent,' or 'For wages.' If it is above £2, there are particulars of the claim required, and that is analogous to a tradesman's bill or a copy of a bill of exchange to be attached to the summons. They prepare that.

12,371. Who prepares it?—The plaintiff himself. He brings the particulars of his claim.

12,372. *Mr. Gordon.*—Or his attorney?—Or his attorney or agent,—anybody employed for him. This would be attached to the summons; which would only then contain in reality the day when he would be expected to appear and defend it, and it would state that the particulars are hereunto annexed.

12,373. What fee is paid?—The fee is 1s. in the pound, with 1s. over, on claims above 40s., which originally was meant to cover the expense of the court,—the building,—a sort of building fund as it was called in the first Act of Parliament. But 1s. in the pound is the fee, and we take no notice of fractions of pounds; that is to say, if you sue for £3, 4s., we should take 4s. for the summons, and 1s. for the building fund fee.

12,374. *The Chairman.*—You take the sum over the fraction?—Yes; if it was exactly £2, the fee would be 2s.; but if it was £2, 0s. 6d., it would be 4s. I often say to poor people when they come to the office, that it is a pity they don't strike out the 6d., as it makes a difference of 1s. on the summons, and 2s. on the hearing.

12,375. *Mr. Gordon.*—Does that fee cover all the subsequent proceedings?—Certainly not.

12,376. *Mr. Webster.*—Would you tell us about the serving?—The summonses are handed to a bailiff.

12,377. *Mr. Clark:*—By whom?—By the registrar. He sends the whole batch into the bailiff's office, and I not unfrequently take a hundred of them in a day. We make a copy, and the bailiff has the original summons and a copy; and his duty is to serve it ten clear days, in such a way as will satisfy the judge's mind that it really came to the defendant's notice. Ordinarily he goes to where the defendant lodges, and gives it to his wife.

12,378. *Mr. Baxter.*—Can no other person but a bailiff serve?—No other person.

12,379. *The Chairman.*—What is the cost of service?—That is included in the fee for the summons. We do not charge anything for serving as such.

12,380. In short, the court undertakes the service and charges nothing for it?—The court charges nothing for it, and finds the officer for it. I should say that that does not give so much satisfaction as you may think, because sometimes parties say, 'May we not serve our own summons?' But we almost invariably refuse that, unless we know the man very well; and then I ask the high bailiff to make him his officer for that specific purpose.

12,381. *Mr. Campbell.*—We have a form in Scotland which has given some dissatisfaction to the public, and which is known as the lock-hole execution,—that is to say, the officer of court proceeds to the dwelling-house of the defender, and finding that he is not at home, and that there is no person in the house when he calls, he knocks at the door, and inserts in the key-hole, or latch of the door, a copy of the writ which he is called on to serve, and he makes an execution to that effect: have you anything equivalent to that?—Not quite equivalent to that; but if the bailiff finds the door shut, and he believes it is shut for the purpose of evading the service, he can attach it to the door. But he must believe there is some one there, and that the door is shut to prevent the service. I should say it is not a good service if he had nailed it on the door, and had not gone on to swear that he believed the door was shut to avoid service.

12,382. *Mr. Gordon.*—What kind of substituted service have you in such a case as that?—None.

12,383. Is there no remedy?—None. It must come to the defendant's notice in some shape.

12,384. *Mr. Webster.*—Does the bailiff make an execution?—The bailiff indorses on the copy of the summons the day and mode of service, and that is handed back to the office, and is placed in the heap before me for hearing. I see, therefore, how it is done. They don't indorse it very fully, but 'on wife,' with the date; and then I know that it has been served on the party's wife, and I presume that she gave it to her husband.

12,385. *The Chairman.*—You cite defendants in all parts of the country in this way?—Yes.

12,386. Not merely in London, but all over England?—All over England.

12,387. Suppose the officer finds, when he goes to the defendant's house, that he has removed into another part of England, does he follow him there?—No; he returns the summons to us; it is not served.

12,388. Then what do you do?—We leave them to reissue the summons. There is very seldom time enough to reissue it to another court.

12,389. *Mr. Webster.*—Does your 4s. fee cover service over any part of England?—Yes; but there is a mileage, I believe, in the country allowed to the bailiff by the Treasury.

12,390. *The Chairman.*—The court does not pay the travelling expenses of the bailiff going to Northumberland?—No; it must be sent to the County Court of Northumberland. If I give leave to a man to issue a summons at Northumberland, I send it myself to the bailiff's office in Northumberland.

12,391. *Mr. Justice Willes.*—The plaintiff requires leave to sue a person out of the jurisdiction of the court in which he brings the action?—He does.

12,392. *The Chairman.*—When he sues a person out of the jurisdiction of your court, are the fees any higher?—No. I have taken out the number of plaints in this last year, and the average amount of them, and I find that in 1868 I issued 15,396 summonses, and the amount sued for was £45,683; the average of that would be about £2, 19s. 4d. a plaint. They came on for hearing, and orders were made in 9196 cases,—orders for payment, or judgments for the defendant. In those cases the plaint was disposed of judicially. What became of the difference between the 9196 and the 15,396, I don't know; they were probably settled between the parties. The amount for which orders were made in the 9196 cases was £24,528. The average of that was £2, 13s. 4d., without any costs,—without the percentage fee, or the attorney's or witnesses' fees; so that the average of the summonses issued was £2, 19s. 4d., and the average of those heard and disposed of was £2, 13s. 4d. That is an anomaly which I was not aware of till I had the list made out to-day; and I cannot explain it, because the larger the amount the more often they are disputed, though that does not appear to be so. The fees of court on all the proceedings in my court for one year amounted to £6347. That was the amount received by Government, and £6271, 9s. 3d. was the whole expense of the court; so that we pay our way.

12,393. *Mr. Webster.*—What fees does the defendant pay to the court?—He pays the whole if he loses, unless the judge does not give costs.

12,394. Has he any fee to pay to the court on making appearance?—No; none whatever.

12,395. *The Chairman.*—Can you tell us in how many cases the defendant appeared?—I have not got that here, but I can send to the Commission a copy of the return which I made last year. I stated that the fees which the Government desire us to take amounted to £6347, but that is exclusive of what we allow on taxation to attorneys and witnesses; and the amount that was allowed to attorneys and witnesses was only £1257.

12,396. *Mr. Baxter.*—When the defendant does not appear, what is your proceeding?—The plaintiff proves the debt before me satisfactorily, so that I can conscientiously say it is due. They don't go to the judge. A recent Act of Parliament gives me jurisdiction to hear them. I always have had reasonably strict proof, and I have heard probably nine-tenths of these cases. The parties grumble when I tell them they must prove the sale and delivery of the goods; but I will not take mere admissions.

Robert Cheere.

12,397. You won't give a decree in absence without any proof at all?—No; I won't do so till I am made to do so by the superior courts.

12,398. *The Chairman.*—Is that done in any of the County Courts?—I think that it is a pity that it is done; but I have heard this take place: 'Have you seen the defendant?' 'Yes.' 'Did he promise to pay?' 'Yes.' Now I think that is hardly to be justified.

12,399. *Lord Barcaple.*—Does the party say that on oath?—Yes.

12,400. *Mr. Campbell.*—Assuming one of these debts to be proved before you in the absence of the defendant, has the defendant any opportunity of having the case re-heard?—He must make a very strong application to the court.

12,401. He must show special cause?—Yes.

12,402. *Mr. Gordon.*—Within what time?—I think there is a limit of seven days.

12,403. Suppose no court is sitting?—He may file an affidavit. If I was satisfied that there was any doubt, I should suspend any proceeding on the judgment that I had so given.

12,404. Have you the power to suspend?—I should do it if I were satisfied; but as we sit every week, nothing arises on that.

12,405. When execution issues, is it done under your direction?—No. Parties bespeak the execution. Some time elapses between the order for payment and enforcing it. Generally I give a month. I suppose I must have made at least 500 orders payable on 24th May, and they have all this time to apply to the judge.

12,406. What notice does the defendant get that judgment has been pronounced against him?—An order is sent to him by post the same night from my office.

12,407. Stating that judgment has been given against him?—A copy of the order which he has to obey, and which he must bring with him when he pays the money.

12,408. *The Chairman.*—And that is addressed to the house at which the summons was served?—Yes.

12,409. *Mr. Campbell.*—And sent the same night?—Yes; or at any rate next day.

12,410. Suppose the case is first heard in the roll of court on a court day, and the defendant appears, what is the course of proceeding adopted?—I ask the parties if they are the plaintiff and the defendant, and then I ask the defendant if he admits the debt. If he says 'No,' and both parties are willing that I should, then I swear the plaintiff, and he begins to prove his case. I ask all the questions myself. I ask, 'Was the defendant a tenant of yours?' 'What was his rent?' 'What did he occupy?' 'When did he leave?' 'How much was due when he left?' and I take a short note for my own guidance. Then I hear what the defendant says.

12,411. *Lord Barcaple.*—On oath?—Yes. I ask him, 'Did you occupy the rooms?' harking back over the plaintiff's evidence, and getting it all confirmed as to the facts. He may say that the house was very bad and not fit for occupation, or that the plaintiff promised to forgive him the rent, or some nonsense of that sort.

12,412. *Mr. Campbell.*—The sums sued for vary from 1s. to £50?—Yes.

12,413. Is there any distinction between cases of the lower and higher amounts as to the right to employ counsel or attorney?—Anybody may employ counsel or attorney in anything, but we should not allow counsel or attorney in any case under £5.

12,414. *The Chairman.*—You would not allow the costs, you mean?—Yes; that is what I mean.

12,415. Do you always allow it above £5?—Not always. If there is any dispute, the basis of our proceeding is this: if we find the attorney has written for the debt, and the defendant has not acknowledged the letter, or filed an admission of the debt in court, which he has the privilege of doing five clear days before the hearing, then we allow the attorney. The cost of the attorney is 15s. up to £20. It is a fixed sum.

12,416. *Mr. Webster.*—Where there is counsel, what is the cost?—£1, 3s. 6d. up to £20, and we can give £3, 5s. 6d. to counsel, including his clerk's fee, in cases above £20.

12,417. *Mr. Gordon.*—Does the system of having a certain fixed fee to the attorneys give satisfaction?—I think, upon the whole, it does.

12,418. *The Chairman.*—What class of attorneys practise in the County Courts? Are they the same class that practise in the superior courts?—I am afraid not.

12,419. *Mr. Campbell.*—But sometimes, I suppose, very respectable attorneys, from consideration for their clients, do appear?—Very often most respectable attorneys; and they bring a batch of cases.

12,420. It may be worth the while of a very competent and respectable young attorney who has a batch of cases?—Yes; and a respectable attorney may make £400 or £500 a year out of the County Court. He is useful to the court and to the suitor; and he is always useful to the court if he is useful to the suitor.

12,421. Is there an obligation on the plaintiff or defendant to attend on the calling of their cases in court?—No.

12,422. But if the opposite party thinks the presence of his opponent essential, I suppose the court will continue the case?—We should say, 'You ought to have subpœnaed him if you wanted him as a witness; and if you have not taken steps to bring him here, the case must be adjourned, and the costs of the day must be paid.' These are matters of detail on which we exercise our judgment. If we see there is surprise, we may say, 'The costs of the day must abide the event;' or we may say to one of the parties that he ought to admit this, and that if he does not do that, we shall reserve the costs.

12,423. *Mr. Gordon.*—You spoke of the proceeding before yourself: is that proceeding in the presence of the judge?—No; the judge is in the court, and a little court has been made for me separately. There is a clause in the last Act which gives me the power to hear cases by default where the defendant does not appear.

12,424. But the case you gave us was that of the plaintiff and defendant being present?—No; I did not mean that, though I may fairly say that, after so long an experience, I find the suitors say, 'Will your Honour hear me?' and I say, 'I will with pleasure.' Then I write on my minutes, 'Referred to the registrar;' and the judge consents to the reference, and my certificate is the order. I hear the case just as the judge would do, and I hear the great bulk of them.

12,425. *Mr. Campbell.*—In a matter of accounting, arising in a dispute between the parties before the judge, is it a common practice in the court for the judge to remit to you, or to any particular officer?—He would generally ask me to do it. He would say that the case should be heard before the registrar.

12,426. You can examine vouchers and documents more conveniently?—Not more conveniently; but it is usual for the deputy to do more of the actual work than the principal.

12,427. *The Chairman.*—Is it any part of your duty to attend in court?—I believe it is, strictly. The judge can say that he will not have the registrar to do any of the work; but if he consents to our hearing the case, we sit in a different room.

12,428. When you don't attend, by whom is the judge attended?—By my head clerk.

12,429. Your representative?—Yes.

12,430. *Mr. Webster.*—Is the order written on the original plaint?—No, it is a separate paper. We have a printed form, all but the names and the amounts. We have two printed forms,—one where we make the order to pay the sum in full on a given day, and another when we make it to be paid by instalments, which we have the power to do—'Judgment against you for £2, 10s. 6d.,—4s. a month,—and the first payment on such a day.' Instead of a calendar month I have always taken the month of 28 days, because I wish, for the purposes of account-keeping, which are extremely voluminous with us, to have the money paid in every

Monday; so that if the parties get their wages on a Saturday, and are not improvident on the Sunday, we get payment on the Monday. I make every order payable on the Monday, unless I say it is to be paid forthwith.

12,431. *Mr. Campbell.*—Then they are made payable at your office?—Yes; all monies are to be paid at the registrar's office.

12,432. *Mr. Webster.*—When the money comes to the registrar's office, by what form does the plaintiff get possession of it?—If it is above 10s., we send him notice that we have got it. The defendant brings the order which we have made, which is so framed as to enable us to put a receipt on it, and the clerk who received it would write the date and his initials.

12,433. *Mr. Campbell.*—Assuming that a case arises in which it is necessary for the judge to take a proof with regard to matter of fact—in actions of damages for instance—what is the usual course of procedure for the ascertainment of the facts?—The parties give their evidence *viva voce*.

12,434. Does the judge make any note of that evidence beyond what is necessary for the refreshing of his own memory in the course of the day?—That is all.

12,435. And he gives a decision on the facts proved before him in evidence?—Yes.

12,436. Is his judgment on the facts final?—It is, so far as the fact is concerned. The law may be reviewed by the judges of the courts at Westminster.

12,437. Suppose the judge to have arrived at a decision in point of fact and law, what record is there of the particular grounds in fact and law on which he has decided the case? Does he write out a detailed judgment?—No.

12,438. Then what record is there?—There is nothing but the order. The minute-book contains simply the name and the order made.

12,439. *Mr. Gordon.*—It is a register?—Yes; and if the parties are aggrieved, and intend to appeal to the courts at Westminster, the aggrieved party gives notice; and if they can agree on their case—that is, on the misdirection or the bad ruling in law—well and good; but if not, the judge settles the case between the parties.

12,440. *Mr. Campbell.*—When called on, he writes out a note of his decision?—He settles what they dispute about. He has a tolerably full note for his own guidance.

12,441. He says, 'I found such and such circumstances to be proved as matter of fact, and I deduced certain inferences as matter of law; and in the result I decided that the defendant should pay so much to the plaintiff?'—Yes.

12,442. *Mr. Clark.*—Is that done at once on the case being disposed of?—No. The party can give notice at the moment, or within twelve days, I think. Then they prepare their case, and find sureties for costs, to be approved by me. They then settle the case, and go to the courts at Westminster, and they have the selection of which court they will go to.

12,443. *Mr. Campbell.*—Have they the remedy of review, however small the amount may be?—No. Under £20 the decision is final. They may go to the judge from me, and he would hear it.

12,444. But when the judge himself decides the case?—That is final up to £20, except by leave.

12,445. *Mr. Baxter.*—Both in fact and law?—Yes.

12,446. *Mr. Gordon.*—Is there any power to remit a case under £5 which involves a question of difficulty?—There was; but I think it is qualified in some shape. One of the judges of the superior courts at chambers can order a writ of *certiorari*.

12,447. And the parties are put on terms?—That is entirely in the judgment of the court above. What we do is to return to the court sending us that *certiorari* the copy of the plaint, and the copy of the minute-book, if it has gone as far as order. We attach it and indorse it, and they go on in the courts at Westminster.

12,448. *Mr. Campbell.*—But that step is taken before any order is pronounced by the judge?—It may or may not be.

12,449. There is a power, I think, given to litigants in their option of having their cases tried by jury?—There is. I think £5 is the limit. If the claim is above £5, they may, in three clear days, call on me to summon a jury.

12,450. Before the hearing of the case?—Yes. Three clear days before the hearing of the case, either party may come and say, 'I wish for a jury of five,' and I am then ordered to summon ten jurymen.

12,451. *Mr. Gordon.*—What fee does he lodge for that?—One shilling for each juror that is to try the case, but no fee for the summons and the service.

12,452. *Mr. Campbell.*—What proportion of cases are tried in that way?—I suppose in the 15,000 cases that I have mentioned, about six, or probably ten, cases are tried by jury. It is a very small fraction.

12,453. Do those cases which are tried by jury involve large sums?—Not necessarily. It may have been a little temper in the parties; you cannot tell precisely what was their motive.

12,454. Then jury trial does not seem to be popular in the County Courts?—A great deal depends on the judge, I believe, and the feeling that exists towards him. Sometimes attorneys feel hurt at the judge's mode of proceeding, and choose to bespeak the jury—thinking, I suppose, that that will control the judge.

12,455. *Mr. Baxter.*—What is the qualification of the jury?—It is the same as in all the other courts. We take them from the common jury list.

12,456. *Mr. Webster.*—What fee are the jurors paid?—One shilling each. When they have given their verdict, we hand them 1s. a-piece.

12,457. *Mr. Campbell.*—The County Court judges have no control, have they, over questions involving servitudes or rights of way?—No; none with reference to real property.

12,458. Not with regard to the regulation of possession, except in the cases of ejectment which you mentioned?—That is all.

12,459. *Mr. Gordon.*—The County Court judge can change the venue?—Yes.

12,460. When it can be shown that the case will be more conveniently tried at another place?—Yes.

12,461. *Mr. Campbell.*—The County Court judge has no criminal jurisdiction?—None whatever.

12,462. He is merely a civil judge?—Yes.

12,463. When appointed to the office of County Court judge, is he precluded from engaging in any private practice of any kind?—He is not at liberty to practise now.

12,464. Either at the bar, or as an arbitrator?—That, I believe, is a vexed question. I believe the late Lord Chancellor Cairns expressed rather a strong opinion that he ought not to take arbitrations.

12,465. Are you aware what the practice has been?—I believe some few of the judges have taken them.

12,466. *Mr. Justice Willes.*—I think the practice has been not uncommon to take arbitrations?—I believe so.

12,467. *Mr. Gordon.*—How long is the County Court judge in your court occupied? Does he sit once a month?—He sits four days a week. It depends entirely on the business. We have usually a hundred cases a day on the list; and one case may take some hours, while the others may be got through in about three hours.

12,468. *Mr. Clark.*—What is the length of your legal year?—We have a vacation of six weeks, and now and then we can make a week for ourselves. We can fix our own sittings. We regulate the sittings according to the exigencies of the business.

12,469. *Mr. Gordon.*—And, when sitting, your court meets about four days a week?—The court itself is occupied about four days in the week; but the clerks are there every day from ten until four o'clock.

12,470. I presume that your court has a much greater amount of business than most of the County Courts?—My court has, I believe, the largest number of cases of any in London, though it is not the most lucrative. It is not so good as Westminster, which is a richer neighbourhood, and it is not so good as

Robert Cheere.

Bloomsbury; but the cases are more numerous than in these two courts.

12,471. But you have more business than the courts in the country districts?—With the exception of two or three, we have; but Birmingham has double the business we have.

12,472. Is there just one County Court in Birmingham?—Yes.

12,473. How many are there in the London district?—Nine or ten.

12,474. *Mr. Campbell.*—In the more populous districts, the time of the County Court judge is pretty fully occupied?—It is.

12,475. The office is not a sinecure?—No.

12,476. Can you tell us what the remuneration of the County Court judge is?—It is fixed by statute. Some have £1500 a year. That is the salary of the judge who presides in my court.

12,477. What is the minimum?—£1200.

12,478. *The Chairman.*—Is £1500 the maximum?—I think so. I should state that travelling expenses are allowed to them in addition.

12,479. *Mr. Campbell.*—But the judge of the Clerkenwell County Court has no travelling expenses?—No.

12,480. And the travelling expenses are not calculated on a scale which would do more than reimburse the judge for the cost he is put to?—It is supposed not to do more. I may state that the expenses of my office last year were £2364, 18s. 11d., exclusive of the judge.

12,481. *Mr. Justice Willes.*—Each judge, I think, got £300 additional in consideration of taking the equitable jurisdiction?—Yes; I believe so. The schedule of the fees is appended to the Act of Parliament.

12,482. *Mr. Campbell.*—You mentioned the gross cost of your establishment, exclusive of the judge; can you give us the details?—The judge's salary is £1500; my salary is £700 a year; and the nine clerks (including my salary) get £2364, 18s. 11d.

12,483. How much does the chief clerk get?—£350. We were originally paid by fees, which were much larger than the present fees. The first judge got between £2000 and £3000 a year out of the fees, and I got into my own pocket over £1800 a year. Then the Home Secretary said he thought £500 was enough, which made me feel dreadfully ill; but I secured to the clerks good payment. I was taken before the Lords of the Treasury, and the late Lord Chief Justice of the Common Pleas, being then Attorney-General (Lord Chief Justice Jervis); they were very anxious to keep the expenses of the clerks down. I had always paid my clerks an *ad valorem* salary, which none of my brethren had done. I have no persons whom I care to serve except those who do their work well; I have no family connections; and I said to the clerks, 'Apparently by the statute I should have £600 a year; whatever the fees exceed, I will have the proportion of six to what you ordinarily would have in an attorney's office.' My head clerk would have had £100 a year in an attorney's office, and on account of the magnitude of the fees he got £300 a year. When Government saw that, and having power to reduce me from £1800 to £500, they said they would also take down the salaries of the clerks; but as I received the fees, I said I would not settle the account unless they got larger salaries, and Government agreed to give them the salaries which I had always given them formerly out of my own pocket.

12,484. On what footing do they hold their offices?—My pleasure.

12,485. Does the chief clerk hold his office only during your pleasure?—I am sorry to say that it is so.

12,486. *Mr. Gordon.*—They are not on the civil service?—No; nor are we.

12,487. *The Chairman.*—Have you no superannuation allowance?—No.

12,488.—Has the County Court judge?—He has. I believe he has £1000 a year.

12,489. *Mr. Webster.*—Is your appointment for life?—On good behaviour. I suppose I could be removed by the Lord Chancellor for cause. I can appoint a deputy; and if I was ill, I should appoint a deputy to do my work, and make my own pecuniary arrangement with him; and that would, in effect, be a retiring allowance.

12,490. *Mr. Campbell.*—But the other clerks have no such power?—They have no such power.

12,491. How many years must a County Court judge serve before he is entitled to a retiring allowance?—I don't know if there is any limit. It has been given in cases of sickness in the instances I have known. I may state that the next step after the hearing and the non-payment is an execution against the goods. When the plaintiff comes and produces the plaint note, we find nothing is paid in our ledger: he can then take execution against the goods; or he can have a judgment summons to bring the defendant before the judge, and see why he has not paid, and the judge may, for causes stated in the Act of Parliament, send him to jail. The number of judgment summonses last year was 1947 out of the 9000 orders. Of those, there were heard 747. What became of the difference between the 1900 and the 700 I must leave you to infer. It is possible that when the parties got the judgment summonses, they paid; but whether they did or not, I don't know. Some of them were not served. When they appear, the judge examines them as to their means and circumstances; and if he is satisfied that they could have paid, or that they have contracted the debt fraudulently, without reasonable means of payment, he can commit them for any period he sees fit, not exceeding forty days. In the cases that were heard, the judge made orders for commitment, no doubt; but out of the 747 the plaintiffs took out warrants to the number of 328 only, so that more than one-half who had obtained the judge's order to send the defendant to jail, found no occasion to use it, and did not even bespeak it, for the figures were—orders 747, warrants 328.

12,492. *The Chairman.*—Without a warrant there could be no imprisonment?—No. The man has the option of proceeding on the order to imprison. The judge says, 'I make an order to have him committed, unless in so many days he has paid the money.'

12,493. Is that imprisonment in satisfaction of the debt?—It is not.

12,494. *Mr. Baxter.*—Can you imprison for any sum, however small?—Yes. But it is not for the sum that we imprison; it is for not obeying the judge's order.

12,495. *Lord Barcaple.*—For contempt of court?—It is said to be so, but it is not really so. Out of the 328 warrants bespoken, only 143 went to prison, and I think comparatively few of them—probably the half—really suffered the terms of imprisonment. They paid on the pressure. I will give you an instance of one that happened this very morning. A party was sued in our court for a debt, the debt and costs amounting to £6, 8s.; he was ordered to pay it on 22d March; he was brought up on a judgment summons, and the judge ordered him to jail for forty days.

12,496. *The Chairman.*—That was the full period?—Yes; and he gave him seven days to make arrangements. The seventh day was last Saturday, and the defendant came this morning and paid £5, though but for that pressure the plaintiff would have had to whistle for the money. The balance is promised next week.

12,497. *Mr. Baxter.*—The period of imprisonment is always limited?—Yes; but I have no hesitation in saying that, without imprisonment for debt, you had better shut the County Courts up. It would be absolute folly to go on without it.

12,498. Can you imprison a second time for the same debt?—Yes, for the same debt, as often as the judge thinks fit.

12,499. *Mr. Adam.*—Have you any power of arresting wages?—No. That has often been talked about, but I hope it will not be carried out. It would do more mischief to the people than can be calculated.

12,500. *Mr. Webster.*—Do you seize goods?—Yes.

12,501. Can they go on with both operations at one time?—No.

12,502. *Mr. Campbell.*—Will you describe to us the

mode in which goods are seized and brought to sale?—We issue a warrant, which we call a *fi. fa.* warrant, and the bailiff goes to the man's lodgings and takes the chairs and tables; he leaves a man in possession, and is told that the money will be sent; in the course of an hour or two it is sent, and the goods are not removed. I cannot tell exactly how many sales have taken place, nor how many warrants were issued in 1868; but I have felt so deep an interest in this matter, that I got the same sort of information some time ago, and it was an incredibly small number of sales that actually took place. There are some, and they are not very oppressive.

12,503. *Mr. Clark.*—Can you force your way into a house and take the goods?—We cannot force an outer door, I believe. The number of executions against goods was 2363; and of these, only 15 sales actually took place: this was not last year, but some time before.

12,504. *Mr. Baxter.*—Who maintains the debtor in prison?—He generally keeps himself.

12,505. Is the creditor not bound to do so?—I never knew of the creditor keeping him, or being asked to do so.

12,506. *The Chairman.*—You have told us the mode in which an appeal is taken from the County Court judge's judgment: are there many such appeals?—Very, very few.

12,507. Can you give us a notion how many?—Two or three in my court.

12,508. In a year?—In a year. The number is hardly so many. I don't think there have been half a dozen the whole time I have been there; I think these have been the result more of obstinacy than of necessity.

12,509. Do you ascribe the infrequency of appeals to the satisfaction of the parties with the judgments?—I do.

12,510. *Mr. Campbell.*—Has any agitation ever arisen in the profession, or among the public, with the view of securing an intermediate appeal between the County Court judge and the Supreme Court?—There is no other tribunal that they could agitate for. I don't know that any other tribunal could be resorted to.

12,511. *Mr. Webster.*—Can you give us an idea of the cost of obtaining a review by one of the superior courts?—I cannot.

12,512. Is there a rule of refusing to give costs in appeals from the County Courts?—I don't think there is.

12,513. *Mr. Justice Willes.*—I think latterly the rule has been to give costs, because otherwise the remedy would be worse than the disease?—Yes.

12,514. *Mr. Campbell.*—Can you give us an idea of the procedure which takes place after the judge has settled the case on which the appeal is taken?—I cannot. It will depend on the stage the proceedings are at on their removal.

12,515. Suppose the case is heard and disposed of, and the order for payment made by the County Court judge, and that the case is settled on which the appeal is taken, how do the parties then proceed?—They set it down as a special case. Both sides leave copies of the cases with the judges of the superior court, and it is set down in the ordinary way. It depends entirely on the business of that court. We know nothing more of them.

12,516. *Mr. Adam.*—You have said there were appeals on some matters from you to the judge?—He could review, I suppose, all my decisions. Mine is held to be a delegated authority; and it is simply because the people know me that my business is so large as it is.

12,517. In point of fact there is no appeal from you?—There has not been one, I believe, for two years. I suppose you are aware that all money for which we grant orders is paid into court?

12,518. *Lord Barcaple.*—What do you precisely mean by that? Do you mean that when you decern for the money, it is not paid directly to the plaintiff?—Not a shilling of it. It is all paid into court.

12,519. *Mr. Campbell.*—That is the case with instalments?—It is the case with all monies. It need not be; but as far as our procedure is concerned, we should not allow any subsequent step for any sum of money at variance with our ledger account. For instance, if, having got a judgment for £6, the plaintiff went and took an execution for £4, we should say, 'We must have the £2 here, in order to make our account square.'

12,520. *Mr. Campbell.*—Do you open a ledger account for every litigated case?—Yes.

12,521. And any partial payment is entered to the credit of the defendant, and a judgment order can be taken afterwards for the balance?—That is so. You will be very much surprised at the number of payments into court in one year. The number of payments last year was 15,984, and the amount £19,399.

12,522. Was a very large amount of that money paid in cases where the defendant had not appeared?—Yes. The number of payments out of court was 13,319, and the amount £20,830.

12,523. *Mr. Webster.*—Can you tell us the cost to the party of getting the money through the hands of the court?—It is nothing more than the fee he has paid. All the fees he has to pay are the 1s. on the summons, and the 2s. on the hearing; in fact 15 per cent. in a disputed case, and 10 per cent. on the debt in a non-disputed case.

12,524. *The Chairman.*—Can you tell me what proportion of cases you have where the amount sought to be recovered is over £20?—It is very small indeed.

12,525. When you say 'very small,' what do you mean?—Not one in 200.

12,526. One-half per cent.?—Hardly so much. I have taken out the accounts of three tradesmen who resort to our court; one took out 309 plaints in one year, another 163, and another 262.

12,527. When you say there is not above one-half per cent. over £20, what proportion should you say there is over £30?—That I cannot say.

12,528. Or £40?—Much the same. The bulk of our cases are under £20.

12,529. What sort of proportion is there between cases above and below £10?—That I cannot give you.

12,530. Are they more numerous under £10?—Certainly; very much. I have brought with me three specimens of the ledger accounts to show what the accounting is like. One of them is a bill of exchange case, another a doctor's bill, and another a draper's account. I have 58,606 entries of money accounts.

12,531. How soon does a plaintiff get his money after it has come into your hands?—Whenever he likes.

12,532. *Mr. Clark.*—You spoke of recovering a certain sum: is the whole of that sum entered in the ledger accounts?—Yes, what is recovered.

12,533. Do you raise a ledger account whenever decree is given?—For the convenience of our book-keeping, I have a ledger so made that there is a little space for every plaint that is entered.

12,534. Do you raise the account on decree?—Yes, on order. On the face of the ledger there would be eight accounts.

12,535. If the money is not paid, what do you do with the account?—We do nothing. We should only enter what the judgment was for and the costs, leaving it in a blank state till something was paid in. I am bound to say that the system of accounting and the whole procedure is extremely carefully done, though one runs the risk of enormous loss, as it is impossible to check it. I have myself been robbed, and have been quite unable to discover it till I make up my ledger balances. It is the duty of the clerk not to shut up at night till he checks the cash in the till with the amount in the cash-book; but it does not follow that it has got into the ledger, and there is great difficulty in checking it. I was robbed one year to the extent of £146, and we had to go through all the ledgers in which there were accounts, ascertaining what was due on one side and the other, and seeing if we had money to meet it. I set my nine clerks to work for six weeks at it, and still we could not account for it. At last, being on

Robert Cheere.

extremely good terms with my clerks, I told them that we must neither eat, drink, nor sleep till we had discovered it; and after waiting till about eleven o'clock that night, the clerk who stole it came and told me of it, and showed me how he did it. No checking could have helped it, for, taking an even sum always, he had called it 10s. short, and it had been so entered in the cash-book.

John Wickens.

JOHN WICKENS, Esq., examined.

12,536. *The Chairman.*—You are a Chancery barrister?—I am.

12,537. I suppose of some considerable standing?—Nearly twenty-nine years.

12,538. We are anxious to obtain some information from you as to the practice of the Court of Chancery. Would you be kind enough to describe the origin and process of an ordinary suit in Chancery?—I can only do that very generally, because our practice is unfortunately complicated, and it would take a very long time indeed to describe all the varieties of it. But an ordinary suit in Chancery is commenced by bill, which is a printed statement of the plaintiff's case in popular language, telling the story, mentioning the persons against whom he claims relief, and describing the relief that he thinks himself entitled to. An ordinary suit in Chancery is commenced in that way. There are some other modes of commencing proceedings in Chancery under particular Acts of Parliament, or otherwise, but that is the normal commencement of a suit. The plaintiff, as soon as he has filed his bill, has a right to require from the defendant an answer on oath to interrogatories founded on the bill; or he may, if he pleases, dispense with such an answer.

12,539. The bill, I presume, is served on the defendant?—Yes.

12,540. *Mr. Baxter.*—Have you any particular officer for serving it?—No; at least I believe not. It is served by the solicitor of the plaintiff, or his agent.

12,541. *The Chairman.*—Practically, I suppose, it is handed to the defendant's solicitor?—I believe so; that is to say, it is served personally upon the defendant, unless a solicitor undertakes to appear for him.

12,542. *Mr. Campbell.*—Is there any particular evidence of service laid before the court?—There is a formal affidavit which the clerk makes, I suppose; but I don't know what the form of it is.

12,543. *Lord Barcaple.*—Does the defendant put in an answer to the bill, separate from the answer to the interrogatories?—No; the two things are combined. The same printed document contains his answer to the plaintiff's case, and also the discovery—the answer to the plaintiff's interrogatories.

12,544. *The Chairman.*—If there be any?—Yes.

12,545. *Mr. Gordon.*—You use the word answer. I understand that as meaning a counter statement or a defence?—The defence is technically called an answer, but it contains the two things which I have mentioned.

12,546. *Lord Barcaple.*—That is to say, an answer to the statements in the bill, and an answer to the interrogatories. Does it contain a statement by the defendant of the facts that he thinks important?—Yes; if there are any facts which he intends to allege, and prove affirmatively, he may state them in his answer.

12,547. *The Chairman.*—But the answer does not consist of three parts?—No.

12,548. If there is an answer upon oath to the interrogatories, the only other part of the bill would be the defendant's statement?—Yes; the defendant's case, of course, may be either negative in form or affirmative in form, but in fact the answer consists of two parts, and not of three.

12,549. The answer being filed, what is the next proceeding?—The answer being filed, the plaintiff then elects in what way he will have the cause tried. And here arises an anomaly in our practice which I don't think anybody would venture to defend. The plaintiff has the right of electing whether he will have the cause brought to a hearing on motion for decree, or by filing a replication. The consequence is, that the plaintiff has a right to elect, although under certain circumstances he is compelled to elect one and not the other. But the results are very different. The motion for a decree is in general much more favourable to the plaintiff than the hearing on replication.

12,550. *Lord Barcaple.*—Would you explain precisely what are the two courses of procedure?—The distinctions are so very complicated that it would be difficult to make them intelligible to any one unacquainted with Chancery practice. Supposing the plaintiff elects to proceed on motion for decree, he gives a notice of motion that he will move for a decree four weeks after the date of the notice, and specifies at the foot of his notice the affidavits which he intends to use in support of his case. After that notice of motion is served, the defender has, I think, a fortnight—this time being enlargeable of course—to file such affidavits as he pleases, in opposition to the plaintiff's case, after which the plaintiff has a week to reply by affidavit to the defendant's evidence; either party may then during a fortnight cross-examine any of the witnesses on the other side before the examiners of the court. That is the proceeding on notice of motion for decree.

12,551. *The Chairman.*—All that being done, the case comes on for hearing?—That being done, if the cause is heard in that way, it comes on for hearing.

12,552. *Mr. Webster.*—Has the defendant put interrogatories to the plaintiff?—Yes; the defendant has a right, after having filed his own answer (if an answer be required), to interrogate the plaintiff exactly as the plaintiff can interrogate him.

12,553. *Lord Barcaple.*—Then replication?—When a cause is to be heard on replication, or (as it is called) in the regular way, the plaintiff, as soon as the pleadings are complete, files a replication, which is a formal document, not signed by counsel,—simply a traverse; and then eight weeks are allowed to each party for putting in the evidence. Of course, I need not say the result of that is, that the evidence on both sides is put in on the last day of the eight weeks, and consequently neither party has an opportunity of seeing the evidence of the other. The plaintiff has no opportunity of replying to the evidence of the defendant. The evidence is either given by affidavit, or, in the case of an unwilling witness, who will not make an affidavit, he is subpœnaed, and examined *ex parte* before the examiner of the court. After the expiration of the eight weeks, either party has a limited time for cross-examination. It follows, I think, from what I have said, that inasmuch as the plaintiff, when the case is heard on notice of motion for decree, has the opportunity of replying to the plaintiff's evidence, that course is in general very much more favourable to him than the other; but he is not always able to take it, because, on notice of motion for decree, he cannot get the evidence in chief of any unwilling witness. A witness who will not make an affidavit is inaccessible for that purpose. I ought to have stated that the cross-examination, when the cause is heard on replication, is in court, and not before the examiner of the court; and therefore there is a difference between the mode of hearing the case, according to the different mode in which the plaintiff chooses to try it. The hearing is conducted, I presume, very much like a hearing in any other court; that is, the plaintiff opens his case, the defendant then answers, and the plaintiff replies. But there is this peculiarity in the hearings before the Court of Chancery: the evidence being nearly entirely on paper some time before the hearing, very little time is practically consumed in reading evidence,—very little of the evidence is practically brought before the court, because the counsel on both sides soon see what facts are proved, and what are not proved; and a certain sort of elimination takes place, which in fact prevents the court from being troubled with more than a very small part of the evidence. In most cases, I should think no part of the evidence is read. It is taken as read.

12,554. *The Chairman.*—When you talk of reading the evidence at the hearing, do you mean that it is read by counsel?—Yes.

12,555. In the course of their speeches?—Hardly that. According to the ordinary rule, the case is opened by the leading counsel; and, strictly speaking, it is the duty of the junior to read the evidence.

12,556. *Lord Barcaple.*—Where there is cross-examination of witnesses at the hearing in the open court, that occurs in the middle of the discussion?—After the evidence is read. In the case of the cross-examination of witnesses in open court, if the cause were heard quite strictly, the leading counsel for the plaintiff would open the case, and then the junior counsel for the plaintiff would read his evidence; and if the defendant wished to cross-examine one of the plaintiff's witnesses, having given notice before, he would cross-examine him immediately after the reading of the affidavit of that witness.

12,557. Does every ordinary case in Chancery first come on for hearing before the Master of the Rolls or the Vice-Chancellor?—I may say every case.

12,558. Then, in that view of it, in every case there is a primary judgment by a single judge, from which there is an appeal?—In every case.

12,559. Is the review very infrequent, or is it pretty common?—The review is very frequent.

12,560. A large number of causes are carried to review?—It varies from time to time. At present, I rather think that our appeal courts have got much less business than usual.

12,561. There being more acquiescence in the first judgment?—Yes; but it is difficult to say to what it is to be attributed.

12,562. *The Chairman.*—It will depend in some degree, I suppose, on the estimation in which the judges of the different courts are held by the profession?—It would rather depend, I should think, upon the estimate which the advising counsel might be likely to form of the chance of a difference of opinion between the court above and the court below, without reference to the question which was right.

12,563. *Lord Barcaple.*—Has there been any considerable discussion in the profession or without the profession as to the necessity for having a judgment in the first instance, from which there is a review, rather than taking the judgment of a court consisting perhaps of more than one judge, from which there should be no review?—I have heard the question frequently mentioned, and I think, as far as I am able to judge, that the unanimous opinion is, that there should be one appeal against the first decision in every case.

12,564. That there should always be a right to one appeal?—Yes.

12,565. *Mr. Webster.*—And that there should always be a decision by one judge in the first instance?—I am not prepared to say that I know that there is unanimity about that.

12,566. *Lord Barcaple.*—Does the Master of the Rolls or the Vice-Chancellor frequently pronounce his judgment at the hearing, or is it more common for him to take it to consideration?—Judges vary very much in that respect; but certainly most cases are decided offhand.

12,567. *Mr. Baxter.*—In court?—In court.

12,568. *Lord Barcaple.*—I believe the Vice-Chancellors sit for a period of three weeks, and then rise for a week. Is there not some such arrangement as that?—A term is three weeks; there are four terms in the year; and there are, I think, three sittings out of term. The sittings out of term last five or six weeks.

12,569. *The Chairman.*—Each?—Each.

12,570. *Lord Barcaple.*—What sort of interval occurs between?—Between Easter term and Trinity term the interval is a fortnight; and there is an interval at Christmas of about three weeks, and an interval at Easter of about three weeks. Otherwise the interval between two consecutive sittings is a week.

12,571. Is the object of that interval understood to be to enable them to overtake judgments in causes which have been taken to consideration?—I never heard that it was. I don't know that it is.

12,572. *The Chairman.*—How many weeks in the year do the Vice-Chancellors sit?—I am a very bad authority on the subject; but I rather think that it is from 160 to 190 working days.

12,573. *Mr. Adam.*—In what form is the appeal taken?—The appeal is, technically speaking, a re-hearing. It is not an appeal proper. We make a distinction between an appeal proper and a re-hearing. It is taken in this form: you petition the Lord Chancellor that the cause may be re-heard; the petition simply states the decree below, without stating anything leading up to it; and there is a mere formal statement that the petitioner conceives himself aggrieved by it, and prays that the case may be re-heard before the Lord Chancellor, and that his Lordship may make such an order as he may think just.

12,574. *Mr. Baxter.*—Is it in writing?—It is in writing, and it is certified by two counsel to be a proper petition.

12,575. *Lord Barcaple.*—Can you give us any information as to the time within which ordinarily the cause will be heard by the court of appeal, after the judgment of the Vice-Chancellor?—I cannot; but at the present moment, although the Lord Chancellor is engaged four working days a week in the House of Lords, and therefore we have lost one-half of our appellate strength, there is no delay.

12,576. That is to say, it comes within a few weeks after the judgment of the Vice-Chancellor?—I should think less. It may have altered within the last two or three days; but when I last happened to inquire, there were very few appeals waiting to be heard before the Lords Justices.

12,577. *Mr. Baxter.*—Can you appeal at any stage of the case?—You may appeal against any order of any sort or kind that the court below makes. You may appeal against an order that the cause should stand over.

12,578. *Mr. Webster.*—Upon certificate by two counsel?—Yes; and in the case of a motion, without any certificate.

12,579. *Mr. Gordon.*—That does not stop the procedure before the Vice-Chancellor?—It does not stop the procedure. If it is desired to stop the procedure, you apply to the judge appealed from; and the practice of late has been to stop the procedure if the procedure was a costly one.

12,580. *Lord Barcaple.*—A final judgment upon the cause, I suppose, is appealable without any certificate?—No; it requires a certificate.

12,581. *Mr. Gordon.*—Is that very much matter of form, or do the counsel really apply their minds seriously to it?—I believe that we do not consider that we pledge ourselves in any way to a dissent from the opinion of the judge below, but only that we consider that the case is one which the party may reasonably ask to have decided before the highest tribunal.

12,582. *Mr. Baxter.*—What are the terms of the certificate?—I think they are, 'We certify that this case is proper to be re-heard before your Lordship, if your Lordship thinks fit.'

12,583. *Lord Barcaple.*—There are reports of the discussions and decisions in the Vice-Chancellor's court?—Yes.

12,584. When the cause comes on in the court of appeal, is it always at such an interval of time that there is a published report that can be made use of at the hearing in the appeal court?—More often than not.

12,585. Where there is not, there is no record, I suppose, of the opinion delivered, and the grounds of judgment stated by the Vice-Chancellor?—A shorthand writer's note is invariably taken of every case which is likely to be appealed from.

12,586. *Mr. Baxter.*—Of the judgment?—Yes, in every case that is likely to be appealed from.

12,587. *Lord Barcaple.*—That must be productive of considerable expense, I suppose?—That is a question I cannot answer.

12,588. *Mr. Gordon.*—Is the judge furnished with

John Wickens.

copies of the affidavits, or does he use the principal?—For the purpose of the hearing of the cause?

12,589. Yes?—The judge always has printed copies of the affidavits.

12,590. Are they printed?—They are printed. He gets it; but whether as matter of right or as matter of courtesy, I cannot say. In the hearing of the cause, the pleadings and the affidavits are all printed.

12,591. I suppose you find that cheaper than having written copies?—Very much cheaper, I believe.

12,592. *Lord Barcaple.*—Is it the opinion of the profession that the system of affidavits works well?—I think it is. I think the opinion of the profession is that 19 witnesses out of 20 intend to tell the truth; and that where the witness intends to tell the truth, and the affidavit is prepared with a knowledge in the person preparing it and in the person swearing it that there may be a cross-examination upon it immediately, in the great majority of cases the affidavit, eked out by the cross-examination, is sufficient for all purposes.

12,593. And that is your opinion?—It is.

12,594. *Mr. Baxter.*—Who prepares the affidavit?—The affidavit is prepared, I suppose, by the solicitor, and very often settled by counsel.

12,595. By counsel for both parties?—No; the counsel of the party.

12,596. *Lord Barcaple.*—The taking of the evidence in court before the judge is a recent innovation?—Our system of taking evidence has been changed so often during the last twenty years, that I should not like to date any part of it.

12,597. But have you found that there has been a great feeling of an advantage resulting from the evidence being taken in open court in Chancery?—I have personally a strong conviction that in a case of really disputed fact, nothing but a mode of taking evidence in which the witnesses are produced before the court, and seen by the judge in person, can be satisfactory. But a case of really disputed fact is certainly the exception in the Court of Chancery.

12,598. You have already said that a case of doubtful credibility is, you think, very rare?—Yes.

12,599. There may be disputed fact where neither party may very seriously dispute the truthfulness of the opposite witnesses?—There may be so.

12,600. Is that a common kind of case in Chancery,—where the inferences to be drawn upon the whole matter is the dispute in point of fact, and not the credibility of the witnesses? Is that a common characteristic of the cases that you meet with in Chancery?—I am not perfectly sure that I can answer that question. The typical case in Chancery is a controversy as to the conclusion in law, which may be a mixed conclusion of law and fact, to be drawn from certain facts which are not seriously disputed. That is the most ordinary sort of dispute, I think.

12,601. *The Chairman.*—In short, the leading facts of a case are seldom in dispute?—Comparatively seldom.

12,602. *Lord Barcaple.*—Is the system of having the cross-examination in presence of the judge very much adopted?—Very little. It takes so much time, and is so inconvenient in many respects, that we always dispense with it if possible.

12,603. *The Chairman.*—Is it expensive?—It may be expensive where it is necessary to bring witnesses up to London from a distance; but the witnesses are not kept waiting. In all cases where the cross-examination of witnesses is to take place, a day is specially appointed for them, and they are not kept waiting for the termination of previous cases.

12,604. *Lord Barcaple.*—Have you always an affidavit by the witness before he appears to be examined in presence of the judge?—No. First of all, there are certain cases which I did not specify,—cases heard on replication in the regular way,—in which the plaintiff applies, immediately after the replication is filed, to have certain issues tried *viva voce*, and these issues are tried *viva voce* before the judge with or without a jury. That is the course, I think, ordinarily adopted in patent cases, but in practice it is almost confined to patent cases. I think it is found to be the most convenient way of taking scientific evidence, especially in cases of mechanical patents, where the thing speaks to the eye, to a certain extent. That is one exception. Another exception I mention incidentally, and it is this,—where, after replication filed, either party wants to examine a witness who will not consent to make an affidavit, then the unwilling witness is examined, and examined *ex parte*, before the examiner of the court. In that case, his cross-examination takes place afterwards at the hearing, though he has not made an affidavit.

12,605. *Mr. Gordon.*—Why should the cross-examination not take place before the examiner?—As a matter of principle I cannot tell you; nor do I know, nor have I found any one ever to inform me, on what principle the division between hearing the case on replication and hearing it on motion for decree—of which that is one of the consequences—has been made.

12,606. *Mr. Baxter.*—Can you take a counter affidavit from him without bringing him for cross-examination before the judge?—A witness may give evidence upon both sides. For instance, if a plaintiff's witness gives evidence with which I, the defendant, am dissatisfied, I may cross-examine him, or I may go to him and say, 'I propose to cross-examine you; but if you will put this or that fact in an affidavit on my behalf, that will satisfy my purpose.' That may be done, and is sometimes done. It is not unfrequently done where the witness is a person of extreme respectability, who has simply made some mistake, or omitted something that ought to have been stated.

12,607. *The Chairman.*—In speaking of the expense of examining witnesses in trying a cause in presence of the court, you mentioned only the matter of the attendance of witnesses: are there no other causes of expense connected with that procedure? The length of the proceeding in court must make it more expensive?—That does not increase the expense materially. I speak on very insufficient information with reference to these questions of costs; but I believe it increases the expense in this way: a particular fee is allowed to each solicitor for attendance for every day on which the cause is in the paper, and consequently if the hearing of the cause extends over three days instead of one day, or half a day, the fees are multiplied to that extent; but the fee to the counsel is not increased by the result of the cause taking three days instead of one. There are no refreshers.

12,608. Where the cause is tried in that way, and the witnesses are examined in presence of the Vice-Chancellor, does he make a note of the evidence?—Yes.

12,609. And is that the proper and authentic record of the evidence?—I believe so.

12,610. In cases where witnesses are cross-examined in court, which you say takes place where replication is filed, does the Vice-Chancellor in like manner make a note of the cross-examination?—Yes.

12,611. Are shorthand writers employed in such cases?—Always, I should think.

12,612. By the parties?—Always, I should think; but I understand that the notes of the Vice-Chancellor would, except by consent, be the proper record of the cross-examination on a re-hearing.

12,613. *Mr. Gordon.*—Jury trial has not been much resorted to in Chancery proceedings?—Not except in patent cases.

12,614. Were you concerned in the Paraffin Oil patent case?—I was not.

12,615. You know that it lasted a considerable number of days?—I remember many patent cases which have lasted many days.

12,616. *The Chairman.*—But not so long as that case, which I believe lasted about thirty days?—Not so long as that.

12,617. *Mr. Baxter.*—Do counsel attach themselves to particular courts?—Leading counsel do, but not junior counsel.

12,618. *Lord Barcaple.*—But there are counsel more or less attached to each Vice-Chancellor's court?—The leading counsel attach themselves, but not the junior counsel.

12,619. *The Chairman.*—Although a leading counsel has attached himself to a particular Vice-Chancellor, he does in fact attend other courts occasionally, does he not?—He attends the appeal courts. He attends any court in which he is specially retained.

12,620. *Lord Barcaple.*—And he goes into the appeal court as a matter of course?—Counsel make their own arrangements as to that. Some counsel will only go into the appeal court either as special, or upon appeals in cases in which they have been counsel in the court below; but the rule is not very strictly adhered to, and some counsel practise in two courts.

12,621. *Mr. Baxter.*—Do you feel it very convenient that the counsel attach themselves to particular courts?—Certainly it is very convenient.

12,622. *The Chairman.*—When you speak of a counsel going special into another court, is there any particular amount of fee that is in practice considered necessary?—50 guineas, besides the fee upon his brief. That is the lowest special retainer.

12,623. In short, there is a fee of 50 guineas in addition to what he would otherwise have?—Yes; it is over and above the other fees.

12,624. *Mr Gordon.*—Is he bound to give his attendance in the court for which he is specially retained, or may he also practise in his own court for that day?—I don't know that the obligation is higher in the one case than in the other. As a matter of fact, the cases in which special retainers are given are frequently important and interesting cases, and such as counsel is very willing to attend to if he possibly can. But special retainers are quite the exception.

12,625. *The Chairman.*—You have told us generally the history of a Chancery suit?—Very summarily indeed.

12,626. I think you mentioned at the commencement that there are other modes by which parties approach the Court of Chancery as suitors: will you give us some information upon that subject?—Originally the Court of Chancery could be approached by English bill only, as it was called, to distinguish it from the French pleadings of the common law courts, except in the one case of an infant, who could apply to the Lord Chancellor to be made a ward of court for protection by petition, which differs from a bill very slightly indeed; but still it does differ in some degree from it. However, various statutes have enabled suitors in certain cases to approach the court in a summary way. First of all, there are a very great many statutes—private and public Acts—which enable a suitor in certain cases to apply to the Court of Chancery by petition. The Leases and Sales of Settled Estates Act, the Trustee Relief Acts, the Trustee Acts, and the Lands Clauses Act, are the most familiar instances. There are also certain cases in which the suitor is authorized to approach the Court of Chancery by a summons—by an application originating at chambers, the least formal of all applications. At the present time an application by an infant for a guardian and maintenance is generally made by summons; it may be made by petition, but it is generally made by summons. Certain applications for the administration of estates, which are very numerous, and form a material part of the business of the Court of Chancery, are made by summons; and the charity business, which was formerly commenced by petition under Sir Samuel Romilly's Act, or by information, is now frequently commenced by a summons authorized by the Charity Commissioners, who have the power of sending a case to be discussed in Chancery through chambers.

12,627. *The Chairman.*—What is the advantage of a petition over a bill?—I don't know.

12,628. Is it not entitled to any privilege of preaudience?—That is so. Each court has a petition day once a week, and, as a matter of fact, a petition does get some advantage in that respect.

12,629. *Mr. Gordon.*—Has the summons any advantage?—In the summons you don't go into court at all; you go into chambers, and you are launched into the matter of the proceedings very cheaply and summarily.

12,630. *Mr. Webster.*—Without bill or answer?—A mere informal statement of what you want on a piece of paper starts the proceedings.

12,631. *The Chairman.*—That saves a great deal of time?—Yes.

12,632. And expense?—Yes.

12,633. *Lord Barcaple.*—Is the proceeding emanating from that before the judge or before the chief clerk?—Generally before the chief clerk; but in all proceedings before the chief clerk the suitor has the right at any time to say, 'It shall be referred to the judge personally.' But, practically, proceedings such as are commenced by summons, which are to a great extent for the administration of estates, are accountants' work, as it were, which is done by the chief clerk without personal reference to the judge.

12,634. *The Chairman.*—Are there any other modes of initiating proceedings in the Court of Chancery?—There is a proceeding in the Court of Chancery distinct from any I have mentioned,—by special case, under an Act of Parliament called Sir George Turner's Act of 1850,—by which, if the parties can agree on a state of facts, they can take the opinion of the court on the question of law, without anything in the nature of a pleading beyond the statement. They agree on the case to be submitted to the court.

12,635. Do you not commence the proceedings by motion in any case?—I am not aware that you do. It is just possible that there may be some case which, if mentioned, might be familiar to me; but at the present moment I do not remember any such case.

12,636. How do you apply for an injunction?—You apply for an injunction by motion always, but after bill filed. Nothing is more common than that counsel should wait to move for an injunction till the clerk has come up to inform him that the bill is filed. When moving for an *ex parte* injunction you wait till the bill is filed, and then you are at liberty to address the court on the subject.

12,637. *Mr. Gordon.*—Can you interrupt the court for that purpose?—With the consent of the court, and the counsel in the case.

12,638. Can you interpose immediately after the finishing of a case?—Yes, for an *ex parte* injunction. In fairness to the court, you would not do so unless the application was very pressing.

12,639. Is the chief clerk an accountant?—He is a solicitor.

12,640. Does he perform a good deal of the accountant work?—He decides simple points of law, and very often complicated points of law; and he takes such ordinary accounts as would be involved in an ordinary estate, or in the winding up of a partnership, for instance.

12,641. *The Chairman.*—Can you give us any idea what proportion of cases are appealed from the Vice-Chancellor to the Lords Justices or the Vice-Chancellor?—No, I cannot. I believe myself, that if the figures were taken, they would be found to vary from year to year very much indeed.

12,642. Of course there are a great many cases that do not go beyond the Vice-Chancellors?—A very great many.

12,643. Or the Master of the Rolls?—There is a great difference between appeal courts as to their tendency to reverse; and the real test, as I said before—that which really multiplies the number of appeals—is the increase of the chance that there should be a difference of opinion between the court above and the court below.

12,644. And that depends on the constitution of the court for the time?—Yes.

12,645. Has the Master of the Rolls any jurisdiction different from the Vice-Chancellors?—He has, I think, the special jurisdiction of admitting solicitors; but for the purposes of such an inquiry as the present, I think practically he has no different jurisdiction. As a matter of fact, in consequence of the Master of the Rolls having the special function of admitting solicitors, a great proportion of the business relating to the taxation of costs has always gone to the Rolls; but that is a mere accident. All the courts have equal jurisdiction in that matter.

John Wickens.

12,646. That is to say, taxation of costs between attorney and client?—Yes.

12,647. *Mr. Gordon.*—How does the system work which requires a defendant to give his answer on oath?—That is rather a large question. If it were desired to make the pleadings very symmetrical, no doubt it would be better to have the answer not on oath, because the answer on oath cannot be amended, and you can withdraw no part of it; whereas the answer not on oath can be amended *toties quoties*. As a matter of fact, a plaintiff in equity has repeated opportunities of amending his bill; and it is his counsel's fault if his bill is not eventually put in the most satisfactory shape. But on each amendment of the bill the defendant has the right to file an answer; he has that right if he pleases, whether it is called for or not, and he may, in that answer, subject to remark, contradict, or explain, or qualify anything contained in the previous answer; but he can take no part of it off the rolls of the court, because it was on oath, the consequence of which is, that in a very complicated case the pleading of the defendant is much less symmetrical at the end than the pleading of the plaintiff; whereas if the pleading of the defendant were not on oath, it might be amended from time to time, and the cause might be heard with a symmetrical pleading on each side.

12,648. Is the calling on the defendant to make oath frequently resorted to?—Oh yes; in almost all contested cases he is required to answer.

12,649. But the plaintiff is not required to put his statement on oath?—And the plaintiff does not.

12,650. Can he be called on to do so?—Yes; after the defendant has answered, he can call on the plaintiff to answer on oath.

12,651. Do you think that the system of calling on your opponent to make his statement on oath tends to promote the ends of justice?—I think it is very desirable that each party should have the right of examining the adverse party on oath and on paper; but whether that should not be kept separate from the pleading, is a large question.

12,652. *The Chairman.*—I understood you rather to say that the combining of the interrogatories with the pleading tends to complication?—It tends to want of symmetry and to complication.

12,653. And the separation of the two would be an improvement?—My personal opinion is that it would be an improvement.

12,654. *Lord Barcaple.*—Can the party never require his opponent to answer upon oath except by putting specific interrogatories?—Only in that way.

12,655. *Mr. Gordon.*—There is no rule in your court requiring a party to give a categorical answer to the statement of fact in his opponent's pleading?—No. He must answer the interrogatories if any are put. If interrogatories are not put, he is not bound to put in any answer at all.

12,656. Does it occur to you that it would be an advantage that the defendant should answer categorically, not on oath, the statements in the plaintiff's case?—As at present advised, I do not see the advantage of that.

12,657. *Lord Barcaple.*—You do not find any difficulty arising from want of record?—Not the least. I think our system of pleading works reasonably well.

12,658. *The Chairman.*—Might it not be shortened?—Yes, it might be shortened. There are various reasons that make pleadings in equity longer than they would otherwise be. Perhaps the most important is, that the counsel who prepare them are very often short of time, and it takes much time and labour to reduce the pleading. Then the bill is very often framed by the plaintiff's counsel with a very insufficient knowledge of what the defendant's case may be, and therefore he is obliged to throw a wide net—he is obliged, in fact, to try to occupy in the first instance much larger ground than eventually he will fix himself upon. But the thing which tends most to the prolixity of pleadings is this,—nearly all Chancery suits of importance turn on the construction of written documents. If these written documents are stated in the pleadings in a summary way, stated as distinguished from being set out, it is necessary to supply counsel and the court with copies of them, which are written copies; and it is found to be cheaper and more convenient in all such cases to set out the document *in extenso* or *quasi in extenso* in the pleadings, so that counsel and the court have the thing once only, and in a printed form.

12,659. *Mr. Gordon.*—Or the material parts?—Yes; but in *hæc verba*, so much as is necessary. That is the thing which I think tends most to the length of our pleadings.

12,660. *Lord Barcaple.*—And that is irremediable: you must have these documents?—Yes.

12,661. *The Chairman.*—The counsel who has to argue the case in court is the same counsel who prepares the bill?—The junior counsel prepares the bill.

12,662. But there is a junior, who argues the case?—It is the special function of the leading counsel to argue the case. The junior only supplements him.

12,663. But what I mean is, that the junior who is to appear in court afterwards is the counsel who prepares the pleading?—Generally, in 999 cases out of 1000. He is there to explain his own pleadings, and to be answerable and responsible for anything that may appear abnormal in them.

12,664. *Mr. Gordon.*—There is a power of amendment?—In bills, but not in answers. An answer being on oath cannot be altered, and all our answers are on oath. We know no such thing as an answer which is not on oath, except where it is specially dispensed with, which is very rare.

12,665. *The Chairman.*—But the defendant's own case may be amended?—No; it is on oath. The only pleading of the defendant, which for the purpose of considering its nature one has analyzed into two or three, is one document in one printed paper, and all on oath.

12,666. *Mr. Justice Willes.*—Does a peer answer on oath?—No; he answers on honour. A peer has considerable privileges in the Court of Chancery, and that (if it be one) among them.

12,667. *Mr. Webster.*—Could the plaintiff amend where he has made oath?—There is no technical reason why he should not amend, although he may have verified his original bill by affidavit; but he would be in a very inconvenient position if he stated a case in his pleading which was inconsistent with his own affidavit.

12,668. Then he seems to fight at a disadvantage in the Court of Chancery?—On the whole, a plaintiff has the advantage.

12,669. *Mr. Gordon.*—Can the plaintiff withdraw his bill at any time?—Yes; at any time, on payment of costs.

12,670. Can a defendant withdraw from the suit?—He can offer to pay the whole that is asked against him, and the costs; and then he is entitled to stop the suit.

12,671. *Mr. Webster.*—Could the defendant, who discovers a new ground of answer or defence after he has sworn his answer, get it made available in any form?—Whenever a plaintiff amends his bill, the defendant has a right to put in a further answer; and therefore, if after putting in the first answer there should be an amendment of the bill, the defendant, having subsequently discovered matter material to his defence, would be able to introduce it in his amended answer; but if there be no amendment of the bill, he can only bring forward the new matter by special leave of the court to file a supplemental answer; which leave is very rarely given. The application is not frequently made, and very infrequently succeeds.

12,672. *Mr. Campbell.*—Such an application would be based on affidavit, I suppose?—It would.

12,673. *The Chairman.*—Affidavit to prove that the matter had recently come to his knowledge?—Not necessarily that; but to excuse his not adverting to it in the first instance. I think there is a case of *Fulton* v *Gilmour* before Lord Cottenham — one of the leading cases on that point—in which a defendant, having raised in his answer a defence arising from an East Indian insolvency, found out that he had mistaken the nature of the procedure, and that it was a much more

complete defence than he had supposed it to be. It was not a case in which the fact had been unknown to him; but the proper conclusion to be drawn from it was unknown to him.

12,674. Was the amendment allowed there?—I believe it was; and the case was so clear that the suit dropped.

12,675. *Mr. Webster.*—The suit was founded on a docqueted account, and the partner had retired and advertised out?—I do not remember the details, but the supplemental answer put an end to the suit. In cases of supplemental answer, the court always require a distinct statement on oath that it is not for purposes of delay, and that it is a *bona fide* case.

12,676. *The Chairman.*—Is there any condition of costs imposed?—That is in the discretion of the court; but, in general, the court would make the person to whom the indulgence was granted pay the costs.

12,677. The previous costs?—The costs of the motion. When the supplemental answer is once filed, it becomes part of the pleadings in the cause, and would be dealt with in respect of costs as any other pleading, I suppose.

12,678. *Lord Barcaple.*—Do you think that system of making affidavit to prove that interlocutory orders asked by parties are not asked for the purposes of delay, has any real effect in preventing unnecessary delay and miscarriage of justice; or are they apt to be emitted very much as matter of course?—I think they have no effect.

12,679. *Mr. Webster.*—Does the court exercise discretion with reference to time for pleadings in all matters; or are there fixed periods within which any one thing must be done?—There are fixed periods, but in all cases extendable by the court.

12,680. *Mr. Campbell.*—I suppose the court is generally content to take the consent of parties as sufficient ground?—A consent would in all cases be a sufficient ground.

12,681. *Lord Barcaple.*—Is there very much time lost in the taking of evidence before examiners, from the difficulty of getting the parties to go on regularly?—There is a great deal of time lost in taking evidence before the examiners of the court, because the examiners at present have got more work than they can get through without great delay.

12,682. But, apart from that, do you find that the parties themselves, and their solicitors, are apt to let the matter lie over as long as it pleases?—I think there is often a tendency on both sides to delay to the utmost possible extent.

12,683. *Mr. Gordon.*—Mutual indulgence?—Mutual indulgence.

12,684. Has there been any attempt, by rule of court, or otherwise, to prevent such indulgence being granted in the Court of Chancery?—I am not aware of that. Either party has considerable facilities of driving on the other; but if neither party wishes to proceed rapidly, the thing sleeps.

12,685. *Lord Barcaple.*—You think there is no great harm done if they are equally willing to let it lie over?—I don't know that there is any great harm done in these circumstances. The court is doing some business.

12,686. *The Chairman.*—Such a thing may occur as parties not being dilatory, but only their representatives?—That may occur.

12,687. Then harm is done?—Yes.

12,688. *Lord Barcaple.*—And harm is done to the credit of the court, if causes occupy years, that might have been disposed of in months?—Yes.

12,689. *Mr. Gordon.*—The terms for pleading may be enlarged of consent?—To any extent, I believe.

12,690. *Lord Barcaple.*—But always by the intervention of the judge, or of the chief clerk?—Of the chief clerk.

12,691. That requires an order. The solicitors cannot do it?—Not without an order; but where there was consent, I should think an order was never refused. It must be remembered, that of the cases that are originated in the Court of Chancery, a very great many—I cannot say what fraction—are compromised. When the parties know what the case on the other side is, they generally find they have overestimated their own case a good deal, and become more willing to give and take; and, as a matter of fact, a very great many cases are compromised. I think it would not be unfair to say that a compromise is the natural end of a Chancery suit.

12,692. *Mr. Webster.*—Is not the wish to effect such compromises one cause of a great part of the delay?—I believe that that is so. No doubt, on the other hand, the delay causes people sometimes to compromise who would not otherwise be willing to compromise; but a great deal of the delay that takes place in court is due to the feeling on both sides, that a compromise would be the natural end of the suit.

12,693. *The Chairman.*—Not so much as half the cases are compromised, I suppose?—I cannot say; and I suppose it would be very difficult indeed to ascertain the statistics in any way.

12,694. Do you think it would be under or above one-half?—Cases are compromised in different stages. There are some cases which are compromised before the hearing, in which case it may be said that the thing is not fought at all. A great many other cases are compromised after decree—after the accounts have gone on to a certain extent—sometimes not only after the hearing, but after several hearings. In order to make the statistics of compromise worth anything, it would be necessary to distinguish between those cases which are compromised when all parties see their rights, with the view of just getting rid of the further proceedings in the suit, for the sake of saving a little delay and expense, and those cases which are compromised so early, that in fact the court has exercised no judicial action upon them.

12,695. Do many cases go to arbitration from the Court of Chancery?—Not many. The cases which go to arbitration, I conceive, are generally cases which it would not be desirable to discuss in open court; or else, cases which an engineer, with a view, is the proper person to decide.

12,696. A case depending upon the opinion of an expert?—Yes.

12,697. Are there considerable arrears before the judges in Chancery?—Not at the present moment, I believe.

12,698. There have been within the last few years?—The arrears have not been very serious at any time, I think, during the last few years.

12,699. Within what time after a case comes into court, after the bill is filed, may it be discussed upon its merits—I mean an average case before a Vice-Chancellor?—I think if the parties are tolerably inclined to be prompt, that a case of an ordinary description, in which full pleadings are required and considerable evidence is required, would probably take between three-fourths of a year and a year before it was heard.

12,700. When the evidence is complete, is it then put down for hearing, but not till then; or may the evidence be taken after the pleadings are completed; and does it hold its place on the roll?—As a matter of fact, causes come into the lists for hearing long before the evidence is complete, and there is no more ordinary application to the court than to strike out a cause set down for hearing for a particular day, on the ground that the evidence is not complete.

12,701. Then the three-fourths of a year would be consumed in preparation of the case, not making any allowance for arrears on the roll?—When I said three-fourths of a year to a year, I was making some allowance for delay in the court after the case was ripe to be heard.

12,702. Of course there are cases which are much longer of being heard?—There are cases much longer of being heard. There are cases in which the pleadings take a very long time indeed.

12,703. How long would you say?—I cannot put any limit to it. These are generally cases in which the parties are not in a very great hurry; but if the case is extremely complicated and the pleadings very heavy,

John Wickens.

the delay is more often to be attributed to counsel than to anybody else.

12,704. But sometimes they may be two or three years in the course of completion?—I am afraid that there have been instances of such things. I don't think that there can be any excuse for the most complicated case taking nearly that time for the completion of the pleadings.

12,705. *Lord Barcaple.*—In what form does a Vice-Chancellor give his decision? What does he do in giving his decision, besides orally announcing his opinion?—Strictly speaking, he does nothing but orally announce his opinion.

12,706. He does not write or dictate any formal decree?—Not unless he thinks it necessary in order to avoid misconception as to what his real opinion is. In a case of great refinement and difficulty, the Vice-Chancellor would no doubt superintend the actual wording of the decree. Some judges are more inclined to do that than others; but in a case of great difficulty, I think they would generally do it. But that is the exception. The rule is that he pronounces his judgment, and that the manipulation of the decree is left with the counsel and with the registrar.

11,707. And is afterwards adjusted?—Yes.

12,708. Is that adjustment often a matter of some controversy?—Very often.

12,709. *Mr. Gordon.*—Controversy as to the terms in which the judgment is expressed, or as to the result?—Controversy as to the machinery to be adopted for working out what the judge intended, not generally as to the intention of the judge.

12,710. *Lord Barcaple.*—And the judge does not, at the time of pronouncing the judgment or afterwards, sign any document?—I believe not.

12,711. *Mr. Webster.*—That is to say, for the court of review?—The decision of the court of first resort in Chancery may be re-heard before the Lord Chancellor or the Lords Justices, and then there may be an appeal to the House of Lords; but before there can be an appeal to the House of Lords, it must be enrolled, which involves the signature of the Lord Chancellor, whether it be his decree or the decree of the Lords Justices; but it is a merely formal signature.

Edward William Le Riche.

EDWARD WILLIAM LE RICHE, Esq., examined.

12,712. *The Chairman.*—What is your profession?—I am a solicitor.

12,713. Have you had much experience?—I should say an enormous experience in common law cases.

12,714. In one particular agency house?—Yes; I was chief clerk in the largest common law house in London—Messrs. Gregory's—for more than twenty years.

12,715. *Mr. Webster.*—Would you describe the course of procedure in a suit at common law, particularly from the solicitor's point of view? What is it you do from the commencement to the trial of the suit?—A client consults you as to taking proceedings to recover a debt, and you write a letter for payment. Failing payment, you issue a writ, which is done in our courts by præcipe,—in Exchequer, or Queen's Bench, or Common Pleas, a writ or summons for John Jones against Thomas Thomas,—then the attorney's name and address, and the date, and you fill up the writ on parchment. You then take the præcipe with the parchment to an office called the Writ department of each court, and it is stamped with the seal of the court. Then we make a copy of it, and serve that copy, if it is to be served, in London; or we send the original to a country attorney, to effect service where the defendant resides.

12,716. *Mr. Baxter.*—Is the account in the cause of action in this writ? Does the defendant know what it is?—Yes; on the back of the writ it is said that the plaintiff claims so and so. Suppose I brought an action for goods supplied on the 1st of January 1869, I should say, '1st January 1869, to goods delivered, so much.'

12,717. He gets a copy of it?—Yes.

12,718. How do you serve it? Do you put it in the post office?—No; that is not allowed according to our practice. There is a mode of giving constructive service, if the defendant evades service. Then we have a mode of making three calls and leaving a copy of the writ, and applying to a judge of the superior court for an order on the defendant to appear as upon service. The order is then made, that in three days after service of that order, the action shall proceed as if personal service had been effected. After the writ is served, the defendant has eight days to appear; if he does not enter appearance, we sign judgment for want of appearance.

12,719. How is the appearance entered? Is it entered in court?—Yes; what we call in court. It is a small slip of parchment. 'In the Exchequer, John Jones, plaintiff, and Thomas Thomas, defendant. Edward William Le Riche, attorney for the defendant, appears for him.' That is filed in court with a 2s. stamp on it. The defendant is then in court. It is the practice to give notice of that appearance; that is not absolutely necessary, but it is considered courteous to do so.

12,720. *Mr. Webster.*—Who gives the notice?—The defendant's attorney gives notice to the plaintiff's attorney of the appearance; and 4s. is allowed for that in the taxed costs. That is the inducement for the attorney to be courteous. When the appearance is entered, the plaintiff delivers a declaration.

12,721. *Mr. Baxter.*—How do you mean?—One attorney sends it to the other.

12,722. Does he not put that into court at all?—No; there is a case in which it is filed in court; but that is very rare. Supposing the writ is not specially indorsed, the plaintiff has to file it in court; but that so seldom now occurs, that we either have the writ specially indorsed so as to enable us to proceed to judgment in case of need, or the defendant appears; and the third case very seldom occurs. Then we deliver our declaration, which is a printed form, headed, ' day of in the year of our Lord 1869, Middlesex, to wit (where the case is intended to be tried). John Jones sues Thomas Thomas for so much for goods sold, and for the account stated.' I am now giving the commonest form possible; and the plaintiff claims so much, being an amount sufficient to cover the debt sued for, allowing for interest.

12,723. The one attorney hands that to the other?—Yes; it is folded up, and on the back of it is just the name of the court,—*Jones* v. *Thomas:* declaration. It is addressed to the attorney who has appeared, delivered, and the defendant has to appear in eight days for judgment, the attorney delivering putting his name at the foot.

12,724. *Mr. Webster.*—The claim in the declaration is a claim for damage, not a claim for payment of the debt with interest? It is a claim for a sum of damage equivalent?—It is equivalent. He claims so much, being sufficient to cover the debt and supposed interest.

12,725. But the claim is for damages?—No; not in the sense in which you put it, because you must not separate the special indorsed writ from the declaration. The special indorsed writ is a claim for debt, and that must be a liquidated amount. Therefore the declaration cannot be for damages when the account is liquidated.

12,726. *Mr. Baxter.*—The declaration is not signed by counsel or agent?—No; the declaration is never signed.

12,727. Who prepares it?—In common cases the attorney; but if it is a little out of the way, we send it to a special pleader, and sometimes we get it done for 10s. 6d. or 7s. 6d.; but if it is a case of more importance, we send it to a barrister, and pay him one or two guineas, or more, as the case may be. Then the defendant has to plead in eight days from the delivery of the declaration.

12,728. How do you fix the date of delivery?—It bears date, and it reckons from the time of delivery.

12,729. Is the time of delivery noted on it?—The date when it is delivered is noted on it. Supposing it is delivered to-day, to-day is put on; and on the back there is a notice to plead in eight days, otherwise judgment. If the party does not plead at the expiration of the eight days, or obtain an order for time to plead, the plaintiff can sign judgment for want of a plea.

12,730. *Mr. Webster.*—Must the application for time be made before the expiry of the eight days, or merely before judgment has been signed?—Strictly speaking, you ought to serve the summons on the seventh day, expiring on the eighth day; but often we are driven for time, and we serve it on the eighth, and as the summonses are returnable at eleven o'clock, it stays judgment. There is rarely a case in which we do not get time. We sometimes get a day extra at a risk, but we save judgment. Supposing the defendant does not plead, we then sign judgment.

12,731. Tell us what that is?—It is a simple sheet of paper, with on the top, 'Judgment for want of plea, so much,' taking the amount specially indorsed. This is called the incipitur. You copy the portion of the declaration ending, 'The plaintiff sues So-and-so.' That is all, and you take that with the declaration to the judgment clerk; he signs the judgment, and marks it on the margin, 'Judgment signed' on such a date. Upon that, if the party has appeared, you draw out your costs, and you must give a copy of the notice to the opposite side. You then attend before the Master; the costs are taxed, the blank for the costs is supplied by the Master, and it is called the allocatur. That is the case where a party appears but does not plead.

12,732. Suppose he does not appear?—If he does not appear at all, on the specially indorsed writ, you sign judgment for want of appearance, and your costs are marked according to a regular scale, £3, 8s. or £4.

12,733. *Mr. Baxter.*—Have you to lead any evidence, or to substantiate your claim in any way?—None whatever, on a specially indorsed writ.

12,734. *Mr. Gordon.*—It is by default?—Yes.

12,735. *Mr. Webster.*—Suppose the judgment by default, and at a subsequent period the defendant wishes to state a defence, by what course of procedure does he get his defence stated?—He serves a summons to set aside the judgment, and to be let in to appear and defend; and that he generally supports by an affidavit disclosing merits, or some inopportune circumstance over which he had no control,—as for example, that his attorney coming to appear broke his leg. On that, the judge generally makes an order that he should be let in, he paying the costs in any event, because that is not the fault of the plaintiff. He pays the costs either then, or at the end of the suit.

12,736. The whole costs?—The costs thrown away by his not having appeared in due time. These are the only costs the Master would allow, because the writ is good for subsequent proceedings.

12,737. *Mr. Gordon.*—Is there any time within which that application must be made?—I know of no time.

12,738. If it has not been put to execution?—I have had it even after execution, and I have had to pay the sheriff's charges in addition to the taxed costs,—supposing the writ was a specially indorsed writ, all the costs marked on the judgment.

12,739. *Mr. Webster.*—Take the case now where there was appearance, and where the defender pleaded?—If the party pleads, you take the next step, which is a joinder of issue. That is done in the same way in the Court of Exchequer or Common Pleas or Queen's Bench—then the date, 'the plaintiff joins and takes issue on the defendant's plea.'

12,740. *Mr. Baxter.*—But what is the defendant's plea?—Supposing he pleads, the pleas are various—not guilty, never indebted, and so on.

12,741. That is not signed either?—No.

12,742. And it has just the attorney's name on the back of it?—No pleadings are signed now. Many years ago they used to be signed.

12,743. All the authentication is the attorney's name on the back?—Yes; but the attorney, of course, is liable to his court to be struck off the roll for malpractice.

12,744. *Mr. Webster.*—Who prepares the defendant's plea?—I should prepare all my common pleas, but not my special pleas. There is no reason why I should take the responsibility of doing so, when the charge would be allowed me in costs. I would say, what is fairly allowable against the client I don't see why I should take the responsibility of, and I might be better employed doing something else.

12,745. *Mr. Baxter.*—The defendant's pleas are very short?—Now they are, but I have had very long pleas. I was taxing some pleas to-day, where the pleas were 15 folios of 72 words.

12,746. *Mr. Webster.*—How many writs did that consist of?—I speak of the pleas themselves.

12,747. *Lord Barcaple.*—Was the bulk of that long paper occupied with statement of fact?—Yes. In the case I refer to, it was setting out a composition deed.

12,748. And it was set out *in extenso*?—Yes.

12,749. *Mr. Webster.*—You were describing the joining issue to us?—Yes. Supposing the plea is 'never indebted,' then there is the replication which is now called the joinder of issue. The special replications are different things altogether,—that is, perhaps that they traverse, or are in confession and avoidance; but if it is simply joinder of issue, as if I say, 'I am never indebted,' the plaintiff joins issue: 'therefore, etc.—therefore let the jury come.' Then a copy is made of the whole proceedings, including the declaration, plea, and the order to let the jury come; and the only alteration is that you introduce, 'who has been summoned to answer by virtue of a writ issued on such a day.' You put in the date in the issue, so that when the record is engrossed, it may appear on the face of the proceedings when the action was commenced. You fill that up, and then put on the back, 'In the Queen's Bench, issue, so and so—Mr. —— defendant's attorney, etc.,—Take notice in this cause for the first sittings at Michaelmas term, to be holden at Westminster Hall, or at Guildhall, or at the assizes at Liverpool, in and for the West Derby Division of the county of Lancashire,' as the case may be.

12,750. All this time have these pleadings not been in court?—Not one of them. That completes the issue and the notice of the trial.

12,751. *Mr. Webster.*—The defendant's solicitor is in possession of that?—He is in possession of a fair copy of it. Then you have to engross it upon parchment. The next step is to set down the cause for trial.

12,752. *Mr. Baxter.*—Have you to get the leave of the court for that?—No; you put that upon a slip of paper, paying £2, and in due time you lodge the record. You engross the record on parchment, which is a *fac simile* copy of the issue, the names of the parties, and the name of the attorney lodging. That is lodged, and it takes its place in the list. I should state that we have to annex to the record copies of all the particulars delivered in the action, whether they be particulars of the plaintiff's demand or of the defendant's set-off. By rule of court, we must annex that. You also get a common jury panel, if it is to be tried by a common jury, which is a list on paper of the jurymen to be summoned for that particular place, Middlesex or London, as the case may be. The particulars and that list are annexed to the record, and lodged with the associate. £2 are paid; and he enters it on the list, and it takes its position for trial in due course.

12,753. *Mr. Webster.*—If the trial be in the metropolis, the associate retains that in his custody; but how is it if the trial takes place at the assizes?—Then you send the record to a correspondent.

12,754. The London solicitor sends it to a correspondent?—Yes; to be lodged with the associate at the opening of the Commission.

12,755. *Mr. Gordon.*—Or the assize clerk?—Yes, at the opening of the Commission. Directly the Commission is opened, he appears in order to get an early

Edward William Le Riche.

entry; but if he wants a late entry, he delays the entry accordingly.

12,756. Can they not be entered till the Commission is opened?—No.

12,757. *Mr. Webster.*—Do the trials commence immediately after the Commission is opened?—No; not on Commission day, as a rule.

12,758. *Lord Barcaple.*—In the event of the case having been conducted by the London solicitor on his own account, and not an agent for a country solicitor, does he generally go down to the assizes to take charge of his own case?—There is a practice that the Masters pursue in allowing costs, that the attorney is entitled to follow his record. Strictly speaking, he might be at the assize town on the Commission day, and so *de die in diem* till the case is tried; but we generally send our records to be entered, and arrange that we shall be telegraphed for when we are likely to be required with our witnesses.

12,759. But the London solicitor goes down ultimately, or his head clerk?—Clearly; unless he likes to trust an agent; which would not be wise if it is an important case.

12,760. Then he does not generally trust an agent?—No; we should not do that if it was an important cause.

12,761. *Mr. Webster.*—Is there any other procedure before the matter comes before the jury?—No; I think I have stated in substance all that takes place. If you mean as regards interlocutory proceedings, there are a great many sometimes. There are summonses to inspect, summonses for interrogatories, summonses for discovery, summonses for time to plead, and for particulars.

12,762. *Mr. Baxter.*—These are before the Master?—Yes; except interrogatories and discovery, and that is reserved for the judges; but we go by consent sometimes before the Masters to save time. There are also summonses to change the venue.

12,763. *Lord Barcaple.*—The interrogatories for discovery require to be answered upon oath?—Yes.

12,764. Is that a form of procedure often adopted?—Very often; and it is a course which I generally recommend in every case if there is the slightest doubt. I have actually succeeded in causes by getting answers to interrogatories.

12,765. And you shorten your evidence afterwards?—Yes.

12,766. *Mr. Gordon.*—That is to say, the pleadings do not disclose the real facts of the case?—The pleadings disclose very little. For instance, if I plead 'never indebted,' you cannot tell what my ground may be. It may be partnership, or a great many defences would come under that. It gives no information whatever.

12,767. *Mr. Webster.*—It is only by discovery that you come to know?—You know a good deal by that. For instance, the other day I succeeded in a case by exhibiting interrogatories, which I am certain I could not have succeeded in but for the answers. Sometimes a party makes bold to swear very strong in answer; but if he makes a different statement afterwards, he is asked if he did not swear to such a thing in reply to such an interrogatory, and how he reconciles the answer he now gives with that. That is very beneficial sometimes.

12,768. Does the discovery investigation include the getting access to documents and books?—No, that is a distinct thing. If you don't know what documents your opponent has, you generally make an affidavit, and serve a summons for discovery, and in that affidavit you set out, if you possibly can, that there is one document,—marking it as well as you can; and upon that the judges will invariably give an order in general terms for all documents. Then you get, in your answer to that, a list of all the documents. Upon that you serve a summons; and the party generally states in answer to that, that he does not object to give inspection of such and such documents. He sometimes puts them in two schedules, and says, 'The deponent does not object to give inspection and copies of the documents mentioned in schedule 1, but he does object to give inspection or copies of the documents mentioned in schedule 2.' Thereupon the opposite party serves a summons to inspect, if he chooses, the whole of the documents, and raises the point before the judge whether he should not have, not only inspection of those that his opponent is willing to grant, but those that he is unwilling to grant inspection of; and his Lordship decides that. That inspection is had at the cost of the applicant, who pays 6s. 8d. per hour generally, and 4d. per folio for the copies; and that he cannot get from the opposite party. It is analogous to the old system in the Court of Chancery for a bill of discovery simply. In order to get the costs, you must make it a bill of discovery, and something else. Upon that we serve a subsequent order for the inspection and getting the copies, and we use them for our own purposes afterwards in the suit.

12,769. *Mr. Webster.*—Suppose the genuineness of the document to be matter of dispute, and you wish to have evidence upon that point, the document being in the hands of the opposite party, what do you do?—To test the signature to see whether it is a forgery?

12,770. Yes?—We would swear an affidavit. I had a case of that sort the other day, which was decided adversely to me. I sued upon a promissory note. Unfortunately, I sued as executor; the testator was of course dead, and the only witness to prove the writing was a lunatic; consequently I was without any proof whatever. I then exhibited interrogatories to get the party's answers. He still kept to the fact that he had never signed any document or paid any interest, whereby to take it out of the operation of the statute of limitations. He made a counter application for inspection of the note, on the ground that he did not recollect that he had ever signed it; and an order was made, and he had inspection of the note, so that he could test his own signature to see whether it was genuine or not.

12,771. The document, however, remaining in your hands?—Yes. We are not bound to part with the document. He is bound to follow and inspect the document where it is. We are not bound to send our document through the post, at the risk of loss.

12,772. *Mr. Campbell.*—Take the case of a tradesman's books, which, on inspection, have a certain appearance of being tampered with, in so far as entries look as if they had been made at dates subsequent to the dates they bear, and had been interpolated for the purpose of furthering the particular claims which may be made in the suit. How would you get access to the original books in such a case as that?—The only ground on which you can have a right to inspect the books and documents in the custody of another person is, that they help your case. Therefore you have to show *prima facie* in your affidavit that they will support your case. Once you have done that on affidavit, you get an order to inspect the books; but you would have to go and inspect them where they are.

12,773. But if you wanted to elicit that before the judge or the jury?—You can subpœna the party to produce his books; or if he is a party to the cause, you may give him notice to produce his books.

12,774. *Mr. Webster.*—You mentioned that the London solicitor usually attended the trial, though it took place in the country: is it usual for a country solicitor to attend the trial of a cause in London?—No; the converse of the proposition is not correct in fact. The Masters say that the agent in town is, as a rule, much more qualified to attend the trial in London, and therefore they won't allow for the country attorney, as a rule, coming up; but there are certain cases of very great importance when they do allow it. These, however, are exceptional.

12,775. *Mr. Gordon.*—Suppose the country agent was to come up, and that no charge was made for the town agent, would the country agent get his travelling expenses and time while travelling?—No; he would get so much as the town agent would have got; that is, 13s. 4d. for watching every day till the cause came on, and 2 guineas for the day that the cause was tried.

12,776. *Lord Barcaple.*—The country solicitor can-

not, I suppose, in practice conduct even the previous part of the proceedings before the trial, except through an agent in London?—It is quite impossible, unless in the case of an attorney who lived within twenty or thirty miles of London, and had an office in London.

12,777. He must have an office within a certain number of miles of the General Post Office?—Yes; and he must also take out the London certificate.

12,778. In addition to the certificate he holds?—No; one certificate, for which he must pay a little more.

12,779. *Mr. Webster.*—Would you describe to us the forms of recording the verdict, and of dealing with the verdict when the trial is in the metropolis, and also when the trial has been in the country?—They are synonymous, as a rule. I don't know any distinction at this moment. In London the jury are sworn; the junior counsel for the plaintiff opens the pleadings; then the senior counsel states the case, and they call witnesses to prove their case; the defendant answers, and then the verdict is entered. In fourteen days after that, unless the judge gives a speedier execution, I get my judgment. I apply to the associate for what is called the *postea*—called so, because it commences with the word 'afterwards;' it is indorsed in the fold of the record, and it gives the findings of the jury,—Afterwards so and so, before the Hon. Mr. Justice So-and-so, the jury found so and so. We take out this *postea* after the expiration of the fourteen days, or at the limit of the time of the speedy execution given by the judge, and we sign judgment. That is taken to the judgment clerk; we then tax costs, and the allocatur is taken on the *postea*, and execution then issues.

12,780. That is where the verdict is not to be disturbed by either party?—Yes; and I know of no distinction, so far as the trial goes, in the country.

12,781. Can you explain to us the working of references made by a judge to a Master?—Under the Common Law Procedure Act, you apply in matters of account for an order to refer to the Master.

12,782. Without any previous judicial proceeding?—You must have your action.

12,783. *Mr. Gordon.*—Is that after the pleas are given in?—No.; you need not wait for pleadings. Directly the writ is issued, either party may make application to have it referred to the Master, if he makes affidavit that it is a mere matter of account. The other side may oppose that, and say that it is not a matter of account, and the judge determines that question. Suppose he comes to the conclusion that it is a matter of account, and that the order ought to be issued, an order is drawn up that it be referred to one of the Masters, he having all the powers of a judge sitting at *nisi prius* as to amendments, and so forth. You then take the original order to one of the Masters, and get an appointment to proceed on the reference. Having got the appointment from him, you serve the copy order with the appointment on the opposite party. Then the attorney, if he has any witnesses to call, draws out an authority from the judge's clerk to give him so many orders for the attendance of witnesses. He gives the names, and he is entitled to put four witnesses, as in our common subpœnas, in each order. He gets that order, and pays 5s. for it.

12,784. *Mr. Webster.*—The opposite party getting no notice of who the witnesses are?—He gets no notice. We then serve the copy of the order containing the time that the Master has appointed for proceeding on the reference; we serve that on the witnesses, and they attend, and are sworn and examined before the Master. Supposing he cannot complete it that day, he gives another appointment, and we serve further orders, and go on till the matter is completed.

12,785. Is that usually done by counsel or by the solicitor?—It is very often done before the Master by attorneys; but counsel also attend continually.

12,786. *Mr. Baxter.*—And then the Master gives his certificate?—Yes; generally on the back of the order. I had a case the other day in which the question was whether I should get £100 odd, and the Master gave me an order for £60; he said, 'I certify for the plaintiff £60, the defendant to pay all costs.' In the order of reference the costs of the action abide the event, but the costs of the reference are in the discretion of the Master.

12,787. Do you go back to the court with the Master's certificate?—If it is a compulsory reference, you are entitled to apply at the expiration of seven days to one of the judges to obtain a judgment on the Master's certificate, unless very good reason is shown before the judge that the Master is mistaken; and then his Lordship would send it back to the Master; but in the long experience that I have had, I don't think I ever had a case where the party successfully resisted an award made in that way.

12,788. *Lord Barcaple.*—As matter of form, is it necessary in all cases with the Master's certificate to get a judgment or award of the judge?—Not in all cases. That would require some explanation. I mentioned expressly as to the compulsory clauses. You get your judgment seven days after the award, unless the judge, upon the hearing of the summons, should be of opinion that it ought not to be granted. If the award is by consent, you have to enforce it in a different manner; you have to make the order of reference a rule of court, and move for an attachment or a rule to show cause why the party should not pay the sum awarded.

12,789. You have to move in court for that?—Yes. That is a different thing altogether. But I now provide in all orders for reference by consent that the party in whose favour the award is made shall have judgment, and that gets rid of the necessity of applying for a rule. I cannot do that in the compulsory orders; but if it could be done in these, it would save the necessity of serving a summons for judgment.

12,790. You get your judgment by going before the clerk?—Yes, by going with the necessary papers before the clerk who signs the judgments.

12,791. *Mr. Justice Willes.*—Do you suppose the summons to be necessary in which one makes an order to sign judgment on a Master's award?—Your Lordship has the same view of that matter as Mr. Baron Bramwell, but I don't know that it is ever done. I told the judgment clerk the other day that I was satisfied it was not necessary after the fourteen days.

12,792. I have always thought it unnecessary to take out a summons before the judge. In compulsory references I think the certificate of the Master equivalent to a verdict; and I should have thought that you might sign judgment upon it, though the practice is to take out a summons?—I know that Baron Bramwell said in his opinion it did not require an order after fourteen days.

12,793. *Mr. Gordon.*—Are there any pleadings given in to the referee by the parties?—No.

12,794. Does he occasionally order them to give in a statement of their case?—No.

12,795. Is there no record preserved of the nature of the disputes that arise before him?—None whatever, unless it is a reference after the pleadings, after the case is at issue. It is the practice of some attorneys not to refer, if they can possibly help it, till the case is at issue, that they may then know the case intended to be set up; but there is no necessity for that.

12,796. Do you file interrogatories calling on the party to answer?—No, not of necessity.

12,797. How is it known what proceedings have taken place before the referee in the event of there being a challenge?—You cannot tell unless there are pleadings, except so far as the plaintiff is concerned. He, on the back of his writ, has indorsed his claim.

12,798. But it may arise on the defence?—Then you cannot tell; but no injury is likely to result before the Master from that, because he is master of his own proceedings, and will adjourn from time to time if the plaintiff is taken by surprise, so that he may have ample time.

12,799. Does he preserve notes of the evidence?—Yes, he takes down the evidence.

12,800. And notes of the pleading or argument?—He takes the heads of the points taken; but he always takes the evidence.

Edward William Le Riche.

12,801. *Mr. Justice Willes.*—He always has his note; and if any complaint is made, we let the case stand over till the Master is in his place in court, and then he produces his note, and explains to the court, in the presence of the parties or their counsel, what really took place. I never knew any difficulty as to what took place before the Master?—I have never known any.

12,802. *Mr. Webster.*—Have investigations into matters of disputed fact and disputed accounts been conducted satisfactorily to the members of the profession? Has it been found a satisfactory way of unravelling these matters?—On the whole it has. We do it greatly to save expense. The only objection I see to it is this, that sometimes, from the pressure of business, it is a long while coming on. I have just completed a case which I think lasted for four months altogether. My opponent was a very contentious man. He obtained a certificate that he was ill, and there were all manner of excuses of that kind, and the Master did not like to proceed *ex parte*.

12,803. *Mr. Baxter.*—But I suppose that does not often happen?—No; but the objection to the references to Masters is, that they are so much engaged with taxing costs, and probably examining witnesses and other matters, and in attending court. The other day, when I was at the Court of Exchequer, two Masters were in the court at Westminster, one was at judges' chambers under the new *régime*, and two were holding references, so that there was not a single Master to tax bills of costs. In that way it operates to the detriment of the suitor sometimes; but, as a rule, I should say that the references were satisfactory.

12,804. *Mr. Webster.*—And very inexpensive as compared with jury trial?—Very, in certain cases. But as a matter of fact, the costs of references and trials greatly vary according to circumstances and the importance and nature of the cases. Voluntary arbitrations are sometimes less and sometimes much more expensive than trials. I had a reference about a year ago in which the number of meetings was between twenty and thirty, and the arbitrator charged about £400 for his fees.

12,805. Would you say that the result was more or less satisfactory than the result of a jury trial?—If I had a case in which I had a witness who would be a hard swearer, I would not have a reference, but I would bring him before the judge and before the jury. But if I had a doubtful case, where possibly justice would be done without technicality, I should be more likely to succeed before an arbitrator, as he would take a more lenient view, and a judge would hold more to the strict law. I would venture to suggest for the consideration of the Commissioners, that another mode of disposing of actions in addition to the present modes by arbitration and trial before jury should be instituted. Both these modes have their advantages and disadvantages; and as it is the opinion of many that juries can be safely dispensed with in all cases except criminal cases, and which is evidenced by the number of references to lay and legal arbitrators, I would suggest that the judges be required to try cases without juries if both parties should consent, and that there should be the same appeal from the judge's decision as at present, unless the parties should agree to the decision of the judge being final.

12,806. *Lord Barcaple.*—In the proceedings before the Master, do counsel appear?—Yes; they may attend if they choose.

12,807. Is it common to have counsel?—Yes; you have counsel there as much as attorneys. Counsel are allowed.

12,808. In the event of the case being one which if it went to a jury would be a short cause, tried in an hour or two, from what does it result that the procedure before a Master is so much less expensive? If there are counsel before the Master, and if the proceedings are very apt to go off in consequence of his being otherwise engaged, how does it come that the expense is usually much less before a Master than before a jury?—A plaintiff going before a jury must always have two counsel; but upon a reference he never has more than one, unless in large railway references. In jury trials also, witnesses have frequently to wait for days till prior cases are disposed of; whereas in references a day is fixed, and the case must come on.

12,809. *Mr. Gordon.*—May the Master not grant delay?—Yes; but if a party applies for a postponement of a trial or a reference, he may have to pay the cost of the day.

12,810. After a portion of the proof has been led, does the Master generally adjourn to enable witnesses to be brought forward?—Yes; that is one great advantage in references. If we find that our case, from some unforeseen circumstance, is not strong enough, the Master would, on intimation that we could prove certain facts, but that we had been taken by surprise, adjourn the case for that purpose, in order that justice might be done.

12,811. *Lord Barcaple.*—Is the detention of witnesses a heavy portion of the expense of a jury trial?—I think so, especially if they come from a distance. I have a case where the witnesses will come from Yorkshire, and I cause one of my clerks to watch every afternoon whether it is in the paper for the following day, so that I might telegraph immediately for the witnesses to travel all night.

12,812. But the witnesses must make the same journey, whether the case is before a Master or before a jury?—But before a Master they come with the certainty of being heard. In the other case they may be kept two or three days, even when the case is on the paper; and in order to save expense as much as possible, I never bring up the witnesses till it is in the paper.

12,813. Have you not trials during term?—Yes; in Middlesex.

12,814. Are you not better aware of the day on which the case may come on there than in cases taken at the sittings?—It is the same thing. There are sittings in term, and sittings after term. There used to be certain sittings in London and in Middlesex (at Westminster Hall and Guildhall). Now there are no sittings in term, but only sittings *nisi prius* at Westminster Hall, and after term they take the sittings in London.

12,815. *Mr. Gordon.*—Why have you not sent the Yorkshire case which you have mentioned to the assizes at York?—I am the defendant in that case; but I will explain why it is not done. There is an assize after Hilary term, and there is no assize for the trial of causes after Easter term, which brings you down to August. I could try a case during Easter term, and get my judgment earlier; all I want is 26 days to get to trial,—8 days on the appearance, 8 days on the declaration, and 10 days' notice of trial.

12,816. The plaintiff resorted to Middlesex, then, to avoid three or four months' delay?—Exactly.

12,817. Would the expense of trying the case at York be greater or less than the expense of trying it in Middlesex?—That is very doubtful, because at the assizes you may be kept for ten days. I had a case in which I was concerned for a person in the city of London: the venue was laid in Liverpool, the cause of action arose there, and most of the witnesses were there. I was for the defendant, and I was ten days waiting for that cause. I came within two of it once, when the special juries intervened; and until the second judge disposed of the criminal business, my case could not get on.

12,818. If a case is important, do you often take leading counsel down specially?—That is not done often. It must be a very heavy case indeed in which that is done.

12,819. I suppose the facilities afforded by railway travelling make it cheaper now to have cases tried in London than it used to be?—Very much; and the power of telegraphing also makes a very great difference.

12,820. *Mr. Webster.*—Would you explain the system of dealing with the fees as between principal and agent, where a solicitor in the country employs a London solicitor?—They can make their own arrangements. I am sorry to say that some attorneys take less than

others; but the usual rule is equal division. Some houses also say, 'It is not fair that we should keep a large staff of clerks, and pay a heavy rent, and also pay a stationer for copying, and you get the nett half of the profits;' and therefore some agents in certain cases have taken 2½d., and let the balance go to the attorney in the country—that is 2½d. to one, and 1½d. to the other. But, as a rule, they divide it equally; and supposing the charge to be 4d. a folio for copying, that is 2d. to each.

12,821. That applies to the charges by the London solicitor?—Yes.

12,822. And not to the charges by the solicitor in the country?—The London solicitor has no share of the country attorney's charges.

12,823. The London solicitor makes the outlays?—Yes; taking care, if he can, to get something on account from the principal. But he makes the outlay, and does all the London work.

12,824. *Mr. Gordon.*—Does he charge interest on the outlay?—No. Some houses give notice to their clients that after a year they will charge interest upon the balance.

12,825. *Lord Barcaple.*—Are there a considerable number of causes which come to be decided by the full court without having been in any form before a single judge?—No.

12,826. I refer to cases which come before the full court on demurrer and on special cases, where the full court dispose of the cause without its ever having been in any form before a single judge, unless it may be for interlocutory orders at chambers?—The only cases I remember are cases which come up on special cause or upon demurrer. These come before the full court.

12,827. Are these cases pretty numerous?—Yes; there are a great many of these cases; and then the special case would determine the action. You could have an appeal on the special case, and go to the court above with it, according to the Common Law Procedure Act; but in the case of a demurrer, supposing the demurrer by the defendant was after the declaration, as not disclosing a cause of action, if the court were of opinion that the plaintiff had no cause of action, the demurrer would dispose of it. But they would still be entitled to bring error upon the judgment of the court, which would be argued in the court of appeal called the Exchequer Chamber.

12,828. But these are cases which are disposed of by the full court upon the law of the case?—Yes.

12,829. There being no question of fact before them at all?—No; but it is very seldom that there is only a demurrer, and not a plea raising questions of fact. You seldom find a case where there are not issues of fact as well as law.

12,830. In such cases where there is a demurrer, and also a plea upon fact, the demurrer is first disposed of, is it not?—Not of necessity.

12,831. But is it frequently so?—I don't know whether you could say frequently, because it very often happens that we can get a trial before we can get the demurrer argued, and it often happens that if the fact is decided for us, there is no need of the demurrer. I have just had a case where a composition deed was set up, and there was a demurrer. The defendant did not attend at the assizes in time; and consequently he did not prove his deed, and the verdict went against him. On that the plaintiff applied to strike out his demurrer, because there was no occasion for him to try the question of law when the other party had not proved his issues in fact; and he got his judgment.

12,832. But where the case does go upon demurrer before the full court without any trial at all, and where the judgment is favourable to the defendant, the cause is disposed of upon the law. Have you found any difficulty in getting the question well raised, so as to be quite intelligible to the full court, without its having been in any form dealt with before a single judge previously?—No.

12,833. Do the court or the counsel seem to find a difficulty in making the whole case perfectly intelligible, so that it may be judged of in the first instance by the full court?—You mean that by the demurrer limiting the question to be decided, not having the facts before the court, they cannot satisfactorily decide the demurrer?

12,834. No; not exactly. There may be questions of law, and the case may be one of some complexity; but is there any difficulty found in making it quite intelligible to the whole court, so as to admit quite readily of their forming an opinion on it?—I have never experienced any; but I have known cases where it would have been better that the facts had been first ascertained.

12,835. Does it frequently happen that, when a case goes to trial, it turns out, on the case being opened and explained, that truly the whole doubtful matter in the case, and the whole thing about which there is any real dispute, is a matter of law?—There are cases unquestionably which turn out to be mere questions of law.

12,836. Are they frequent?—I have known many of them; but the majority certainly require facts to be elicited first.

12,837. When they do turn out to be matter merely of law, the procedure at the trial is, I suppose, very much lost labour and lost money?—It would be to a certain extent lost labour; but if the facts are short, they would soon be disposed of, and you could raise the question of law upon the facts as proved.

12,838. But the facts are disposed of at great expense if there is a jury trial?—Yes; but the expense is very much less than it used to be, by reason of the facilities given by railway and telegraph.

12,839. *Mr. Gordon.*—Have you found any inconvenience resulting from the practice, which I understand exists in English courts, of producing documents at the trial without exhibiting them to the other party, or giving notice of your intention to adduce them at the trial?—If you want a document which is in the possession of a third party, you serve a subpœna *duces tecum* for him to produce it.

12,840. Is that communicated to your opponent?—It is not, for it would not be advisable at all times that your opponent should know the documents you intend to give in evidence. In some cases it might.

12,841. But supposing you have a document in your possession, the contents of which may be quite unknown to your opponent, you are entitled to produce it at the trial without giving him notice that you have such a document, or that you are going to call on another party to produce it. Does that lead to injustice or surprise?—I have known cases where it has led to injustice in this way, that it has necessitated an application for a new trial afterwards, on the ground of surprise. But, on the other hand, I should be very loath to let my case be known to my opponent.

12,842. *Lord Barcaple.*—Do you often see a failure of justice arising from that?—I don't think so. If it is a document which you are entitled to inspect, you can get an order to inspect it.

12,843. *Mr. Webster.*—If you know of it?—Yes; but you cannot provide for all cases.

TUESDAY, 4TH MAY 1869.

Members Present:—

THE LORD JUSTICE-GENERAL.
MR. JUSTICE WILLES.
LORD BARCAPLE.
E. S. GORDON, Esq., Q.C.
JAMES CAMPBELL, Esq.
JAMES ADAM, Esq.
J. B. BAXTER, Esq.

THE LORD JUSTICE-GENERAL IN THE CHAIR.

Henry Cadogan Rothery.

HENRY CADOGAN ROTHERY, Esq., examined.

12,844. *The Chairman.*—You are Registrar of the Admiralty Court?—I am.

12,845. Have you been long in that office?—Since 1853.

12,846. Do you hold any other office?—I am also Registrar of Her Majesty in Ecclesiastical and Admiralty causes in connection with the Privy Council.

12,847. You are a member of the Judicature Commission in England?—I am.

12,848. We are anxious to learn something of the course of proceedings in the Admiralty Court,—of the form of pleadings, among other things?—The form of pleading in the Admiralty Court is, I think, as simple as it is in any court. The rule with respect to pleading is, that 'every pleading shall be divided into short paragraphs, numbered consecutively, which shall be called the articles of the pleadings, and shall contain brief statements of the facts material to the issue.'

12,849. These are statements of fact, without law?—Without law.

12,850. By what form of writ is a process commenced in the Admiralty Court?—It is commenced by a præcipe, which the proctor or solicitor fills up, and brings into the Registry. That is the first step. The form of the præcipe is this: 'I, *A B*, of ——, do institute a cause of —— (damage or salvage) on behalf of ——.' Thereupon an entry is made in the cause-book; the cause has a number given to it; and that number, which is called the distinguishing number of the cause, is thenceforth marked upon every paper in the cause, so that it is readily known to what cause any paper belongs.

12,851. *Mr. Gordon.*—Does that number continue just for a year?—No; it runs on.

12,852. *The Chairman.*—How is the defence brought into court?—Sometimes the defendant has notice of the institution of the cause from the plaintiff's solicitor, and comes in voluntarily; often, however, the plaintiff's proctor proceeds to take out a warrant of arrest against the property, if it is a proceeding *in rem*, which most Admiralty causes are. But to entitle him to a warrant, he must show that he has a *primâ facie* case; that is, that the court has jurisdiction, and that he has a reasonable ground of action. Thereupon a warrant issues for the arrest of the vessel, which the proctor leaves with the marshal, who executes it through the collector of the customs at the port where the vessel happens to be.

12,853. The service is done under the direction of the court?—It is. Before I was Registrar, and for a short time afterwards, the practice used to be for the solicitor himself to serve the warrant through his own agent, thus, as it were, transferring the property to the defendant's possession. This practice, however, was attended with much inconvenience; and accordingly, in concurrence with the Treasury, we obtained permission to employ the collectors of customs in the different ports, to act as substitutes of the marshal; and it is through the collectors of customs that the arrest is made. One great advantage resulting from the present practice is, that the collector knows pretty nearly where every ship in the port is, and he has greater power, than an ordinary person would have, to prevent the vessel leaving.

12,854. *Mr. Gordon.*—In London the marshal does it?—Yes.

12,855. *Mr. Baxter.*—How does the defendant get notice?—The notice is served upon the ship itself. In a proceeding *in rem*, the proceeding is against the *res*, and against all persons having any interest in the property, who are cited to come in and protect their interests. The warrant is in these terms: 'Victoria, &c., to the marshal, &c., and to his substitutes.—Whereas a cause of —— has been instituted in our said court on behalf of —— against —— in the sum of ——, we therefore hereby command you to arrest the said vessel, and to keep the same under safe arrest until you shall receive further orders from us, and to cite all persons who have or claim to have any right, title, or interest in the said vessel, to enter within six days from the service hereof (exclusive of the day of such service) in the registry of our said court, an appearance in the said cause. We further command you to warn all the said persons that, if they do not enter an appearance as aforesaid, the judge of our said court will proceed to determine the said cause, or make such order therein as to him shall seem right.' The proceeding is against the *res*, and the presumption is, that there is always somebody in possession of this *res*, who will inform the parties who have an interest to appear and protect their interests.

12,856. *The Chairman.*—The form of that writ which you have just read seems to be a command to the officer who is to execute it, to give warning to parties?—It is.

12,857. But that is not done?—It is done in this way: the warrant is served on the ship, by showing the warrant to the person actually in charge of the ship, and by leaving affixed to the mast, or to some part of the vessel, a true copy of it. That is considered to be a sufficient service.

12,858. That is the whole service?—That is the whole service. Thereupon the owner appears, or sometimes a mortgagee, or some other person who may be interested in it; for any person is allowed to intervene to protect his own interest.

12,859. *Mr. Baxter.*—But when it is *in personam*, how is it done?—Then a citation *in personam* is taken out, and that has to be served personally upon the party cited.

12,860. *The Chairman.*—Just as in other courts?—Yes; it is served personally on the party cited; or if the person cannot be found, and is keeping out of the way, then, as in other courts, you may apply to the court to have substituted service.

12,861. *Mr. Gordon.*—What is the kind of substituted service generally resorted to?—Well, it is now hardly ever resorted to: formerly, if personal service could not be effected, the instrument was served upon the Royal Exchange, as being the usual resort of merchants, but that is not done now. The court directs the mode in which the substituted service should be effected.

12,862. Is advertisement in the newspapers ever resorted to?—Yes, in case of the sale of property. We never sell property till notice of the sale has been ad-

vertised three times in newspapers at certain intervals of time.

12,863. *The Chairman.*—You are speaking of the notice of sale?—Yes; not of the arrest.

12,864. That is in causes *in rem*?—Yes.

12,865. *Mr. Gordon.*—You said that before the warrant for arrest was issued, the court must be satisfied that they had jurisdiction, and also that there was a reasonable case?—Yes.

12,866. Is that done by affidavit?—It is done by affidavit. No warrant is allowed to issue without an affidavit being brought in. Here is the form of the affidavit in a cause of possession: 'I, *A B*, make oath and say as follows: That I am the lawful owner of ——— sixty-fourth shares of the ——— or vessel ———, belonging to the port of ———. 2. The said vessel is now lying at ———, and is in the possession or under the control of [state name, address, and description of the person retaining possession, and state whether he is the master or part owner, and if owner, of how many shares]; and the said ——— refuses to deliver up the same to me [and the certificate of registry of the said vessel is also unlawfully withheld from me by the said ———, who is in possession thereof.] 3. The aid and process of the High Court of Admiralty are necessary to enable me to obtain possession of the said vesssel [and of the certificate of registry].'

12,867. *The Chairman.*—That seems to set out simply the cause of action?—Yes; or, 'I, *A B*, make oath that on such and such a day I rendered certain salvage service to such and such a vessel, that I have made application to the parties for compensation, but have not obtained any, and the aid of the court is required to enforce it.' The chief clerk ordinarily fills up the warrant, which is then sent to myself or the Assistant-Registrar to sign. Should there be any difficulty as to whether the court has jurisdiction, the chief clerk always brings it to our notice, and takes our directions as to whether the warrant should issue or not. If we entertain any doubt, we refuse a warrant, and tell the parties that they must apply to the court.

12,868. But where there is no doubt about the jurisdiction you issue the warrant?—Yes.

12,869. *Mr. Gordon.*—In what circumstances do you exercise jurisdiction with reference to a foreign vessel?—We make no distinction between foreign vessels and other vessels as regards arresting them, nor whether the plaintiff or defendant be a foreigner.

12,870. Or both?—Or both. I believe that we act in this country more liberally in that respect than many foreign countries do. Foreign countries generally do not entertain suits between two foreigners. Here we make no such distinction.

12,871. *The Chairman.*—The presence of the vessel in the country is sufficient?—We consider that the claims which the Admiralty Court ordinarily enforces are liens which attach to the ship, and which follow the ship wherever she is. That is the theory on which we proceed.

12,872. According to the universal maritime law?—According to the universal maritime law.

12,873. If no appearance is made for any defendant, what takes place next?—If no appearance is entered within 14 days, the plaintiff takes out a notice of sale, which has to be advertised in the newspapers.

12,874. In certain newspapers prescribed by the court?—Yes; the *Times*, the *Shipping Gazette*, and generally a paper published at the place where the vessel happens to be. If, at the expiration of the time fixed by the advertisements, no person appears, then on proof being given that these advertisements have been duly inserted, and upon its being satisfied that there is a good ground of action, the court pronounces for the claim, and orders the appraisement and sale of the vessel. Then the proceeds are paid into court, and persons having claims against the property file the particulars of their claims.

12,875. Persons other than the plaintiff in the original suit?—Yes. The court determines the priorities amongst the different parties.

12,876. *Mr. Gordon.*—In what form do they file their claims?—They file them simply with what we call a minute of court. Each claimant is obliged to institute a separate action against the vessel; and though the vessel may have been sold in one action, the proceeds themselves are proceeds in court, and not applicable simply to that action. For instance, it very often happens that a vessel is seized in a bottomry suit first; but before that suit is concluded the seamen have entered a claim, or a salvage suit has been instituted. The owners, finding that the demands on the vessel are greater than the probable amount of proceeds, take no steps in the matter, but leave the vessel in the hand of the court. The bottomry bond-holder then proceeds to sell the vessel, and the proceeds are brought into court. Notice is then issued to all parties who have instituted a suit against the property, and the court determines the priorities.

12,877. *Mr. Baxter.*—You consider all the claims under the suit at the instance of the bottomry bond-holder?—Not exactly. The course is generally this: suppose that the bottomry bond-holder was to apply to have the amount of his bottomry bond paid out to him, notice of that application would have to be served on the seamen, the salvor, and any other person who may have instituted a suit, or rather on their proctors; and they might then come in and object to the money being paid to the bottomry bond-holder, and might maintain that their claims should be first satisfied.

12,878. *Mr. Gordon.*—It becomes an interpleader suit?—Yes; though we don't call it by that name.

12,879. *The Chairman.*—And if there is any reversion after satisfying these claims, it belongs to the owner?—Yes.

12,880. And it will remain in the hands of the court till they come and ask for it?—Yes.

12,881. When a defendant or defendants appear, in what form do they plead?—The plaintiff brings in his petition, which is ordinarily very short, and in separate articles. (Witness exhibits it.)

12,882. *Lord Barcaple.*—Is that the pleading which the rule as to articulate statements, to which you formerly referred, applies?—It is.

12,883. *Mr. Gordon.*—That is after appearance is entered within a fortnight?—Yes.

12,884. *The Chairman.*—The first part of the paper is called 'preliminary acts:' what exactly is that?—They are confined exclusively to damage or collision cases. It was found that the defendant very frequently, when the plaintiff had given in his plea, framed his defence upon the admitted facts in the plea, and it was deemed desirable by the late judge, Dr. Lushington, that the parties before they pleaded should each deliver into the registry, sealed up, a document, which is called the 'preliminary act,' containing a statement of the following particulars:—

(1.) The names of the vessels which came into collision, and the names of their masters.
(2.) The time of the collision.
(3.) The place of the collision.
(4.) The direction of the wind.
(5.) The state of the weather.
(6.) The state and force of the tide.
(7.) The course and speed of the vessel when the other was first seen.
(8.) The lights, if any, carried by her.
(9.) The distance and bearing of the other vessel when first seen.
(10.) The lights, if any, of the other vessel when first seen.
(11.) Whether any lights of the other vessel, other than those first seen, came into view before the collision.
(12.) What measures were taken, and when, to avoid the collision.
(13.) The parts of each vessel which first came in contact.

It prevents a defendant from setting up an altogether false case—at least it is done with that view. I should state that sometimes a case is heard upon the preliminary acts alone, without any pleadings at all. The rules allow that. It not infrequently happens that all the

Henry Cadogan Rothery.

issues are brought out upon the preliminary acts, and that therefore no pleadings of any kind are necessary.

12,885. In cases which are not collision cases, are there no preliminary acts?—No.

12,886. What is the first pleading in a case which is not a collision case?—The first is called a petition. I have here one. It is only in collision cases that the preliminary act is required.

12,887. When is the petition put in?—Within a fortnight after the defendant has entered an appearance.

12,888. *Mr. Adam.*—Is it always printed?—No; when given in, it is in writing. Within a fortnight from the petition being given in, the defendant has to give in his answer, and then the plaintiff has a week to reply, but frequently a conclusion is filed instead of a reply. Then the plaintiff prints and files all the pleadings.

12,889. *Mr. Gordon.*—Do you find that the printing is a great convenience?—A great convenience.

12,890. And economy?—And economy.

12,891. *Lord Barcaple.*—The original pleadings are given into court?—Yes.

12,892. And remain with the officer of court?—Yes.

12,893. *The Chairman.*—Are copies served upon the opposite party?—No document can be filed, where there is an opponent, without a copy of it having been previously served upon the adverse party.

12,894. *Mr. Gordon.*—And certified?—And certified on the back that a copy has been served; otherwise it is not received into the register.

12,895. Can you prolong the periods?—Yes.

12,896. Upon cause being shown?—Yes.

12,897. Is that occasionally done?—Very often: and one of our chief difficulties is to prevent the great waste of time which occurs from the proctors indulging one another.

12,898. *Lord Barcaple.*—Does that happen to a large extent?—I cannot say it happens to a very large extent, because our rules are very stringent, and we always make a point of refusing time unless it appears to be necessary.

12,899. *Mr. Gordon.*—Can you refer us to any rule which has the effect of preventing such delays?—It must rest very much with the judge or the officer, who, whenever any indulgence of the kind is granted, ought to condemn the party asking for it in the costs of the motion. Our rules only specify that a certain act shall be done within a certain time, and there is another rule which says that the judge or the Registrar may allow an extension of time on good cause shown, and it depends entirely on the person who grants that indulgence whether a strict hand is held over the proctors or not.

12,900. *Lord Barcaple.*—But the application for the extension of time is made by the proctor without the aid of counsel?—Yes, generally in the cheapest possible form.

12,901. Then the whole expense will be the proctor's fee on each side, I suppose?—Yes, it is so.

12,902. Is it found to be an operative discouragement?—I think so. There is the inconvenience of being called up before the court, or before the Registrar; and proctors would often sooner file their plea than have to be summoned to attend before the judge or Registrar.

12,903. *Mr. Gordon.*—Suppose both proctors agree to delay?—They would then sign an agreement and a consent in writing. We have a rule, which is in these terms: 'Any agreement between the proctors in a cause, if in writing, dated and signed by both proctors, may, if the Registrar think it reasonable, and such as the judge would under the circumstances allow, be filed, and shall thereupon become an order of court, and such order shall have the same force and effect as if the same had been made by the judge in person.' If they bring me an agreement for time, I ask the ground, and they say generally that they are under treaty for settlement of the case. If so, it seems hardly expedient to force them on.

12,904. Do you require the cause to be assigned in the agreement?—No.

12,905. *Mr. Baxter.*—Do you ever refuse delay where both parties consent to it?—No, unless it was a very unreasonable application.

12,906. *The Chairman.*—Suppose that a party fails to plead within the time, what is the consequence?—If, when a defendant has given in his answer, the plaintiff does not within a week file his reply, the defendant is at liberty to file a conclusion, and the pleadings are then concluded.

12,907. Suppose that a defendant does not avail himself of his privilege to file a conclusion?—Then, if the time has expired, we don't receive the reply unless the defendant writes on the back of it that he consents to its being filed.

12,908. If the defendant does consent, you receive it?—Yes. We consider that to be a consent.

12,909. Don't you find that indulgence is often given by a proctor to his opponent in that form?—Yes; and to the great injury of the parties to the cause.

12,910. *Lord Barcaple.*—What is the effect, as matter of pleading, of the defendant filing a conclusion?—That the pleadings are concluded.

12,911. But are they concluded in a way more disadvantageous for the plaintiff than if he had made that formal note to which you referred?—Not in the least; only the pleadings are concluded, and the parties cannot, without the leave of the court, plead any further.

12,912. That conclusion contains a denial of the defendant's statements, so far as they do not coincide with the plaintiff's statements?—It concludes the pleadings.

12,913. And no evil results to the plaintiff?—None, except that the plaintiff cannot plead further.

12,914. There would be an evil if the plaintiff wanted to put in a replication?—Yes. Then he must apply to the court to rescind the conclusion, and allow him to file his reply. The court would sometimes refuse that; but I should think it would generally be granted on his paying all the costs that have been incurred.

12,915. *Mr. Adam.*—By whom are the pleadings prepared?—They used always to be prepared by the solicitor, and settled by counsel; but I think now that they are almost invariably prepared by counsel. I have no practical knowledge of that, however. When I was in practice, it used to be as I have said; but many alterations have taken place since I became Registrar.

12,916. *The Chairman.*—You speak of the solicitor. Is that the same as the proctor?—Yes. In the Admiralty Court formerly the proctors alone were allowed to practise; the court was then thrown open, and the result has been that a great number of solicitors have come in to practise: sometimes we call them solicitors, sometimes proctors. In 1859, when I drew the rules which came into operation in 1860, the proctors were in the majority, and the definition given was that proctor shall mean any proctor, solicitor, etc. Now the solicitors are in the majority, and in any amended rule it would be better that the term proctor should be dropped.

12,917. *Mr. Adam.*—I suppose the expense of preparing a paper by counsel is allowed against the opposite party?—Yes, so much a folio; a shilling a folio for drawing, which is the solicitor's fee, I think, in all courts, and the fees of counsel in addition for settling it.

12,918. *The Chairman.*—I see there are two signatures to each of these papers?—One is the proctor's and the other is the counsel's. That is merely continuing the old practice which existed before the court was thrown open, when the proctors invariably prepared the plea, and counsel settled it.

12,919. *Mr. Adam.*—Would the court receive a paper which was not signed by counsel?—It ought not, if it observed it; and certainly the clerks in the registry ought not to receive it. It might escape them.

12,920. But it is not proper?—It is not.

12,921. *The Chairman.*—Could you give us a notion of what may be the entire expense of producing a petition and answer?—You mean to the end of the printing?

12,922. Yes. I want to know what expense both

parties have incurred when the paper is printed in this form, with all the previous proceedings?—I see that in a table I have prepared, showing the amount of the plaintiff's costs up to the time of bringing in printed copies of the pleadings in twenty-one cases, the average amount allowed on taxation as between party and party was £26, 17s. 0¾d.

12,923. What is the next step?—The next step is to determine the way in which the case is to be proved. In the Court of Admiralty the case may be proved in any one of the following modes,—by affidavits, by written depositions, or by the oral examination of witnesses in open court, or partly by one mode, and partly by another.

12,924. *Mr. Baxter.*—Have you any juries?—Never.

12,925. *The Chairman.*—Which is the mode generally resorted to?—Formerly there were two forms of pleading. Salvage and other simple cases were called act or petition cases, the pleadings being by petition and answer, and all such cases were proved by affidavit. There was, however, a more formal proceeding, which was called proceeding by plea and proof. In that case the plaintiff gave in what was called an allegation, to which the defendant, after a certain period, had to give in his answers on oath; the plaintiff then produced his witnesses, who were examined by an examiner in secret upon the several articles of the allegation; the examiner put what questions he chose to the witness, for the purpose of eliciting what he could say on the particular articles to which he was designed. After the examination in chief was concluded, the adverse party, without knowing at all the evidence that had been given, gave to the examiner certain interrogatories in writing, and these were administered without reference to what the witness had said in his deposition in chief. When the plaintiff had produced all his witnesses, and they had been examined, the defendant gave in his responsive allegation, to which the plaintiff was obliged to give in his personal answer on oath; then the defendant produced his witnesses, who went through the same process; and after that the plaintiff gave his counter allegation, and the same process was gone through.

12,926. But all that is abolished?—Yes, entirely.

12,927. What is the present system?—The system of oral examination in open court has been gradually introduced; and almost all the cases are now heard by oral examination.

12,928. *Lord Barcaple.*—With or without affidavit?—If an affidavit is to be filed, leave must be asked of the court. If the witnesses are abroad, or are going away, they are examined before an examiner or before a commissioner. Sometimes it may not be worth while to send an examiner abroad, and then some one on the spot is appointed commissioner. We have the greatest facilities for taking evidence in our court, for a case may be proved partly by affidavit, if the court choose to allow it, partly by examination of witnesses on commission abroad, and partly by the examination of witnesses orally before the court. Sometimes the witnesses are examined orally before the court at different times. Seamen are very slippery witnesses; and if the seamen of one vessel happen to be in this country, the party very frequently prefers that his witnesses should be examined at once rather than wait for the arrival of the other vessel, lest he should lose his evidence altogether. They are examined in court; and if there is a considerable interval before the examination of the other witnesses, the evidence is reduced to writing, and printed. It is taken down by a shorthand writer.

12,929. *The Chairman.*—But I understand that the preference now is for examination in court?—Undoubtedly. That is found to be far better than the other system. Very little reliance is placed upon affidavits.

12,930. Then, if that is so, I suppose the greater part of the evidence is adduced in open court?—The greater part of it is adduced in open court. In the year 1853, shortly before I was made registrar, I published a small pamphlet, showing the absurdities of the system then existing. I have here a copy of it. Its recommendations generally were, viz., 1st, That the pleadings should be concluded before any witnesses were examined; 2d, That the proctor and counsel should be present when the evidence was taken; and there was one other suggestion, I think.

12,931. I see that, at the time you published this pamphlet, you were an examiner yourself?—Yes; I had then the largest practice as an examiner in the court.

12,932. *Mr. Gordon.*—Then you don't approve of the system of affidavits?—No, not at all.

12,933. Why?—Because the affidavit is generally drawn by the solicitor, and does not fairly represent the evidence of the witness.

12,934. But is there not a power of cross-examination reserved?—Yes; no doubt that is so. An affidavit is very good if it is simply to prove a fact in the case,—to prove a document; or to prove, for example, the day when a vessel left a particular port.

12,935. Where it is not likely to be a contested point?—Yes.

12,936. Where there is not likely to be a conflict of evidence?—Yes; but where there is a conflict of evidence, the only mode of ascertaining the truth is by the oral examination of the witness in open court.

12,937. *Lord Barcaple.*—I suppose, in Admiralty causes, you have very frequently a conflict of evidence from the subject-matter of the dispute?—Certainly; I believe that is notorious.

12,938. And from the class of witnesses?—Yes. Collisions are the more important of our cases; they generally occur at night, and each set of witnesses sees the thing from a different point of view; and without meaning to commit perjury, they give a very different account of the circumstances.

12,939. And each party is more or less liable to the imputation of having been in fault?—No doubt.

12,940. *Mr. Adam.*—You said the evidence was taken down in shorthand. Is the shorthand writer an officer of the court?—He is not an officer of court, but he is appointed with the approval of the court.

12,941. By whom is he appointed?—By the judge or by the registrar. The present shorthand writer was appointed in my time; and though he has no formal appointment, he takes the evidence in every case, and he is sworn in every case.

12,942. Is he paid by the parties?—He is paid by the parties.

12,943. *Mr. Gordon.*—Do his notes form the record of the evidence which is given orally?—Yes; and that is the record which ultimately goes before the Judicial Committee of the Privy Council, in the event of there being an appeal.

12,944. *Lord Barcaple.*—Is that record of the evidence certified in any way?—It is certified by the shorthand writer.

12,945. *The Chairman.*—The judge does not take a note of the evidence?—He does take a note of the evidence. No person could properly hear a case without taking a note of the evidence very largely; but the judge's note of the evidence does not go before the court of appeal. He takes it more for the purpose of impressing the facts on his own mind than for any other purpose.

12,946. For his own use entirely?—For his own use entirely.

12,947. *Lord Barcaple.*—Does it very frequently happen that he pronounces his judgment then and there?—Generally.

12,948. *Mr. Adam.*—Does the judge dictate to the shorthand writer what he is to write?—No, never; the shorthand writer takes it down, question and answer.

12,949. *Lord Barcaple.*—And so writes it out?—Yes.

12,950. *The Chairman.*—Do you not find that that mode of taking the evidence makes the record of the evidence very long?—It may in some cases; but I think it is more satisfactory. It certainly is more satisfactory than it is in appeals from the Probate Court, where the judge's notes of the evidence sometimes go up to the House of Lords in addition to the shorthand writer's notes of the evidence. I have also understood that in the common law courts it is a very great labour for the judges to write out their notes of the evidence for the

Henry Cadogan Rothery.

court above, and that there is sometimes great difficulty in obtaining them.

12,951. *Lord Barcaple.*—In the Probate Court you say the judge's notes and the shorthand writer's notes both go to the court of appeal?—In one case I know that was so.

12,952. Are you aware whether the shorthand writer acts for the court in the Probate Court, or is he not merely employed by the parties?—Lord Penzance spoke to me on that subject only a few days ago. At the Judicature Commission we were discussing the question of whether a shorthand writer should be permanently attached to each court. I proposed it, and was very strongly in favour of it. Lord Penzance was not present at the time; but I afterwards spoke to him on the subject, and he told me he was decidedly of opinion that a shorthand writer should be appointed. He stated that on the death of one of his clerks, he had made it a point that the second clerk should be a shorthand writer, and that that second clerk takes down all the evidence in shorthand; and it is the greatest comfort to him, for he himself does not take the evidence at length—which he would be bound otherwise to do—because he has a shorthand writer on whom he can rely, and who is, as it were, part of the court itself; and if he has any difficulty, he refers to the shorthand writer. Lord Penzance told me he would advise a plan of that kind to be adopted, by which a shorthand writer should be attached to the court.

12,953. *The Chairman.*—As soon as the evidence is completed, the judge delivers his judgment?—Generally; sometimes he reserves his judgment.

12,954. *Mr. Gordon.*—Is the judge not assisted by nautical men?—He is assisted by two of the Elder Brethren of the Trinity House in any case which involves nautical skill or requires nautical knowledge. This is invariably the case in collision cases, and occasionally, if the parties apply for it, in salvage cases, where nautical skill is required. In no other cases is the judge assisted.

12,955. What effect has their opinion on his judgment?—They are simply advisers. The responsibility rests with the judge entirely; but of course in a purely nautical question the judge would hardly put his own opinion as against theirs.

12,956. *The Chairman.*—At the same time he is at liberty to discard their opinion?—He is at liberty to disregard their opinion; and if they differ, he may either form his own opinion, or he may refer it to the Trinity House. Dr. Lushington used always to send it to the Trinity House for them to appoint other two Trinity Masters to meet and consider the evidence; but that was not deemed satisfactory, because the two last-named Trinity Masters would not have an opportunity of seeing the witnesses. The present judge, in the only case which has come before him in which they differed, heard the case over again with one additional Trinity Master, or rather, I should say, he heard the arguments; but that also was not very satisfactory, because the third Trinity Master had not had the advantage of hearing the evidence of the witnesses.

12,957. An appeal lies from the judge of the Admiralty Court to the Privy Council?—Yes.

12,958. In all cases?—Yes; not from all orders, but from all final decrees, and, with his permission, from all interlocutory orders.

12,959. But not without leave?—Not without leave.

12,960. *Mr. Gordon.*—Are there cases which are referred to you as registrar by the judge of the Admiralty Court?—Yes, there are a great many. All damage cases are referred to me: when the judge has determined who is to blame, if he pronounces in favour of the plaintiff, he refers the claim, together with all accounts and vouchers, to the registrar, assisted by merchants, to assess the damages.

12,961. *The Chairman.*—That will take place in all collision cases?—Yes; in all collision cases. We have now jurisdiction in questions of disputed accounts between masters and owners—where a master has been navigating for a year or two, and has received large freights and made heavy disbursements. These and collision cases are the most important cases that come before me. The questions between masters and owners being generally questions of account, involving a great number of accounts, almost invariably come before me *ab initio*. They rarely go before the judge.

12,962. *Mr. Baxter.*—Do you take the assistance of any person?—I always have two merchants, as they are called, to assist me, if the case which is referred to me involves any question of mercantile usage, or requires skilled knowledge. I have three merchants who assist me: one is Mr. John Cattley, who was a leading merchant in the city, and who is one of the directors of the London and Westminster Bank; another is Mr. Sidney Young, who was a shipbuilder; and the other is a partner in Barings' house. They are gentlemen of high standing in the city.

12,963. *The Chairman.*—How are these advisers remunerated?—They are remunerated for each case: where the amounts are considerable—and the cases that come before me are generally considerable in amount—they receive 5 guineas for each case; where the case is small, they only get 2 or 3 guineas. It rests with me to fix the amount of the fee. Where, as sometimes happens, the case is a heavy one, large in amount, and very difficult, occupying two or more days, the merchants get larger fees.

12,964. *Mr. Gordon.*—Is the fee so much a day?—The amount of the fee does in a measure depend on the time occupied. One case this year lasted no less than five days; it involved many thousand pounds; and in that case the merchants got 20 guineas a-piece.

12,965. *The Chairman.*—Four guineas a day?—Yes.

12,966. *Lord Barcaple.*—Are these days spent in taking evidence or in hearing argument?—In both. A great number of witnesses were produced.

12,967. *Mr. Gordon.*—And you have the parties before you?—Yes.

12,968. *The Chairman.*—By counsel?—Yes. I have here a return of the number of references that have taken place since 1841. I take that year, because it was the year in which the Admiralty Court became what I might call a public court. Before that the registrar used to take the fees for himself; and Lord Arden, who held the office at that time, had enormous fees during the war. In 1840 the Act 3 and 4 Vict. c. 65 passed, which made it a public office; and it is that time that we generally make our starting-point. The number of references in 1841 was only 2; then they came up to 6 and 10; and in 1853 they were 30 in number. They gradually increased till, in the year 1867, they were 78; and in the first four months of the present year there have been 31. So that the references are increasing in number; and they have been increasing in importance too.

12,969. *Mr. Gordon.*—Is there an appeal from you?—Yes, to the judge of the Admiralty Court, and from the judge of the Admiralty Court to the Privy Council.

12,970. Do you preserve any record of the evidence?—Yes; I take the evidence. Sometimes the parties have a shorthand writer to take down the evidence of the witnesses before me; but latterly that has not been done, and I have generally taken very full notes.

12,971. *The Chairman.*—And your notes go to the judge?—Yes.

12,972. And they would be the record of the evidence in the Privy Council?—Yes.

12,973. *Mr. Gordon.*—Do you take a note of the admission?—Yes.

12,974. *The Chairman.*—How do you find the system of recording the evidence yourself, to work?—It would save me a great deal of trouble if I had a shorthand writer, because I should then only take down what I considered to be very important. I should of course write a good deal myself to fix it in my memory. At the same time there is a great deal of irrelevant matter that I should not think of taking down, if I did not feel that I was bound to take a full note to go before the judge.

12,975. You would take down things which there might be difference of opinion about?—Yes.

12,976. But a great many irrelevant matters slip out

in the course of an examination which you would not take down?—Of course.

12,977. As regards the interest of the parties, which is the best,—your own note, or the shorthand writer's; I mean as regards the interest of the parties in respect of expense as well as everything else?—It is very difficult for me to answer that question. There would be the additional expense of the shorthand writer, and the much greater length of the evidence that would be taken, and which of course would be printed if it went before the court of appeal. On the other hand, if I had a shorthand writer, a case would, I think, probably be finished more quickly than it is now, so that there would be less expense.

12,978. Do you find that a case is finished more quickly before you when you have a shorthand writer?—Yes, I think so.

12,979. Do you think there is much difference?—I had a very heavy case this year, which lasted five days; and if I had had a shorthand writer, I think it would not have lasted more than three days. I am sometimes obliged to stop counsel during their examination of the witnesses, as they get rather too fast for me; but if there was a shorthand writer, there would be nothing of that kind.

12,980. *Mr. Gordon.*—Do copies of your notes require to be made?—Yes.

12,981. For the parties?—Yes; and I am obliged to correct them. My writing in taking the notes is very illegible, and the going over and correcting it takes up a great deal of my time; all of which must be considered in the expense, because if I were not so employed, I should be doing something else.

12,982. Are there sometimes issues of fact extracted from the pleadings?—We have never done that yet. It is a suggestion that has been thrown out by the Judicature Commission, that if the issues are not clearly brought out, application might be made to the judge to settle the issues.

12,983. *The Chairman.*—In the form of questions?—Yes, in the form of questions; which might be very convenient occasionally.

12,984. Who is the taxing officer of your court?—I am.

12,985. Can you give us some notion of the costs of a suit in the Admiralty Court?—I think I stated it at the end of a paper which I wrote for the Judicature Commission; it is in these words:—'Lastly, as to the costs: It is not easy to say what generally is the cost of an Admiralty suit; it varies very much with the nature of the cause and the number of the witnesses, and the compensation to them for their viatics and loss of time. Speaking roughly, however, I should say that the amount of a bill of costs in a *contested* suit is generally from £60 to £150, and sometimes as much as £200. Whether this is more or less than it would be in a similar suit in a common-law court, I do not know; but only last week one of the leading counsel in the Court of Admiralty stated in court that in the same cause, in which a fee of 15 guineas would be given with the brief in the Admiralty Court, a fee of 60 or 70 guineas would be given if the cause were tried at Guildhall. If this be so, I have no hesitation in saying that the costs of trying a collision cause in the Court of Admiralty must be much less than in a court of common law.'

12,986. *Mr. Gordon.*—Do you mean on each side?—On each side.

12,987. *Lord Barcaple.*—You mean the sum you give includes both sides?—No; each side.

12,988. It is the costs that the party will recover if he has got his costs?—Yes.

12,989. *The Chairman.*—It is the bill of costs of the successful party?—Yes.

12,990.—*Mr. Gordon.*—Are you in the custom of limiting the amount of charge as against the unsuccessful party?—Giving him something *nomine expensarum* do you mean?

12,991. No; I mean cutting down the charge?—Yes; that is the duty of the taxing officer. A person who has gained his suit, and recovered costs, leaves his bill, and the two solicitors attend and fight over the several items of it.

12,992. You limit the charge as against the party, though you might sustain it against the client?—Yes, certainly. A client might be a very nervous person, and might wish to have a great many consultations with counsel. These would be a very legitimate charge for the solicitor to insert in his bill, but they would not be proper charges to allow against the adverse party.

12,993. *The Chairman.*—Have you any general rule for fixing the amount of counsel's fees?—No, none. It is purely within our discretion.

12,994. Suppose a case lasts one entire day, what would be the ordinary fee for counsel?—It would depend entirely on the importance of the case.

12,995. You mean the pecuniary importance?—Yes, very much upon that; and also on the question whether or not any difficult points of law were involved, which required a good deal of reading up.

12,996. Suppose a case to go into a second day?—Counsel have refreshers, as in other courts. I don't think there is any distinction in our court as to counsel's fees, except that I think that in the old Doctors Commons days they were lower than they were in the common law courts.

12,997. Do you think that is not the case now?—I think the fees are higher, but I don't think they are quite so high yet as in the common law courts. I speak, however, merely from what I have been told. I don't know whether the Commission are of opinion that the assessors and merchants whom I have are a good form of tribunal; but I feel so strongly the value of the tribunal that I should be very glad to answer any questions on the subject, if any of the Commissioners entertain a doubt about the value of them. We differ in that respect from the common law courts, where, I understand, the Masters are referees; and they adjudicate on all kinds of questions without the assistance of any skilled persons; which I look on as being a source of very great mischief.

12,998. *Mr. Justice Willes.*—It has been held that the Masters may employ a skilled person?—I was not aware of that.

12,999. He is not bound to act on his report?—Nor am I. But I think it is rarely that they have any skilled person to assist them.

13,000. You could not get on without it?—It would be quite impossible. There are, however, cases in which I do not require experts.

13,001. In many cases the judge has not Trinity Masters?—Yes. There were two masters' wages cases last week in which I did not require merchants, because the question was simply one of evidence as to whether anything was due, and it did not turn on mercantile usage.

13,002. *Mr. Gordon.*—You mentioned the fees that these gentlemen receive. Probably they look on it as being a position of honour?—Yes, they do so. I observe in the evidence given in Scotland that a great many questions were asked as to whether it would not be expedient that the amount of damages should be settled at the same time that the merits of the case are decided. I entertain a very strong opinion that it would be most inexpedient to do that; and for many reasons. In the first place, the two questions are essentially distinct. The question that goes before the judge is, which vessel is to blame. The proof of that depends entirely upon the evidence of the seamen who are on board; but these men could give no evidence as to what the cost of repairing the damage of the collision would be. That must come from totally different persons. So that you have a totally distinct class of witnesses necessary for deciding the merits of the case, and for assessing the damages. In the next place, if you were to have your witnesses in court in order to ascertain what the amount of the damage is, *non constat* that you would require them, because you don't know which party will succeed. In almost all our cases we have action and cross-action; and if you adopted that plan of the judge deciding not only the merits of the case, but hearing evidence also as to the quantum of damage done, he would have to hear witnesses not only as to the merits of the case, but also

Henry Cadogan Rothery.

as to the quantum of damage sustained by the plaintiff, and as to the quantum of damage sustained by the defendant, before he had decided whether the defendant or the plaintiff was entitled to recover.

13,003. *Lord Barcaple.*—Are there not cases in which you have to ascertain the damage done to both vessels?—Sometimes, when both vessels are pronounced to blame for the collision; but all I would observe is, that you ought first to decide who is to blame, and after that assess the damages; it is not necessary to ascertain the amount of the damages, if the party is not entitled to claim them.

13,004. *The Chairman.*—Don't you think the witnesses who are to speak to the question of blame, and the witnesses who are to speak to the question of damage, may to a certain extent be the same? For instance, supposing it were a question whether a certain defect or damage in the vessel had been caused by the collision, or had occurred before, the seamen on board the vessel would be good witnesses on that question?—That is a very exceptional case; but even then the question would rarely, if ever, turn upon the evidence of the seamen, but rather on that of the master or the owners of the vessel. I have such a case now before me, where a steam vessel, which had been damaged by collision, was run on shore, and the bottom got injured. This was said to have injured the machinery, and the question was, whether it did or did not injure the machinery; but the seamen on board could give no evidence on that point. The only persons who could give that evidence were the owners, or the engineer who was in the habit of repairing the vessel.

13,005. *Mr. Gordon.*—Your observation as to the advisability of separating the question of how the damage was caused, and the extent of the damage, refers more particularly to Admiralty causes, I presume?—Yes. I am not applying it to any other causes.

13,006. *Mr. Adam.*—I observe, from the report of the Judicature Commission, that proceedings may be taken, in a case of collision, either in the common law courts or in the Admiralty: which is preferred?—The best answer I can give to that is an observation which Lord Chelmsford made on one occasion. He said that when he was at the bar, if he had a good case, he always advised the parties to go to the Admiralty Court; but if his clients had a bad case, he always advised them to go to the common law courts. He thought if it went to the Admiralty Court, it would be properly investigated; but if the plaintiff went to a common law court, he would stand a fair chance of getting a verdict. He said that the plaintiff in a collision case almost always gained at common law. It is not so in the Admiralty Court.

13,007. *The Chairman.*—Are the Trinity Masters who sit with the judge remunerated in the same way as the mercantile gentlemen whom you consult?—Yes. They receive 2 guineas for each case; and inasmuch as there is generally an action and a cross-action, they generally get 4 guineas a day. The Trinity Masters are supposed to be public officers to a certain extent. Their connection with the Court of Admiralty dates from a very early period. Their fees were fixed at a very early period, and it has not been deemed expedient to alter them; though it can hardly be said that 2 guineas is a sufficient compensation to a skilled person for a whole day.

13,008. *Mr. Justice Willes.*—Is 2 guineas a very ancient fee?—Yes, it has existed for a great number of years.

13,009. Would you say for centuries?—No, I should think not for centuries; but most probably from about the middle of last century, when, I think, the fees were fixed.

13,010. *Mr. Gordon.*—Do they receive any salary from the public?—They do.

13,011. What salary?—I don't know exactly what it is; but it is under consideration now, I believe, to reduce the number of Trinity Masters, and to give them a higher salary.

13,012. *Mr. Adam.*—Can either of the parties require you to take the assistance of the assessors; or can you do it of your own motion?—If they asked me, I should always do it, in the same way that the judge, if he is asked, would always take Trinity Masters.

13,013. *Mr. Gordon.*—Do the parties pay them?—Yes.

13,014. *The Chairman.*—Suppose one party asks you, and not the other?—Then I should exercise my own discretion, as the judge always does with respect to Trinity Masters. If both parties consent, he invariably takes Trinity Masters in a salvage case. If one applies for it, and the other objects, he reads the papers, and exercises his own discretion.

13,015. *Lord Barcaple.*—I observe in those pleadings which you have given us, there is merely a setting forth of facts. There is no setting forth of any grounds in law upon which either party relies. There are not what we call in Scotland pleas in law?—No.

13,016. Has that always been the style of pleading?—Yes.

13,017. Do you find any disadvantage to result from that?—No, we do not. It is very difficult to say that law is never pleaded. You cannot always separate law from fact.

13,018. *Mr. Gordon.*—But I presume your cases chiefly result in a difference of the facts as alleged by the respective parties?—Yes, they do.

13,019. *Lord Barcaple.*—Bottomry bond cases may involve very nice points of law?—Yes.

13,020. *Mr. Gordon.*—Suppose you were pleading on a claim founded on a bottomry bond, would there be any law stated—I mean as to the priority?—Law would be pleaded in such a case as this: a vessel being in the charge of a pilot, that, by the law of such and such a place, the owner was bound to take a pilot, and that therefore he was relieved from responsibility; that would have to be pleaded.

13,021. *The Chairman.*—You would set forth the law of the place?—Yes. For instance, in the case of the 'Halley,' which was recently before the Court of Admiralty, and went to the Privy Council, there was a collision between two vessels in Belgian waters, and foreign law was involved.

13,022. *Mr. Justice Willes.*—But foreign law is considered matter of fact?—Yes.

13,023. *The Chairman.*—Suppose that the defendant objects to the jurisdiction of the court, in what form would he plead that?—The old practice used to be, that he was bound to appear under protest; but now he sets it out in his plea. He would state in his answer that the plaintiff had no grounds for this action.

13,024. *Mr. Gordon.*—Have you any demurrers in your court?—Yes.

13,025. At the conclusion of the pleading?—No; before. As soon as the petition is given in, the defendant may demur to it within four days of its being given in, and say, that even if it is proved, it would not give him the remedy he seeks. Thereupon, the admission of the petition is objected to, and that is heard formally.

13,026. Before the judge?—Before the judge. The judge then says that it is sufficient, or rejects the petition altogether—in fact, rejecting the suit; or he directs that the petition should be amended, which, I think, is the practice in Chancery.

JOHN BOYD KINNEAR, Esq., examined.

13,027. *The Chairman.*—You are a member of the English bar?—I am.

13,028. When were you called to the bar?—In 1856.

13,029. You were also a member of the Scotch bar?—Yes; I was called there in 1850.

13,030. Your practice is in Chancery, I believe?—It is.

13,031. I don't know that there is any particular subject on which the Commissioners desire specially to examine you; but we shall be very glad to receive any suggestion that you have to offer us on the subject of our inquiry?—I think there is scarcely anything derived

from Chancery practice that I can suggest as being at all calculated to be an improvement upon the Scotch system. Substantially, in theory, the two systems are somewhat the same. Some years ago, when a bill was introduced for the purpose of establishing in Scotland the division of procedure into common law and equity forms, which prevails in England, I set out in a pamphlet the strong objections which occurred to me to such a course; but I ventured to add some suggestions derived from the practice in England in both sets of courts, which seemed to me to be capable of being adopted with advantage in Scotland. Some of these suggestions have been already adopted in the statute subsequently passed; but there are one or two that have not been adopted, and perhaps you will allow me to mention them by reference to this pamphlet. The first is derived from common law rather than from Chancery, and it is to the effect, that in case of actions concluding for payment of a liquidated sum, proceedings might be shortened by indorsing the amount of the claim upon the summons, together with a note of the costs of the summons, with notice that, if the amount is paid, proceedings will thereupon come to a close. Another suggestion was, that edictal citation should be abolished, on the ground that it conveys no real intimation, and that it would be better to allow the court, where personal service or service at a dwelling-house could not be effected, to judge what is the proper method of bringing the fact of the action to the knowledge of the defender.

13,032. Are you aware that a considerable alteration has been made upon the system of edictal citation by Act of Sederunt since that time?—I was not aware of that Act of Sederunt.

13,033. Within this year,—with a view to secure, as much as possible, personal notice. That is an improvement in the direction you wished?—Quite so. Then another suggestion, which comes more immediately from our Chancery practice, but has been also adopted recently at common law, is the permission to serve interrogatories by the one party upon the other, calling for an answer on oath to certain specific questions.

13,034. You approve of that proceeding?—Yes; that, under proper restraints, works very well. I think it has often a tendency to prevent litigation, and to shorten it.

13,035. *Mr. Gordon.*—What do you mean by proper restraints?—In Chancery it is sometimes abused. It is spun out to an unnecessary length. Questions are put with absurd minuteness, calling for an answer to every conceivable variety of circumstance, which leads to expense and overloads the proceedings. The questions should perhaps be brought before the court in the first instance, and allowed by them; or failing that, the court should exercise considerable powers in regard to the costs of such questions, if they deem them unnecessary.

13,036. *Mr. Campbell.*—Like adjusting interrogatories for an examination on commission in certain proceedings in Scotland?—Exactly.

13,037. *The Chairman.*—Such interrogatories have never been adjusted at the sight of the court, but only at the sight of the clerk of court. Would you suggest that such interrogatories should be adjusted at the sight of the clerk of court, when served on the defender, in the way you propose?—I would much rather have them adjusted by the court than by the clerk of court.

13,038. *Mr Adam.*—Do you mean these interrogatories to be served at the very beginning of a cause?—Yes, at the very beginning; with power to serve them at a later period by leave of the court, when circumstances arose to make the court think that course expedient.

13,039. *Mr. Baxter.*—How are they adjusted just now in Chancery?—They are in no respect adjusted, except when the party has refused to answer. They are, in the ordinary case, drawn by counsel, and served upon the opposite party. They are at the discretion of counsel.

13,040. *Lord Barcaple.*—Has the opposite party not a power of complaining that they are improperly drawn, and getting them restricted in some way?—Yes, he has practically, by not answering such as he feels convinced are improper. Then the party putting the interrogatories may bring the question before the court by excepting to the answers for insufficiency.

13,041. He goes before the chief clerk, or before the judge?—Before the judge. But it is not very frequent that interrogatories are not fully answered.

13,042. But it is a certain amount of check?—It is a certain amount; but it is generally found that even if interrogatories are long and useless, it is easier and cheaper to answer them than to cause objections by declining.

13,043. And adjusting them might create some expense. There is the necessary attendance of some person before the judge?—That is true. Then there is another point which occurred to me before, and I still think it might be useful. I refer to obtaining documents by a less cumbrous process than a commission and diligence to recover them, adopting a method which both at Chancery and common law is adopted, of requiring a witness or party to produce documents according to a notice which is served on him. If an ordinary witness so called upon fails to produce the documents, he is liable, if the court thinks they are proper to be produced, to the ordinary punishment for neglecting a subpœna; and if a party to the suit has been required to produce documents, and fails to do so, then the party who has called on him has the option of giving secondary evidence of the document which has not been produced.

13,044. *Mr. Gordon.*—I presume the latter right will only exist where the party called on to produce is the opposing litigant?—That is so.

13,045. Is there not this advantage in the case of a party proceeding by our system of Scotch commission and diligence, instead of the proceeding of a *subpœna duces tecum*, that the document is exhibited before the trial according to the Scotch practice, whereas in England I presume you can only have that proceeding for exhibition at the trial?—In Chancery the evidence in chief is all produced before the trial. At common law I believe that if a document is very important, and inspection of it is required, the judges have power to make an order for inspection.

13,046. In the hands of a neutral party?—Yes; or to permit that it shall be inspected.

13,047. But to command is the question?—To command certainly—not to compel the delivering up, but the exhibition.

13,048. *The Chairman.*—Don't you think that the proceeding by commission and diligence may be very useful in a case when important documents are in the hands of a third party unconnected with the parties to the suit, and where the examination of them beforehand may be very important for the preparation of the trial?—Undoubtedly. I should not in the least propose to abolish the system of commission and diligence, but I offer this as a substitute in many cases. It would be cheaper, because a commission and diligence is very cumbrous, and must often be very expensive; and it must frequently be for the purpose of obtaining formal evidence of the contents of a document, which are perfectly well known, or merely to obtain formal evidence that the document does not exist.

13,049. Have you any further suggestion?—No; but I may say that, on the general principle of procedure, it is becoming more and more impressed on my mind, that it is very desirable that, at the earliest possible stage, the parties by their counsel should come before the judge. Such a course perhaps is more difficult in Chancery cases than it might be at common law, because the cases are more complicated; but I think it could be worked in Chancery cases, that at a very early stage the parties should come before the judge, and that the nature of the case should be explained to him; that he should then ascertain the real facts in dispute, call for evidence on them in the way he thinks fit, and then the case would be ripe for his judgment, both on law and fact.

13,050. That seems a very good general principle; but how do you propose to enforce it? What I under-

John Boyd Kinnear.

stand you to mean is this, that the less delay there is before the cause is ripe for hearing before the judge, the better?—Yes; and that the delay will be diminished by bringing the parties before the judge at a preliminary stage.

13,051. How would you propose to expedite matters so as to bring the parties before the judge sooner than they are brought under the existing practice?—I am not sure that I could suggest anything that would bring them before him much sooner than they are by the recent Act in Scotland. But speaking of ascertainment of facts, my idea is, that after the parties on each side have made their statements of the facts, they should come before the judge, and that the judge should, in a not very formal manner, and not calling for argument, ascertain for himself, with the assistance of counsel, what are the facts that are in dispute, rather than by calling on the parties to make admissions apart from what they do in the judge's presence.

13,052. *Mr. Campbell.*—You are aware that your object is attained in the Sheriff Court in Scotland?—It is so.

13,053. At the first calling of the cause the parties are brought together in presence of the judge, and the grounds of defence are at once stated?—Yes; without any written statements at all preceding it. It is the same in County Court common law procedure. In County Court Chancery procedure, which has been introduced within the last three years in cases under the value of £500, the plaintiff makes his statement of facts, and the defendant may or may not make a written statement of facts; that is optional with him. If he fails to do so, when he has material facts, of the existence of which he ought to have forewarned the plaintiff, that will be considered in the question of costs. But as soon as these statements are interchanged, the parties come before the judge.

13,054. *The Chairman.*—We have been told that the equity jurisdiction of the County Courts has not been much called into exercise?—I believe not very much,—not sufficiently, at least, to enable one to judge how it might work.

13,055. Can you account for that in any way?—No.

13,056. *Mr. Gordon.*—I suppose you are aware that in the Court of Session Act of last session there is a provision, that as soon as the pleadings are given in, the counsel shall attend the Lord Ordinary with a view to dispose of the further procedure in the case?—Yes, I am aware there is. But I think they still continue the principle of requiring the parties to propose their own issues.

13,057. As part of their pleadings?—At that stage.

13,058. *Mr. Campbell.*—And the parties don't meet the Lord Ordinary until a written defence has been lodged in court?—I think, generally speaking, a written defence—at all events in cases of the nature of Chancery cases—would be necessary, and an assistance.

13,059. *The Chairman.*—Do you think the form introduced in the Sheriff Courts in Scotland to which Mr. Campbell has referred would be suitable to Chancery cases,—of the defender appearing by his counsel or his procurator, and stating the defence verbally, and having it minuted by the judge?—That could be worked certainly; but I think there would frequently be an advantage in having a written statement.

13,060. *Mr. Campbell.*—But, practically, the system is an alternative one. The parties appear before the judge; and the defender's procurator or counsel having stated in an intelligible form the general nature of the defence, the judge then considers whether in his opinion it is a case which requires a more detailed statement, and a statement necessitating a rejoinder, for the proper preparation of the cause; or whether he thinks it such a case that he may either adopt the written note of the defender's pleas, or write out one himself on the spot?—Probably it would be advisable that there should be very great power given to the judge, whenever you give him a universal jurisdiction, to adopt the procedure applicable to cases of a different character, some of which are simple, and some complex.

13,061. *The Chairman.*—Would you be inclined to recommend the adoption of that Sheriff Court system in the preparation of pleadings before the Lord Ordinary in the Court of Session?—I think it is a system that could be worked with advantage, including the option.

13,062. *Lord Barcaple.*—Have you any personal experience of the working of it?—No, I have not. It seems to me, from the records that occasionally come before me, as well as from the nature of cases that I see in England, that in the majority of them the judge could by a few questions, in a very short space of time, ascertain the leading points in dispute; and though it would certainly impose more labour upon the judge in the early stages, yet I think it would save trouble ultimately; and of course if it made the judge's labour heavier, there would simply be a necessity of appointing more judges. It might, nevertheless, be a great economy to the public.

13,063. Does it strike you that it is a duty that could be safely left to the judge, who does not know the case of the parties, while they may be supposed to know it themselves?—I would not give the judge the power of superseding the parties, but only of ascertaining from the parties, who would be represented in important cases by lawyers, what are the vital facts of the case.

13,064. Would not that come to be pretty much of a discussion by counsel before the judge, and double argument very much?—I scarcely think in most cases that it would. It would be the ascertaining by the judge of what were the allegations—not involving an argument by counsel on their pertinency or truth.

13,065. In a case involving considerable nicety, must not the counsel, before they could be safely entrusted to deal with a judge who knows nothing about the matter, in so limiting the cause, have prepared themselves very thoroughly upon it?—Certainly the counsel ought to be well acquainted with the case.

13,066. At that stage?—Undoubtedly.

13,067. *Mr. Gordon.*—It involves the relevancy and the materiality of the allegations; and that is a delicate matter for the judge to handle at an early stage, till the story has been told?—But I propose that the whole story should really be before him at the early stage.

13,068. *Lord Barcaple.*—Not in writing?—Yes, in writing—in the statement of the plaintiff, and, if necessary, of the defender.

13,069. But it is not at all an uncommon thing to have an exceedingly short condescendence, with great propriety; and with equal propriety, a statement of facts for the defender of very considerable length,—the defender relying upon a number of facts, often of great complexity, the pursuer's case being one that admits of being stated in a single sentence?—I was asked if I would approve of the general adoption of the Sheriff Court practice in Scotland, but I had not previously been speaking of that as recommending it myself. I think the Sheriff Court practice could be worked; but the process I was speaking of myself was rather the Chancery practice in the County Courts here, which gives the defendant always the option of giving a written statement if he chooses, and in fact rather invites him to do so.

13,070. *Mr. Gordon.*—Have you any acquaintance with common law pleadings?—Very little. I went on circuit for a few years after I was called, but I have been long out of practice in that branch of the profession.

13,071. *The Chairman.*—Have you any further suggestion to offer?—No, I think not. I don't think the Chancery practice in this country, as to pleadings or evidence, offers anything further which you could borrow with advantage. The whole system of evidence is as bad as possible in Chancery.

WEDNESDAY, 5th MAY 1869.

Members Present:—

Lord Colonsay.
Mr. Justice Willes.
Lord Barcaple.
Edward Gordon, Esq., Q.C.
Sir Edward Colebrooke.
James Campbell, Esq.
James Adam, Esq.
A. Orr Ewing, Esq.
John B. Baxter, Esq.

The Right Hon. LORD COLONSAY in the Chair.

John D. Bell, Esq., examined.

13,072. *The Chairman.*—You were formerly a member of the English bar?—Yes; I am so still.

13,073. I understand you have had some experience of the working of the code in India?—Yes. I have practised in India for some years.

13,074. At what time?—From the commencement of 1849 till the end of 1863 continuously; and since then I have been out three times, practising for a few months on each occasion.

13,075. Can you explain to us, within reasonable compass, the general character of the system—the mode in which parties are brought into court, and the procedure in court?—Previous to July 1862 the practice in her Majesty's courts in India was exactly the same, with some improvements, as the common law and Chancery Courts practice in this country. In July 1862, when the amalgamation of the courts took place, the practice as introduced by Act 8 of 1859—the Civil Procedure Code—was introduced into the amalgamated courts. It had previously been in operation in the Country Courts. That amalgamation abolished all distinction between courts of law and courts of equity. The same judge in the same suit could administer law according to the principles of common law, or according to the principles of equity. Previous to that they had to apply, to stay by injunction the proceedings before a judge, to the same judge sitting as it were in another court. The effect of this has been to simplify matters exceedingly, and to do justice between the parties at much less expense. The suit is commenced by a plaint; which is a very short statement, showing on the face of it the grounds on which the man seeks for particular relief. That plaint must show that it is brought within the time allowed by the law of limitation, and it must show a distinct legal or equitable cause of action on the face of it. If the judge is satisfied as to the sufficiency of the plaint, the writ of summons issues, directed to the defendant.

13,076. *Lord Barcaple.*—Then the plaint is laid before the judge before the litigation commences?—Yes; the plaint is presented to the judge, and the judge may either reject it or accept it.

13,077. Is he attended by a solicitor or by counsel on the part of the plaintiff when considering that?—By a solicitor or counsel in the High Court, or by what is called a vakeel in the Country Courts.

13,078. Probably it may be sufficient to confine your observations to the High Court?—Yes. There the work is done by attorneys and barristers in the same way as in this country.

13,079. The judge disposes of it on hearing the plaintiff's counsel or attorney?—Yes. He says, 'I have to present a plaint,' stating what it is, and handing it to the judge, who casts his eye over it, and if he sees it is sufficient in law, he says, 'Let this be filed.' That plaint has to be verified by the party, or by an authorized agent. He has to verify the facts according to the best of his knowledge and belief. Every proceeding in the nature of a pleading has to be verified in the same way.

13,080. *The Chairman.*—By affidavit?—It is what is called a verification: 'I, the above plaintiff, say that the facts in the above plaint are true to the best of my knowledge and belief.' There is a punishment for a false verification provided by the Act. The summons is served personally, or, by leave of the court, substitution of service is granted. The summons charges the defendant to appear on a certain day, either personally or by agent, and to bring with him all papers and documents that may relate to the subject-matter of the suit. The judge, at the time that he issues the summons, also directs whether the case is to come on for final disposal in the first instance, or for settlement of issues, and whether written statements are to be filed by the parties. If the case comes on for final disposal, on the day appointed for the appearance of the defendant, he must enter an appearance, and the case is put down in a list, and taken at as early an opportunity as possible. When the case is called on for hearing, the plaintiff's counsel states his case and calls his witnesses, and the defendant's counsel states his case and calls his witnesses, just in the same way as in a trial in this country. The judge may see at the hearing that there are disputes in law as well as disputes in fact between the parties. If he sees that there are disputes in law, he may direct the legal argument to take place before they go to the expense of calling witnesses. *John D. Bell.*

13,081. *Lord Barcaple.*—At what stage is it that you say he may see that?—When the parties first appear before him.

13,082. Both parties?—Yes. It is a very uncommon thing for a suit to come on without written statements. It is only suits of the most simple nature that come on without written statements, and it is more satisfactory to have written statements. If written statements are directed, the plaintiff prepares his statement of all the facts upon which he intends to rely in the suit. In fact, he gives what would be an exceedingly well-drawn bill in Chancery, without of course the charging parts, and those repetitions that we had in the old bills in Chancery, but an elegant and concise and proper statement of all his facts. The defendant prepares his statement of facts in the same way. The plaintiff does not see the defendant's statement, and the defendant does not see the plaintiff's statement, till both are filed; then they are entitled to take copies; the object of that being to prevent anything like making up a case to meet the other case. That is more necessary in a country like India than it would be in this country. Upon the written statements being filed, the case comes on for settlement of issues in the first instance. In the High Court it is almost invariable, that the parties agree upon the issues in law and the issues in fact arising between them before they come into court; but if they do not agree, the judge hears what disputes there are between them, and he has the power of examining the parties to supplement any defects there may be in the statements, and to ascertain completely what the points at issue between the parties are. Then, if it appears that there are issues in law, it saves expense if they are determined like demurrers in this country. If there are issues in fact, they are tried by witnesses; which witnesses are examined in presence of the judge *viva voce*. The judgment is then given, and it must be in writing; and a decree is drawn up in terms of the judgment. I would draw your Lordship's

John D. Bell.

attention to one great defect in this procedure,—the absence of any power to examine the defendant on interrogatories previous to the case coming on. Up to the time of the case coming on for hearing, there is no opportunity of scraping the conscience, if I may use the expression, of the different parties; and in a case where there is a breach of trust involved, and where the facts are within the knowledge of the opposite party alone, it is almost impossible to get satisfactory relief. Knowing, as I do, the Chancery practice here very well, I think there is nothing so satisfactory, in cases which form the subject of equity proceedings, as having a power of examining on interrogatories previous to the hearing of a suit; and I have seen in common law practice here several cases in which that has been most beneficial, although in the common law courts here they don't give you so much power of examining on interrogatories as you have on a bill in Chancery. It is a most beneficial power; but it is not given in India. The case having been determined say for the plaintiff, application is then made for execution of the decree. He may apply either for attachment of property belonging to the defendant, or he may apply for the personal arrest of the defendant. If he applies for the attachment of property, he states the date of his decree, the effect of it, and sets out a schedule of property which he believes to be the property of the defendant, and which he seeks to attach. It is unnecessary to go into particulars as to the modes of attaching different sorts of property; but upon the attachment being effected, if the property does not really belong to the defendant, any person who has a claim to it comes in, states his claim to the court, and the court, if it sees that it is a perfectly clear case, may decide then and there whether the property is to be released: if there is any difficulty about it, it can dismiss the claim, and leave the parties to a separate suit to ascertain who is entitled. If the defendant is arrested, the first thing to be done is to bring him before the court. He is not allowed to be taken to a sponging-house; he must be brought straight before the court. The court then asks if there is any ground why he should not be committed to prison. If he shows that he has acted honestly, and that he has actually no property; or if he shows that all the property which he has he is perfectly willing to give up, —the court will call upon the plaintiff to show cause why he should not be released upon giving up all that property. If the plaintiff does not satisfy the court that it is a case calling for the putting in force the penal clauses of the Act, he is discharged, and he gives up all his property. If, however, he does not give up all his property, but has to go to prison, the plaintiff must pay into the jailer's hands a certain sum for the maintenance of the prisoner so long as he is in custody. The sums so paid for the maintenance of the prisoner are added to the amount of the decree; but he cannot be detained in prison for these extra sums. If, after he has been committed to jail, he wishes to give up all his property, he comes before the court and expresses a wish to do so; and the same thing takes place as if he had made that application in the first instance. If he gets released from custody on so giving up his property, he cannot be arrested again, but his subsequent property is liable for the debts, so that it is not like a discharge under the Insolvent Acts. If, however, he does not make any application for release, the extent of imprisonment that can be inflicted under the Act is two years. Although the Act does not provide for it, there is a practice in the High Court the same as exists in the courts at home, of applying on affidavit for particular relief pending the suit. Under the Act, a receiver may be granted pending the suit; but it does not provide for the mode in which it is to be done. Our court adopts the old English practice of making the application on affidavit. These are matters of detail that it is unnecessary to go into. If the party is dissatisfied with the decree, he can either apply for a review of judgment,—which application he must make within a fixed time,—or he may appeal to the court sitting in its appellate jurisdiction. When the appeal comes on,—for it is a matter of right to have the appeal, not a matter of discretion,—it is heard by a larger number of judges than sat on the first hearing. The usual practice is only to have one judge sitting on the first hearing, and to have an appeal to two. With great submission, I think that where one judge is sitting both as a judge of law and fact, the decision is not so satisfactory as our old tribunal which we had in the Supreme Court,—three judges sitting as judges both of law and fact. Then there was no appeal to the same court sitting in its appellate jurisdiction; that court was locally final. If there was an appeal at all, it was only, in cases of a certain amount, to the Privy Council direct. I know that my feelings on that subject are agreed in by most of the practitioners. When we had a bench consisting of Sir Lawrence Peel, Sir James Colvile, and Sir Arthur Buller, and subsequently of Sir James Colvile, Sir C. Jackson, and Sir Arthur Buller, and their successors, the decisions gave great satisfaction; because you had, as it were, a jury of educated men of differently constituted minds,—one perhaps with strong feelings and views in one way, either religious or otherwise, and one with feelings in another direction,—and they counterbalanced each other, and made a most satisfactory tribunal. As it is, with one judge sitting on the law and fact, with an appeal from his decision, the judges will, in nine cases out of ten, take the facts from his decision; and if he has gone wrong on a point of fact, it is exceedingly difficult to show the judges above that he is wrong, because they always say he has seen the witnesses, and that he is the best and most competent judge.

13,083. What record have they of the evidence?—The evidence is written down by the deputy registrar, and each witness must sign his deposition. Cases are disposed of exceedingly quickly in that way, on *viva voce* evidence. No evidence is taken except in the presence of the judge, unless under a particular commission directed to some officer of the court, or to some person specially appointed, and the evidence is all taken down in writing.

13,084. But that is an exceptional case?—It is. It is only where native ladies or sick people wish to be examined, or where the parties are at a little distance from town, and it is inconvenient for them to come.

13,085. *Mr. Campbell.*—Is the note of evidence preserved by the registrar dictated to him by the judge?—No; it is taken down as the witness says it. It ought to be in fact a shorthand writer's note; but there are two objections to that: one is that we have not got shorthand writers; and the other is that the judge could not look over his shoulder and check him if he has made a mistake. The judge does not know what is being taken down in shorthand. The judge superintends the registrar.

13,086. *Sir Edward Colebrooke.*—Has the procedure which you have described given satisfaction?—Very great satisfaction.

13,087. *The Chairman.*—Is the evidence taken down, question and answer?—No.

13,088. It is taken in the narrative form?—Yes.

13,089. *Sir Edward Colebrooke.*—Is it attended with much reduction in the costs of the suit?—With reference to equity suits, there is a very great difference; but I am not prepared to say what the difference is. It is very much more speedy; but there are so many suits, that at present there is a great accumulation of business.

13,090. The statements delivered in are a simple recital of the facts on which the suit depends?—Yes; and drawn in as nice a legal form as possible.

13,091. No prolixity is allowed?—None is allowed. But in our courts it is left very much to the discretion of the counsel who draw them, and they never abuse it. In the Country Courts, where there are untrained lawyers, they enter into long statements.

13,092. And arguments?—Yes; but that can be struck out if the judge chooses.

13,093. *The Chairman.*—You mentioned that, when the parties appear before the judge, he sifts the case to see what issues arise in law and in fact?—Yes.

13,094. Is there any note or record made at that

time of the issues so arising?—There is. They are drawn out as one of the proceedings in the cause.

13,095. By the judge?—By the judge. He says, 'I find that the following issues are the issues in this case, and I appoint such and such a day for the hearing of them.'

13,096. And he separates the issues of law and the issues in fact?—He does. The Act does not state that it is necessary to do so, but it is done in practice; and a finding must be made upon each issue. There is a case, I believe, in the Privy Council, in which the advisability of always finding on each particular issue was pointed out.

13,097. Is it always, or generally, the same judge who has framed the issues that tries the cause?—No, not necessarily.

13,098. But the judge who does try the case limits the trial to the issues that have been so prepared?—Yes; but if in the course of the case it appears that some other issue arises, he has the power of adding another issue.

13,099. *Lord Barcaple.*—If the issue appears to be an issue of pure law, does he record that in the same way?—Yes.

13,100. And if he finds both issues in fact and law, he records both?—Yes; he records them—issues in law, 1, 2, 3; issues in fact, 1, 2, 3.

13,101. *Mr. Campbell.*—And where the issues in law afford sufficient grounds for the decision of the case, these are disposed of by the court before the question of fact is entertained?—Yes, in the same way as a general demurrer would be argued here before the case is set down for trial by a jury.

13,102. *Lord Barcaple.*—Is there a large number of cases so disposed of on questions of law without going into the evidence?—No, I should say a very small number; because the parties never can agree upon their facts. The practice does not apply to ecclesiastical and Admiralty and matrimonial proceedings. The ecclesiastical and Admiralty proceedings are the same as in England up to a certain stage, and then the Act comes into operation. The Vice-Admiralty proceedings are exactly according to the rules under the Vice-Admiralty Commissions; but I don't know whether it is necessary to go into that. With reference to criminal proceedings, all cases tried in the High Courts are tried exactly in the same way as in this country, with a judge and jury. There is an appeal in criminal matters, upon the Advocate-General giving his fiat that there is a proper cause for appeal.

13,103. *The Chairman.*—Is it a jury of 12?—Yes. In the Mofussil, that is to say, in the interior of India, the criminal procedure is under a specific code. I may state what the codes of India now are. There is, first, the Civil Procedure Code, which applies to all the courts in India; there is the Penal Code, which is a law stating what are offences, and what the punishments are,—that applies to all courts in India; there is the Criminal Procedure Code, which applies only to the Country Courts, and not to the courts within Calcutta.

13,104. Are these codes embodied in statutes?—In Acts of the local legislature, not in imperial statutes. There is also the Code of the Law of Succession, which was drawn in consequence of recommendations from home.

13,105. *Mr. Adam.*—Do you think that, in the class of cases that come before the Supreme Court, the provision requiring parties to appear in the first instance before the judge, before giving in written pleadings, is satisfactory?—They appear in theory, by entering appearance; but if the issues are to be fixed, and they appear before the judge, I think it is very satisfactory.

13,106. I understood you to say that in all cases, before written pleadings were given in, the parties appeared before the judge, and the judge then determined whether written pleadings should be given in or no?—No; I have not made myself understood. When written pleadings are to be given in, the judge says in his summons that written statements are to be put in; and suppose an appearance is entered by the defendant in the office, written statements are then put in, and the parties appear before the judge to fix the issues.

13,107. I thought it was after seeing the parties that the written pleadings were ordered by the judge?—No, not necessarily. The summons generally says written statements are required. If there are no written statements required, the parties appear before the judge, issues are settled, and the case is disposed of finally.

13,108. *Mr. Gordon.*—What generally determines the judge in saying that no written statements are required?—When it is an action evidently of the most simple nature, from the plaint; such as on a promissory note, or for goods sold on any particular occasion.

13,109. *Mr. Campbell.*—After the parties are before the judge, if it appears that there is more complexity in the case than was originally anticipated, is it still in his power to order written pleadings?—Yes; and he very often does so.

13,110. *Mr. Adam.*—Is there any limit as to the amount for which an action can be brought in the High Court?—No; in the High Court it can be brought for any amount.

13,111. *Lord Barcaple.*—But is there any sum so low that the action cannot be brought in that court?—If parties bring a suit in the High Court that can be determined by the Court of Small Causes, they do so at the peril of costs.

13,112. *Mr. Gordon.*—What is the limit of the jurisdiction of the Court of Small Causes?—I think it is £100 now. It is either £50 or £100. The jurisdiction has been increased lately; and it is for the Legislature to consider whether it is not advisable to make the judicial staff stronger, if the amount is increased.

13,113. *The Chairman.*—How are parties forced on, if either of them is hanging back and not pressing his suit? Suppose a defendant wishes to delay, what can the plaintiff do to force him on?—A certain day is appointed; and unless the defendant shows the court good ground for delay in an affidavit, he does not get delay.

13,114. If the plaintiff is not pressing on, has the defendant a mode of forcing on the suit?—The case comes on upon a certain day; if the defendant appears, and the plaintiff does not appear, the case will be dismissed.

13,115. Suppose both parties choose to allow the case to lie over, does the court take cognisance of it?—The court always insists on its consent being got to an arrangement of that sort. There must be an application on consent made to the court, and it must be approved of by the court.

13,116. If no such application is made, the court will dismiss the cause on the day on which it should have been heard?—Yes; it appears on the board; and if no one appears, it is struck out.

13,117. What is the effect of that?—The case is dismissed absolutely, and the plaintiff cannot bring another action. I think it is a defect in the Act that the plaintiff cannot withdraw from the suit before judgment without the consent of the court. I think that is a defect, for this reason. Very often, in consequence of mismanagement of a plaintiff's case, either from ignorance or carelessness on the part of his agent, he sees he is not in a position to go safely to trial. In England he would have power to be non-suited any time before judgment. That is taken away by this Act, and the party cannot retire from the case. Unless he gets the consent of the court to withdraw his case, with leave to bring another one specially given, his ceasing to go on absolutely debars him from any further proceeding. I have seen several cases in which that was very hard on the parties.

13,118. You think that is an imperfection?—I think it is; because it depends very often on an erroneous impression on the judge's mind as to the plaintiff's case being a fair one, when he has not the whole facts before him, so as to form a proper judicial opinion.

13,119. *Lord Barcaple.*—I suppose, to a large extent, the litigants in the Supreme Court are natives?—Yes; but there are a great many European litigants. There is a very large mercantile business.

13,120. *Mr. Campbell.*—In the practice of these courts, do the judges devolve any portion of their judicial duties or functions in ascertaining facts, or dispos-

John D. Bell.

ing of the simpler points of the law, on Masters or chief clerks?—No; and I think that is a defect. If an account has to be taken in the suit, the judge is supposed to take it himself; and inasmuch as the judges have just as much as they can get through, people find that their accounts are never taken properly. Formerly they used to have a Master to take them; but in consequence of great delays in the Master's office, he was abolished, and the judges thought they would take the duties themselves. My own experience teaches me that it would be a great improvement to have a body of regular accountants attached to the court for the purpose of taking the accounts, as is the case, I believe, in Scotland. I know that there has been immense complaint of the utter inability to get a case properly carried through in India, where there is a reference to take an account. The court has the power to refer to a party to investigate accounts; but that is seldom or never done in our court, because the judge always takes it upon himself.

13,121. *Mr. Adam.*—Is the court at Calcutta supreme over all India?—The appellate jurisdiction is supreme over the whole Presidency of Bengal and particular provinces annexed to it.

13,122. But not Bombay?—No. There is a High Court in each Presidency. There is also a High Court at Agra, and a Chief in the Punjaub.

13,123. Are the proceedings the same in all these Supreme Courts?—I believe so, so far as Madras and Bombay are concerned. The charters are all exactly the same, I think, except that Agra has not the same original jurisdiction.

13,124. *Mr. Campbell.*—Then there are five Supreme Courts?—Four High Courts established by royal charter; and there is a court in the Punjaub established by local Act, which is very much the same as the High Court at Agra in principle.

13,125. And an appeal lies from the High Court in the Punjaub direct to the Privy Council?—Precisely.

13,126. *Mr. Gordon.*—Can you give us an instance of a judge separating an issue of fact and an issue of law from the statements of the parties?—If a plaint stated that the plaintiff claimed a certain sum of money as due from the defendant, on the ground of the defendant having verbally agreed to pay the debt of a third person, the issue in law would be whether such agreement was good unless it was in writing.

13,127. *The Chairman.*—Would there be any issue of fact in that case?—Yes. Secondly, if it was good without writing, was it in fact made.

Richard Vigors Doyne.

RICHARD VIGORS DOYNE, examined.

13,128. *The Chairman.*—Your practice was chiefly in the appellate court in India?—I left India in April of last year; and for about five or six years before leaving, my practice was almost altogether confined to the appellate court. I only went specially into the original jurisdiction.

13,129. In what form do causes come into the appellate court, and from what sources?—Causes come into the appellate court on appeal from all the district or zilla courts, as they are called, and also on appeal from the decisions of the single judges (being themselves judges of the High Court), who try cases in the original jurisdiction in Calcutta. The High Court has an original civil jurisdiction, and has also an appellate jurisdiction, the Calcutta cases being disposed of usually by single judges: there may be more, but in the great number of cases they are disposed of by single judges, with a right of appeal to two or more judges of the same court, that is, the High Court.

13,130. How many judges are there in the High Court?—15. The number varies, but the Chief Justice and 14 other judges is what is contemplated by the charter. One-third of them are to be barristers, and the remainder civilians or pleaders, or members of the civil courts.

13,131. *Mr. Gordon.*—Members of the Scotch bar are eligible?—Yes; one-third must be members of the bar of Scotland, England, or Ireland.

13,132. But no member of the Scotch bar has ever been appointed to the bench?—We have had very few Scotch advocates there—hardly any.

13,133. *Lord Barcaple.*—Is there one chamber of the appeal court, or more than one?—There are several. They are called division benches. Not uncommonly there are five division benches sitting at the same time, all entertaining appeals from the various zilla or district courts outside Calcutta.

13,134. Each consisting of how many judges?—Nearly always two. It lies with the Chief Justice to distribute the benches; and in some special cases three sit, and even more than that, when it is the pleasure of the Chief Justice, according to the importance of the case; and if conflicts of decision have taken place on the same point, it lies with the Chief Justice to appoint a bench of three, five, seven, or any other number, for the purpose of quieting any such question. But the ordinary division bench that entertains appeals from the zilla judges, whether native or European, consists of two judges.

13,135. Is it a court of two that entertains appeals from the court of two in the High Court?—When two judges sit in the High Court in the original jurisdiction, which is uncommon, then a bench of three entertains the appeal from them.

13,136. *The Chairman.*—The evidence is taken before the one or two judges who sit in the first instance, and then there is an appeal?—Exactly; the appellate court having certain powers of taking further evidence under certain circumstances given to them by sections of the Civil Procedure Code. When they consider that the case has not been properly tried below, or that certain evidence has been omitted, or certain issues have not been raised which ought to have been raised, the appellate court have a limited power to convert themselves into a court of original jurisdiction for taking further evidence.

13,137. The evidence is taken down in writing?—It is always taken in writing by the judge who has to try the case, or under his superintendence,—in his presence.

13,138. Does he generally form one of the two or three judges who sit in appeal?—Never. Review and appeal are two wholly distinct things in India. He sits in review, but never in appeals.

13,139. Would you explain the distinction which you take between review and appeal?—The right of review is one that I apprehend is almost peculiar to the Indian courts. It was borrowed from the former procedure; and it is very distinctly expressed in the Indian Procedure Code, that any party who shall not have appealed to the next court of appeal,—that is to say, in the appellate branch of the High Court, who shall not have preferred and carried an appeal to the Privy Council from the decision of the High Court in Calcutta,—if he shall consider himself aggrieved by a judgment that has been passed, shall have a right to apply to the judge or judges who heard and delivered the judgment by which he considered himself aggrieved, to re-hear it. He may apply to them on various grounds, which are distinctly specified in the Act, such as that he has since come into the possession of evidence which he was not in possession of, and could not have arrived at at that time; or he may point out that they have fallen into some broad error in law, or that they have overlooked some very important part of the evidence. That application must always be made before the same judges, and before no others, and it is limited in the way I have spoken of,—that he must not have preferred and carried an appeal forward to the Privy Council; and it must also be done within a certain limited time. An appeal is, as matter of course, always against the judgment of a lower to a higher court; that is to say, in India it is from the judgment of the court of first instance to that which sits purely as an appellate court.

13,140. The one is the same court reviewing its own judgment, and the other is an appeal to the higher

court?—Yes; it is to some extent like re-hearings in England before the courts in equity.

13,141. *Mr. Campbell.*—Am I right in supposing that there may be a review at two different stages; that is to say, supposing a single judge has tried a case, and given his determination, he may be asked to review his decision?—Certainly.

13,142. Or, if it has gone a stage further, and the Supreme Court sitting for the purposes of appeal has been referred to, there may be review there again?—There may be.

13,143. If that is thought preferable to going to the Privy Council?—Quite so. It is to give the court an opportunity of correcting an error, and to prevent a resort by the litigants to the Privy Council, which in India is always looked on with very considerable alarm, as they have to remove their causes across what they call the black water, entrust them to agents with whom they are not acquainted, and send their money there.

13,144. Supposing such review has taken place, is there still a right of appeal open to the Privy Council?—Certainly; and the usual practice is to file the petition of appeal to the Privy Council the day after they file the petition for review.

13,145. Then it is possible for a very obstinate litigant to have a very great multiplication of procedure. He has his case argued before the judge who originally tried it?—Yes.

13,146. He gets that judge to review the decision; then he goes to the appellate tribunal, and gets a decision there?—Yes.

13,147. Then he may have a review there?—Yes.

13,148. Are such cases known?—Yes; I have had many such cases in my own practice. I have seen a case in which even the same decision was reviewed before the High Court three times by each party,—changing the decision every time.

13,149. Don't you think that an abuse?—It is difficult to say. If there be error in the decision, it is difficult to call the rectification of an error an abuse.

13,150. *Mr. Gordon.*—The case you have mentioned was probably a complicated one?—There had been great conflict of opinion in the courts, and a variety of decisions; and as soon as there was a decision on one side, the party in whose favour it was, filed a petition of review to the other court, to consider its former decision. I was in the whole of these reviews myself. I lost three, and won three.

13,151. Is it within the discretion of the court to refuse a review?—It is within their discretion to refuse; and such refusal is final under the Act. The first application being nearly always *ex parte*, the other side is not necessarily brought before the court, or subjected to any expense; and probably 90 per cent. of reviews are refused on the first application, without bringing the opposite party before the court at all, so that the only expense incurred is by the obstinate litigant.

13,152. Is not the other party generally represented?—No. When a judgment has been passed in review, and a party being dissatisfied with it, desires an opportunity of reviewing it, he makes his first application *ex parte*. He has to make out a *primâ facie* case to the court already quite possessed of the case; they are naturally reluctant to allow a review; and unless strong ground is shown for it, they don't give notice to the other side. If they do, it is to come in on such a day and show cause why the judgment should not be reconsidered.

13,153. But, in point of fact, does not the opposite party generally watch the case?—Yes.

13,154. So that there is expense incurred?—Very little, I should say. They generally watch for the purpose of informing themselves; but even that is unnecessary, because the party has to put in a petition on stamped paper, setting out with great detail and accuracy the grounds on which he asks review, and out of that petition he is hardly ever allowed to wander. Therefore the other side are most fully apprised of the grounds on which review is applied for, by seeing the petition of review, which they can get out of the office for a rupee. In that way no very great expense is occasioned.

13,155. *The Chairman.*—In the pleadings given in, are the statements of fact separate from the propositions in law, upon which the party relies, or are they mixed together?—I suppose the question is put with reference to the pleadings in the inception of the cause?

13,156. Yes?—In India you can hardly apply the term pleading with any correctness to the statements that have to be made by the parties. I have no doubt the Commission has some acquaintance with the Code of Indian Civil Procedure; and the term 'pleading' is never used in it from beginning to end, the great object of that having been, as it always appeared to me, to avoid as far as possible paper warfare. The plaint, as it is called, which, no doubt, is another word for declaration, is of the most simple character.

13,157. *Lord Barcaple.*—Is that the very first document?—The very first. The plaintiff is obliged to come in and file, either by himself or an agent, his plaint, which he has to subscribe and verify in a manner which exposes him to prosecution if he should make any false statement. But the plaint, the form of which is prescribed by the Code of Civil Procedure, is of the very simplest character. It contains merely the name of the plaintiff, and his address and description, the name and address of the defendant, with his description, for the purpose of showing that he falls within the jurisdiction of the court. Then it goes on to state the nature of the claim—payment of so many rupees due on a bond bearing date so and so, of which so much has been paid, or none has been paid at all, leaving due so much. That is the whole of the plaint, if the provisions of the Act are adhered to. On that a summons is issued to the defendant, who comes in, and he does not necessarily put in any written statement at all. He may tender one on the first hearing if he chooses; or if he does not choose to do so, and if the case is one of such complication as to require a distinct statement of the position which he desires to take up, the court may call on him to do so. He then puts in the simplest statement of his own case, free from all argument; and if he indulges in the smallest amount of argument or prolixity, the paper is liable to be rejected, and returned to him.

13,158. Does he state anything but facts? Does he state propositions in law?—According to the Act, it is contemplated that he should state nothing but simple facts. It has grown a very common practice to say at the end, 'It is submitted that the plaintiff has no claim on the facts, and having regard to the points of law, such and such are submitted;' but the code contemplates nothing but the simplest bare statement of the facts on which the defendant relies. He may say, 'I never executed such a bond, and the plaintiff's case is all moonshine and fraud;' or, 'I did execute such a bond, but I have got a set-off;' or, 'It has been discharged in such a way;' and the court draws the legal inferences. The court has this before them, the parties are present, and the judge says, 'Then I suppose the points on which you are at issue are so and so.' They say yes or no, and the issues are written down, as appears to the judge requisite and proper. After that, the plaint and the written statement are put on one side, and nothing is attended to but the issues. The Code of Civil Procedure in India states distinctly that the issues are to be drawn up without reference to the written statement, or any differences that may appear in the statements of the parties made orally from the statements in the written paper.

13,159. *Mr. Baxter.*—Then there may be nothing but the plaint and the issues?—There may be nothing else. The issues are everything; and none of us ever find the smallest difficulty in raising the issues, which is generally done by consent of counsel. We are supplied with the plaint, and such information as our clients give us; and very often, in the bar library, we write on our brief what we consider the issues. Very often we agree; but if not, we go into court, and the whole thing is settled, as to issues, in ten minutes.

13,160. *The Chairman.*—When you say the parties appear, do you mean that they must appear personally?—They must, under the Act, appear either personally or by some agent properly authorized, who himself must be aware of the circumstances of the case, or he must be

Richard Vigors Doyne.

attended by some person fully informed of them, and competent to answer any questions put by the court.

13,161. *Lord Barcaple.*—But that knowledge may be knowledge derived from the party?—Quite so; and the fullest powers are given to the court at any time whatever, up to the latest moment, to amend the issues, or to add to the issues, and to call for further statements, or to take any step of that sort calculated to elicit the true points in contest.

13,162. Is it very common to add to the issues, or to amend them?—I think it is not uncommon to add to the issues. It is not very common, but I have seen it done. I should say it is rather exceptional than otherwise; because I have no doubt that in ninety-nine cases out of a hundred there is not the least difficulty in the parties saying what is the contest between them at the first start.

13,163. About fact it may be so; but do not questions of law sometimes emerge in the course of the argument that have not been foreseen by the parties?—I have very seldom seen that. When any question is suggested as a new one by either party, it is open for him to say, 'This comes on me by surprise, and I wish for a postponement of the case that I may look into the authorities,' if it be a question of law, or 'to seek for further evidence,' if it is a question of fact; and the court, if satisfied that the application is reasonable, give a week or a fortnight; and they will sometimes even grant commissions if they see that there has been an oversight, the great object of the court being to do broad, substantial justice between the parties, and to avoid paper warfare. The Act was introduced into India under rather unfavourable circumstances. We were all very angry, and disposed to look as unfavourably as possible on it. It was imposed upon the court without consulting even the judges; and the imposition, as I call it—not in an offensive sense, because it has turned out very well—was accompanied with a measure which was about the most unpopular that ever occurred in India, the abolition of the Supreme Court. It was abolished in 1862 by letters-patent; and by the same letters-patent the Act of 1859, or the Code of Civil Procedure, was made the code of procedure for the new court, which swallowed up the Zillah and the Supreme Court. The old Supreme Court was probably the most respected institution in India, and had been always looked on as the very palladium of European rights. It was matter of surprise that it was swept away, and we looked upon it as a degradation being doubled up with the Zillah Court. We had the greatest veneration for the mode of pleading—though my feeling since has been one of wonder that it existed so long—and yet within twelve months not a voice in the country was raised against the new system.

13,164. *Mr. Baxter.*—What system of pleading had you before that?—We had the pure English system of pleading.

13,165. *Mr. Gordon.*—Common law or equity?—Both.

13,166. *Mr. Baxter.*—And you find no inconvenience, but the reverse, from the system being done away with?—Speaking for myself, I think it has been the removal of a great scandal.

13,167. *Mr. Campbell.*—When a single judge of the High Court has pronounced his decision in a case, there is an appeal within the court?—Yes.

13,168. How many judges does the appellate tribunal generally consist of?—Generally two.

13,169. Assuming that these two are divided in opinion, what is the result?—The charter provides for that; and there has been a great conflict of opinion in the courts as to the construction of it. Formerly the first rule was, that where it was upon a question of fact, and the judges differed, one agreeing with the court below, the judgment remained undisturbed; where it was upon a question of law, the case was referred to another judge: a third judge was called in.

13,170. And he was made a sort of oversman?—He was made a sort of umpire.

13,171. *Mr. Baxter.*—Does it often happen that the two judges differ?—It is not infrequent; but I would not say it is frequent. I have been in very many cases myself in the course of a large practice in which that did occur; but probably it is a very moderate percentage.

13,172. *Mr. Campbell.*—In a very great majority of instances any two competent, educated judges will generally concur in matters of fact?—I think so. Such is my experience generally.

13,173. *Mr. Gordon.*—Is it the case, that before any cause is put down for proof or for debate, the judges or the judge who presides selects certain issues of fact and law?—Yes.

13,174. He prepares them?—Yes.

13,175. He eliminates the points of law as well as of fact in regard to which parties differ?—Exactly.

13,176. As suggested by the statement laid before him?—Exactly. He may do it from seeing what the contest as to facts is, because very often a legal issue will arise out of the issue as to fact.

13,177. *The Chairman.*—Then you think the present system is a satisfactory one?—Yes, as far as general principles go. I would by no means advocate the adoption of the Indian civil code *literatim*, because there are a great many defects in it, but it is an enormous improvement in what I had been accustomed to see before. I may add that I concur with Mr. Bell's evidence as to the deficiency in the machinery of the court for settling matters of accounts.

JOHN HOLLAMS, Esq., examined.

13,178. *The Chairman.*—Your experience has been connected with the common law courts?—Yes, but not exclusively.

13,179. It has also been in the equity courts?—Yes.

13,180. As a practitioner before these courts?—Yes.

13,181. A solicitor?—Yes.

13,182. You are one of the Judicature Commissioners?—Yes.

13,183. The report of that Commission seems to point at an obliteration to a considerable extent of the distinction between courts of law and courts of equity?—Yes, so far as procedure is concerned.

13,184. The separation as to procedure had been found inconvenient I suppose?—Yes, I think so. When I say it points to that so far as procedure is concerned, I apprehend the rest will follow. The real impediment is, I think, procedure.

13,185. It is put in a course to arrive at a complete amalgamation?—The great disadvantage of the system hitherto in this country has been, I think, the different procedure. Things are called by different names; the procedure differs from the very commencement in every stage, and consequently there is great difficulty in connecting and blending the two systems together. The Legislature has attempted to do it; but in consequence of the wholly different mode of procedure in the respective courts, and the great division between the practitioners, the bar practising in the two courts being quite distinct, and the judges being taken exclusively from their own branch, in general they really do not understand the procedure and the technical terms and language which are used in the other branch. One object, I think, of the Judicature Commission was, by establishing a simple mode of procedure, to remove that difficulty, because I need hardly say that the principles of law in the main on which the courts act are precisely the same, and when once you have removed the impediment caused by the distinction in the procedure, there is really no difficulty blending the two jurisdictions together.

13,186. The mode of taking evidence is different in the two systems?—Yes, it is now. At common law, the evidence is always oral before the court and jury; in Chancery, at present, it is absurdly intricate; sometimes it is taken in one way and sometimes in another, but, as a rule, it is documentary evidence. The witnesses are sometimes examined before the judge who hears the

cause, and the judge generally decides without a jury, although not necessarily.

13,187. The evidence is taken by a person appointed for the purpose of receiving the evidence of witnesses?—In Chancery the evidence is frequently taken by affidavit in the first instance, subject to cross-examination by the opposite party; sometimes the witness is examined in chief upon deposition, and his evidence is taken down, not by way of question and answer, but in the form of a narrative, and is subject to cross-examination in like manner. The cross-examination under certain circumstances takes place in court before the judge; under other circumstances it takes place before the examiner, and the judge has not the opportunity of seeing the witness, or judging of his demeanour, or knowing the exact language which he uses. He only gets the effect of it. That, in my experience, produces much inconvenience. Amongst others, the witness may refuse to answer a question, and the remedy is only a special application to the judge to commit him to prison for contempt for refusing to answer, and the proceedings break off till that preliminary matter has been decided. That I think adds very seriously to the expense of the litigation.

13,188. *Mr. Campbell.*—And to the delay?—And to the delay.

13,189. *The Chairman.*—There is a power, is there not, of taking evidence before the judge, even in the equity courts?—Yes; but it is not ordinarily exercised.

13,190. *Lord Barcaple.*—Do you know from what cause it has arisen, that that has been so little used?—I think it arises, in great measure, from the cause I referred to just now, that the judges are taken from the equity bar. They have not been accustomed to the examination of witnesses, and they don't like it; and of course it occupies more of their time. The hearing of the particular cause in court would no doubt be prolonged, if the witnesses were always examined fully before the court. There is no doubt that a great deal of evidence is given in every cause, and necessarily so, which turns out in the end not to be material to the point really to be decided; and that evil, I think, is extremely great with the present system in equity, because there is no means of knowing at all whether it will be material or not, that is, the judge has no opportunity of stopping the evidence; whereas, when the witnesses are examined before the court which has to decide, many members of the Commission will know that it is extremely common for a judge to say, 'I don't think that point material,' and to put a stop to that head of evidence. But if you are giving evidence on a preliminary stage, any point that may be material is worked out by the witnesses.

13,191. You speak of a jury trial?—No. I am speaking of every case in which there is a contest of fact.

13,192. But were you not speaking of jury trial when you said that the judge had an opportunity of stopping the evidence?—Yes. I am speaking of jury trial, or a trial in which the judge has the witnesses before him, and is to decide the facts.

13,193. *Mr. Campbell.*—There are some cases where the judge himself decides the matter of fact without a jury?—Yes.

13,194. And does so on hearing the evidence of witnesses *viva voce* before himself?—Yes; for instance, in the Probate Court and the Divorce Court that is so. It is by no means necessary to have a jury. Disputed questions of fact—for instance, whether a will was obtained by undue influence and fraud—are very often brought before the judge without any jury at all.

13,195. *Lord Barcaple.*—Where there is a review on the evidence from the judge's decision, is there not a difficulty in his stopping the course of examination?—I think not. The judge acts on his own responsibility.

13,196. You think the parties acquiesce pretty readily in a suggestion from the bench, although there is a review?—Yes, I think so.

13,197. *Mr. Gordon.*—The judge will probably not interfere, unless it is a pretty clear point?—Of course judges vary very much in that matter.

13,198. *Mr. Campbell.*—What is the relative proportion of cases tried by the judge alone, and cases tried by the judge with the assistance of a jury, in the Court of Chancery?—In the Court of Chancery a jury is quite exceptional; perhaps, numerically, one in a thousand.

13,199. There is a certain class of cases, where the witnesses are brought before the Vice-Chancellor, and examined *viva voce?*—Yes.

13,200. And these cases are occasionally decided by him without the assistance of a jury. There is another class of cases, where he does take the assistance of a jury?—Yes.

13,201. What proportion does the one class of cases bear to another?—There is a third class in which the witnesses are cross-examined before the judge. They make affidavits, or are examined first before the examiner, and are liable to be cross-examined before the court. Probably they are the most numerous; the others are not frequent.

13,202. Neither of the others are frequent?—Neither frequent.

13,203. *Mr. Gordon.*—Then the great mass of cases in the Court of Chancery is disposed of on evidence obtained by affidavit?—Yes; or deposition.

13,204. How do you think that system of giving evidence by means of affidavit works?—Where it is upon a disputed question of fact, I think very badly. Words are put into the mouth of the witness, which are not his own words, and an unscrupulous witness, or a weak witness, is induced to use language which is not natural to him, and which he would not himself have used, if he had attempted to describe what passed. Where the evidence is formal, I think there is great advantage in having evidence by affidavit, because it seems to me absurd to bring a witness 200 or 300 miles to prove a fact which is not in dispute; and I think such evidence may well be given by affidavit, as is recommended by the Judicature Commission.

13,205. Is there any way by which a judge could give directions as to what portions of a case might be tried by affidavit, and what portions by oral testimony?—Yes. I think you will find there is a recommendation to that effect in the report of the Judicature Commission as to the desirability of allowing documentary evidence to be given, where it would obviously save expense, and where it is not on direct questions of conflict between the witnesses.

13,206. *Lord Barcaple.*—There seems to be a marked difference between the equity and common law courts in this respect—that in the equity courts every matter goes in the first instance before a single judge, from whom there is a review; while in the common law courts, if there is any matter that can be disposed of without a jury, it goes at once to the full court?—Yes; but it is material to be borne in mind, that in a large proportion of the cases in the court of equity there is no real conflict as to the facts. Therefore when one speaks of the mode in which witnesses are examined in Chancery, it must be borne in mind that in a great many cases in equity there is no real conflict as to facts. That is so, to a considerable extent, in the courts of common law. A great many cases are now decided in the courts of common law on a special case stated between the parties, who agree on the facts, and submit a written statement to the court, and ask the judges to decide who is in the right. The old system in the courts of common law was that every question went first before a jury. The court sitting in *banc* is not in theory a court of first instance; it is in the nature of a court of appeal, in one sense, from the judge and jury. It certainly has grown to be a court of first instance, because many cases of great importance are now decided primarily by the court upon special case, or upon demurrer arising upon the pleadings, and questions of law are now never in our courts argued at any length at *nisi prius;* they are reserved for argument before the full court, and that has therefore become to great extent a court of first instance.

13,207. There don't appear to be any suggestion of doing away with the double judgment in the Court of Chancery,—the judgment, first of all, of a single judge, and then a review from him; and it seems to be thought

John Hollams.

right still to keep up that distinction between the two sets of courts?—The report of the Judicature Commission proposes that the appeal from the single judge in Chancery shall no longer be to a single judge, but shall be to the court of appeal, which is to be the court of appeal for both common law and equity.

13,208. But will it be the same court of appeal to which there will be an appeal from the judgment of the Queen's Bench and the Common Pleas?—Yes.

13,209. *The Chairman.*—I rather think it is proposed that, in regard to the mode of ascertaining the facts of a case, the judge, whether he be an equity judge or a common law judge, shall himself determine the course of investigation, and not the parties; that is to say, whether by examining witnesses before the judge, or by trial by jury, or by procuring evidence taken in some other way?—No. The report of the Judicature Commission suggests that the plaintiff may propose his own mode of trial, subject to change upon the application of his opponent.

13,210. *Mr. Gordon.*—Leaving it therefore in the ultimate discretion of the judge?—Yes, if the parties differ; but if they do not differ, the judge would not interfere.

13,211. Is it your own individual opinion that there is an advantage in having the judgment of a single judge, on the first disposal of the case, subject to review?—I think so. For instance, in the court of equity, supposing the recommendations of the Judicature Commission were to be adopted, it would not do to do away with the Vice-Chancellor, and let the appellate court be the court of first instance. In the first place, it would be very extravagant as regards time and other considerations. There is a great deal of the business, when it comes to be sifted, as to which there is no real doubt what the decision must be. The point is hardly arguable, and if argued, the litigant himself or his advisers are quite convinced that he was in the wrong, and there is no ground for an appeal. It would be very extravagant, I think, to send all the business in the first instance to the court of appeal. Then, again, I think that cases are of necessity and naturally better argued upon appeal than they are in the first instance. They have been ventilated; all parties know where the shoe pinches, and they apply themselves to that. The question of how many appeals there should be is a much more difficult one; but that there should be at least one appeal, I don't entertain any doubt—at all events in all cases of that description.

13,212. *Lord Barcaple.*—Would you apply the same principle to cases that are at present in the courts of common law where they don't require the intervention of a jury?—Yes, because I apprehend it would be the same kind of case. Of course there can be no appeal for any practical purpose, if it is a mere question of whether A swears right or B swears right. The credit to be given to a particular witness you cannot usefully appeal in such cases as those.

13,213. *Mr. Campbell.*—I understand it is contemplated that, in the event of cases being tried by a judge without the intervention of a jury, the decision of that single judge shall have the same finality with reference to the mere facts as the verdict of a jury?—Yes.

13,214. Is it your opinion that that is satisfactory?—I think you will not find many cases where there is a direct conflict of evidence tried before a single judge. Where there is a direct conflict—in other words, where it involves the credibility of a particular witness—parties will, as a rule, continue to avail themselves of a jury.

13,215. *Lord Barcaple.*—Do you think it is desirable that they should continue to do so? Are you favourable to that mode of trying questions where there is a proper conflict of evidence?—I think so. Where it comes to be a question of the credibility of witnesses, I would rather trust to a jury than to a single judge. There seems to me to be great advantage in doing so in these cases. You have no expression of opinion on the part of the jury till the whole thing is decided. As a rule, jurymen don't know each other beforehand; and they sit in the box and hear the case out before they form an opinion. That seems to me to be more favourable than where you have a tribunal which can express an opinion at an early stage. The plaintiff's witnesses may be extremely plausible, and it may be very difficult for any one to suggest a reason why they should not be believed, till the other side is heard. But if there has been an expression of opinion before the defendant's witnesses are heard, it is not very hopeful for them.

13,216. *Mr. Campbell.*—You think the judge commits himself to an opinion more easily than a jury, because he has the opportunity of speaking?—Yes; and he speaks with one mouth and one mind. The jurymen have no one mouthpiece.

13,217. *Mr. Gordon.*—Don't you think the plaintiff has a very great advantage before a jury, and that it is difficult to get their minds disabused of the impression produced by his evidence?—Unquestionably that is so; but I don't think that is confined to a jury. No doubt jurymen differ as much as judges; but one does not see the difference. But judges themselves will admit that they have different modes of dealing with a thing; and some judges are much more fond of expressing premature opinions than others. Some are very reserved, and hear a case out, and others very soon intimate an opinion.

13,218. *The Chairman.*—Even when they have a jury?—Even when they have a jury.

13,219. *Mr. Gordon.*—But that first impression is removeable by evidence led for the defendant?—To a certain extent it is; but the judge has great influence with the jury. He has the last word with them; and though he does not always get the verdict he wants, yet if he is determined to do so, he generally does; and if he forms a very strong opinion—say in favour of the defendant—though he may think that the first impressions in favour of the plaintiff had not been removed from the minds of the jury, yet if he is disposed to remove them, it is hard if he cannot do so.

13,220. What do you say as to cases involving fraud? Do you think that such cases are better disposed of by juries or by judges?—'Fraud' is rather a wide term; but I think fraud involving conflict of evidence is better disposed of by a jury.

13,221. I mean influence used in order to obtain the execution of a deed—that is the kind of fraud I allude to more particularly?—I don't say that I would be for sending such cases as those to a jury—a case, for instance, of a trustee and *cestuique* trust, cases ordinarily dealt with by the Court of Chancery. But cases of that kind vary so much that it is impossible to lay down general rules. There is frequently in these cases no real conflict as to what passed. The disposition of juries is to uphold transactions, and to look perhaps rather too much to the indirect consequences of a verdict, and to be guided by prejudices in matters of that kind.

13,222. *Lord Barcaple.*—The case suggested to you just now was the fraudulent obtaining of a will?—I think that is a case eminently suited for a jury. Wherever you have a conflict of evidence—the facts interspersed with the ordinary events of life—I think there is great advantage in taking twelve men indiscriminately, who are engaged in business, who have no common thoughts or knowledge of each other, and let them apply their common sense to it, and say whether the account given by the witnesses on the one side or the other is the more credible one. I think they have many advantages over a judge or individual arbitrator, because they have more general knowledge of the world.

13,223. *The Chairman.*—It has been suggested that there are certain classes of cases in which you may almost predict what the verdict of a jury will be—cases, for example, of master and servant: is that consistent with your experience?—I should not use such very decided language as that. There is no doubt there is a strong disposition on the part of juries to side with the weak against the strong, but I would not put it further than that—that their leaning is naturally to the weaker side. If you have an individual against a great company, the feeling of the jury is that it is a hard case on the individual, and that it won't hurt the company much. I am always assuming that the jury are satisfied that the plaintiff has got a grievance. Of course

they expect him to prove that; but if a man has got his leg broken on a railway, the jury think it very hard on him, and that he ought to be paid by somebody. In collision cases, or where a man is run over in the street, the jury think he ought to be paid. They are not particular as to who ought to pay him, but they are disposed to make the defendant before them pay, if he can afford it.

13,224. Is the inclination of your opinion to send such cases before a jury?—I think it is unavoidable. I don't think you can select cases of that kind, and say that you won't trust a jury to try them.

13,225. In the Court of Chancery, if the parties are sluggish in their movements, and neither of them seems very urgent to get on with the case, does the court interpose, and compel them to get on, or are they allowed to sleep as long as they choose?—That is perhaps a little difficult to answer. The court after a fashion does urge them to go on, and in the end compels them to go on; but practically they are allowed to delay the matter almost as much as they like. The pressure put upon them is very slight indeed.

13,226. *Lord Barcaple.*—Do you see any mode in which practically the pressure could be made much more effective?—No. My own feeling is that it is a mistake to limit them. I think there is a great deal of litigation which ought not to be commenced, and which dies a natural death. When people cool on it, they come to their senses. I think it would be a great pity to limit the time, as has been done in some cases, for taking each particular step. If the parties choose to delay enforcing their supposed rights, let them do so; and as long as the man sued does not complain, I don't understand why the court should interfere. It is quite competent for the defendant to press his adversary on; but if he does not do so, I don't see why the plaintiff should be compelled to go on within a limited time. Of course that does not apply to cases in the Court of Chancery, where there is a trust fund, and the rights of absent parties have to be dealt with. These cases ought to be proceeded with peremptorily.

13,227. The court acting there almost administratively?—Yes, I mean cases of that kind. But in other cases I think litigants may be left to follow their own wishes.

13,228. Do you think the present mode of taking accounts in the Court of Chancery is working satisfactorily? it is done by remitting to the chief clerk, is it not?—Yes, it is done by remitting to the chief clerk. I should hardly say that it works quite satisfactorily, because I cannot think it is worked in the way that it was intended to be worked. Practically it is done by remitting the matter to the chief clerk, who again remits it to his clerk in the first instance to vouch the account. Then it comes back to the chief clerk on any queried items in the account, and may go to the Vice-Chancellor; and all that produces considerable delay, and consequently expense; delay is caused by the intervals between the appointments before one official and another.

13,229. What occurs to you as a more satisfactory mode of disposing of that business?—I think if one matter were as far as possible taken up and disposed of before another was begun, it would be much better than the system of taking up things piecemeal. They take up an account for an hour or two; then they drop it, and take it up again at the next appointment, which may be a month afterwards. That of course involves great waste of time, because there is always to a certain extent the necessity of discussing common ground over again; for you have always to explain to an official the nature of the question, and after a month he is not likely to recollect what passed on the previous occasion. If he went on with the whole account at once, it would greatly facilitate matters.

13,230. Does it occur to you that it would be an advantage to have regular accountants officers of court?—I think not. I think such duties are better done by lawyers.

13,231. Then you would still leave it in the same hands, but have some regulations by which it should go on more continuously?—I think so; and more under the personal control of the judge.

13,232. Would it really be at all within the power of the judges of Chancery, with the business that they have just now, to overtake that immediate supervision of accounts?—When I speak of accounts, I do not of course mean the details of figures—mere accountants' work; but I am rather speaking of the questions more or less of principle which may from time to time arise on the accounts. I think they may be decided promptly, and brought to the attention of the judge promptly, if the judge were more in chambers. Sometimes taking an account will be a question of whether certain repairs have been done by a trustee on the trust estate. That may merely involve vouching the accounts, and there may be no question as to the propriety of the outlay. In the next case, precisely the same in its general features, it may be suggested that the trustee was extremely extravagant, and consequently that a portion of his account ought to be disallowed. In the third case, it may be suggested that the account is altogether fraudulent; that the alleged repairs were done on the trustee's own property; and that the claim on the trust estate is a fraudulent claim. In the first of these cases it would be merely a production of vouchers to see that the items were correct; and any one may do that. In the second and third of the cases, it may involve serious conflict of evidence; and I think all that would be better gone into at once before a lawyer than before an accountant. In the first case, an accountant can do it perfectly well, I admit; but I think a lawyer can also do it. You cannot in the first instance, as an ordinary rule, be sure whether any questions of difficulty of the kind to which I have referred will arise or not.

13,233. *Lord Barcaple.*—These observations refer mainly to the case of trustees' accounts?—I gave the instance of trustees' accounts; but I don't think they are confined to that.

13,234. The same would apply to partnership accounts?—Precisely; or accounts for building a house or building a ship.

13,235. Suppose the case of a long series of transactions running over a number of years?—As a rule, what I refer to as questions of accounts would not be very ancient. For instance, in common law actions, it might be a contract to make a railway, or a bridge, or a public work, and there is a dispute as to extras; the contractor perhaps claims £50,000 or £100,000 for extras. Every item is disputed; and it is said, 'That matter was included in your contract;' or, 'It is only one-half what you claim that is not included in your contract.' That is matter of account; but it is dependent on the evidence of engineers and architects and builders at every stage; and it is not a matter to be disposed of by vouchers.

13,236. *The Chairman.*—How would it be disposed of in your courts?—Practically, it is disposed of by arbitration according to the present system. In theory it would be disposed of by trial before a jury, unless it was so purely a matter of account that it could be referred to the Master.

13,237. But practically it goes to arbitration, I suppose, because trial by jury is not a mode of decision which is considered advisable in such cases?—It would be quite impossible to try such a case before a jury. Trial by jury is not adapted to a case where there are many issues to try, or where minute detail is involved; it is only where there is some broad question that can be understood by a jury.

13,238. *Mr. Gordon.*—In the case of dispute as to partnership accounts, do the parties make any payment for the services of the officer of court who is employed in making up their accounts?—No, not directly; but they pay a fee upon every summons taken out, which of course comes indirectly to be much the same thing. Upon every appointment the parties are summoned to attend, and there is a fee collected by means of stamp on each of these applications.

13,239. What fee is collected for an appointment?—I think it is 5s.

13,240. Would it be 5s. for an appointment before

John Hollams.

the Master, which might be continued for three or four days?—At common law the whole thing is different. The remuneration goes to the Master nominally, but he has no interest in it; it goes to the fee fund. At common law it is 10s. an hour. In Chancery it is a mere stamp on the appointment.

13,241. *The Chairman.*—The 10s. is paid by the parties?—Yes; now by stamp.

13,242. Between them?—No. The party setting the officer in motion pays 10s. an hour, which is a very low rate of remuneration as compared with private arbitration.

13,243. *Mr. Gordon.*—Is it not hard to make the country pay for the disputes of two partners?—I think, as a rule, the country does not pay. I don't know the figures exactly; but, in the main, our courts are self-supporting. Some courts show an excess, and some a deficiency; but, in the main, I think there is very little charge on the public in respect of the courts of justice. I am speaking of the civil courts.

13,244. *The Chairman.*—The fees collected from the suitors cover the expenses?—Yes; and I think they are adapted on the principle of doing so.

13,245. *Mr. Gordon.*—Does the system of common law pleading give satisfaction?—I think not. I don't think that either system gives satisfaction; and the Judicature Commission proposes some very sweeping changes. I cannot conceive anything worse than the system of common law, except the system of Chancery.

13,246. *Mr. Baxter.*—Will there be a uniform system now?—It is proposed so.

13,247. *Mr. Gordon.*—The common law pleading very often does not disclose the true points in dispute?—No; and it never discloses them with actual dates and facts. It is done almost always in figurative language. In some cases you are obliged to plead with great nicety, and the defendant is obliged to specify all his defences; whereas you may raise the same kind of question in other instances where the pleadings give no information, and you have no means of knowing what answer is to be set up. It is a matter of chance. For instance, in an action for goods sold and delivered, where the defendant denies his liability, that may involve a question of partnership; but there is no species of information given, because, if the plaintiff sues for goods sold and delivered, and the defendant says 'never indebted,' nothing can be more concise; but these pleadings give you no species of information as to the question to be tried, whether it is disputed that the man ever got the goods, or that the contract fell under the statute of frauds, or that he was not a partner.

13,248. *Lord Barcaple.*—What you desiderate is a plain statement by each party of the facts on which they rely?—My own opinion is, that it should be rather of the nature of a particular than a pleading. The equity pleadings profess to be a statement of facts; but they have drifted into evidence and arguments in support of the case, and they are extremely verbose and extensive, and very confusing to read. All you require, I think, is a short statement of the actual facts, that the defendant may know in respect of what transaction he is sued, and that the plaintiff may know what answer the defendant is going to set up.

13,249. Does it occur to you that there is any necessity for that being accompanied by setting forth the pleas in law on which each party relies—the real grounds of action and defence?—No, I think not. I think that will only cause expense—frequently quite unnecessarily. I think it is quite right that there should be a power for either party, in case he is in any doubt, to apply to the judge for further information. If he does not know what the case against him is, he should have the means of applying summarily to the judge for further particulars of the case, so that he may know the point of law as well as the question of fact raised against him; but I think what we know here as a particular will answer the purpose. For instance, the defendant pleads fraud to an action—he says he was induced to enter into the contract by fraud; the ordinary practice, then, is, that the plaintiff applies to the judge for an order on the defendant to give him the particulars of the fraud. Now, I think that the particulars of the fraud should be furnished in the first instance. The general plea is of no use to the plaintiff; it is the particulars only that are of use to him.

13,250. *The Chairman.*—I asked you about putting the parties in motion if they are disposed to linger over a case. My attention was directed accidentally to a case which was disposed of by Vice-Chancellor Malins last year,—the case of *Wellesley* v *The Countess of Mornington*,—which seems to have lasted upwards of thirty years, and to have cost an enormous sum. It is stated that the bill was filed in May 1839; and the object of the suit was to ascertain the right of the lady to an annuity of £1000 a year. It is stated that the case has been going on ever since, and that she had not received anything in the interval; and at length it was decided that she was entitled to be paid £22,000, with interest. She had been suing *in forma pauperis* for a great part of the time. Now that seems to be a very cruel state of matters?—But I don't think the law is responsible for that, though the fact that she was suing *in forma pauperis* may account for it.

13,251. Parties may be litigious, and they may be very remiss in pressing their case at the proper time?—It is quite absurd to suppose that any case could properly occupy thirty years, or anything approaching to it.

13,252. *Mr. Campbell.*—There are not many such cases?—I don't think there are any such cases. I don't think there is any case which could properly take that time. Of course, if parties choose to play with the thing, it is difficult to say that they may not spin it out.

13,253. *The Chairman.*—There is another case that lately came under my notice from knowing something of the parties—a case that had originated in 1803, and had been going on till it was compromised the other day in Chancery. It began with reference to a banking establishment, of which the Earl of Leicester was a partner. Do such cases not show that if parties are remiss in their proceedings, and are not pressing on their cases, or are exceedingly litigious, the time runs on without the court feeling it incumbent on them to interpose?—Certainly, that is so. I don't know that the court will ever interfere except in certain stages. If matters get into chambers, they do urge parties on; but if it is not before the court itself, or not in chambers, I don't think the judges have any cognisance of the case, or that there would be any interference with it. But I think the parties have themselves to blame there; it is not the system.

13,254. *Lord Barcaple.*—Is the course of framing a special case for the judgment of the court much adopted now?—It is; much more so than formerly.

13,255. And is coming more into use?—Yes.

13,256. Is it in favour at present?—It is open to this very serious objection, that where the parties do not agree upon the facts, it leads to very serious expense; and the practice is to refer the matter to a barrister as a private referee, to state a case for the opinion of the court.

13,257. But the parties must first adopt that course: it is exceptional and only adopted of consent?—Nominally they must consent, but practically they are forced to consent.

13,258. That is when the court sees that there is no proper dispute on the facts?—When the judge at the trial says, 'This is not a question which ought to be tried before a jury,' practically it is very difficult for the parties to avoid having it stated in the form of a special case.

13,259. Is not that course sometimes taken at the outset before the trial at all?—Oh yes; and then it works extremely well. Where the parties can agree upon the facts, I know of no better mode of raising the question.

13,260. Is it coming into favour here?—Very much; but of course it is only applicable to very simple cases, and there are many cases in which that course could not be adopted.

13,261. They may be simple cases, but raising nice

enough questions of law?—Very; and questions of great pecuniary importance to the parties.

13,262. Is it contemplated that these cases shall go at once to the full court, or be heard by a single judge?—The report of the Judicature Commission leaves these cases as at present. No doubt the report is open to the charge of inconsistency in that respect, that such cases in equity would be decided before one judge, while if they come before the common law branches they would be decided by three judges. No doubt the report is open to that observation; but I may state it was felt that there was considerable difficulty in at once wholly changing the system.

13,263. And, as a general rule, are not equity cases more complicated?—It is very difficult to answer that question. I should doubt that. The real explanation, I think, is this, that the more complicated cases at common law are practically referred to private arbitration, and do not come before the courts. But if they were dealt with and tried out, I doubt very much whether the Chancery cases are more complicated. The common law courts get rid of them.

JAMES ANDERSON, Esq., Q.C., examined.

13,264. *The Chairman.*—You are a Scotch advocate, and you practised for some years in Scotland?—I did for ten years.

13,265. How long have you practised before the Court of Chancery?—Since 1839.

13,266. The proceedings in the Court of Chancery are brought before the Vice-Chancellor or the Master of the Rolls in the first instance?—They are the judges in the first instance.

13,267. There is then an appeal or review?—Yes; or rather a re-hearing. The Vice-Chancellor acts *vice* the Chancellor, and the Master of the Rolls has a co-ordinate jurisdiction, but the Lord Chancellor or the Lords Justices may hear causes in the first instance. The appeal is strictly a re-hearing, and it is so in effect, though it is not heard by the same judge who made the order or decree.

13,268. The usual course of proceeding is to go in the first instance before the Vice-Chancellor?—Yes. Unless a special cause is assigned, the Lord Chancellor or Lords Justices will not interfere in the first instance.

13,269. How does the Vice-Chancellor proceed in expiscating the facts of the case?—There has been a great change since I first knew the Court of Chancery. When I first practised before that court, the procedure was by bill and answer. The bill was a very technical instrument, and the answer was still more so; but the proceedings have been much simplified. The bill and answer are very much like the condescendence and statement of facts in Scotch records, dropping a great many of the technicalities.

13,270. And considerably abridged?—And considerably abridged.

13,271. And with less mixture of argument?—They never professed to have argument. The bill and answer concluded by submitting points to the court which were very much like the Scotch pleas in law; but so many hypothetical views were presented, that these submissions to the court often branched out to a great length; and that is very much dispensed with now.

13,272. The proceeding originates by the plaintiff filing a bill?—Yes.

13,273. And then an order is made?—A subpœna is at the same time issued. It is the warrant for bringing the defendant before the court.

13,274. And the defendant puts in an answer?—He may or may not put in an answer. It is optional in the plaintiff to require an answer; and that is, I think, a great improvement on the old system, by which answers were always required. The plaintiff now may not call for an answer, and the cause is speedily at issue. If no answer is required, the plaintiff goes into evidence, and the defendant also. At one time the evidence was taken apart, neither party knowing anything of what his opponent was doing; and at the end of a specific time, publication passed, having the effect of circumduction in Scotland. That was extremely unsatisfactory. But now there are examiners before whom the witnesses are examined in presence of the opposite party, very much as witnesses were examined on commission in Scotland; if it is considered necessary, the witnesses may be examined before the judge.

James Anderson.

13,275. *Mr. Baxter.*—Suppose the plaintiff does not require an answer, can the defendant put in an answer?—Yes; he may put in his voluntary answer.

13,276. *The Chairman.*—If he does not choose to put in an answer?—It is scarcely an answer now to the bill. The plaintiff, if he desires to have discovery, files interrogatories, which the defendant answers.

13,277. Are these interrogatories answered upon oath?—They are.

13,278. *Mr. Baxter.*—Always?—Always upon oath, unless in the case of persons exempted from taking an oath.

13,279. *The Chairman.*—When the answers are put in, and parties are to meet in order to investigate the facts, is there an order by the judge that they shall proceed to investigate the facts?—No. That is regulated by the general orders of court. The cause goes at once to the examiner. Frequently before the parties get that length there are amendments on the bill. There are very often amendments on the bill. Within a certain time there is an order, as of course, to amend the bill; and that is frequently done if an answer is put in. If the defendant is interrogated, and certain matters are brought out in the answers, these are frequently made the foundation of an amendment of the bill.

13,280. Is it amended more than once?—Yes, it may be so.

13,281. *Mr. Baxter.*—Is the answer amended more than once?—No; the answer is never amended.

13,282. *The Chairman.*—But if there is an amendment on the bill, the defendant may put in an additional answer?—Yes, an answer to the amended bill.

13,283. The evidence is taken in presence of the parties unless there are affidavits?—Yes; a great deal, however, is taken by affidavit.

13,284. How is that brought before the judge? Is it just reported?—After publication has passed, and the time for going further into evidence has expired, the cause is set down for hearing. I am speaking now of what I may call the ordinary practice by bill and answer, and examination of witnesses. I shall mention some special exceptions presently.

13,285. Being set down for hearing, it is argued?—Then it comes on for argument in the regular course of the cause paper.

13,286. The judge then decides it. Does he take time to consider when he thinks that necessary?—Yes.

13,287. And afterwards delivers his judgment in court?—He delivers his judgment in court always before the order is made.

13,288. He delivers his judgment in court, and that is put in the shape of an order?—The judgment he delivers in court contains the reasons for the order he makes; and at the conclusion of his exposition he says that the order is so and so, stating what he thinks ought to be done.

13,289. Does he draw up that order himself?—Not the formal order, but he states the substance.

13,290. Or is there an officer of court who does it?—Yes, the registrar of court draws up the formal order, but the judge very frequently concludes his exposition of the case by saying, 'My opinion, therefore, is that an order should be made so and so,' stating its terms. The registrar, who fills a similar position to that of a principal Clerk of Session, takes down a note of that, and afterwards draws it up, and sends the draft to the parties to see whether they are satisfied with it. If there is no objection, it is drawn out; but if there are objections, he hears them, and then draws up the order as he thinks it ought to be drawn up.

13,291. That order is signed by the registrar?—Yes.

James Anderson.

13,292. From that judgment there is an appeal?—Yes, there is an appeal or a re-hearing; and being a re-hearing, when the appeal was from the whole decree, although the plaintiff was in possession of the judgment, he opened the case again. That did not obtain in interlocutory or partial judgments; if the order merely decided a point in a case, then the appellant began.

13,293. That review or re-hearing is before the court of appeal?—Yes. The court of appeal consists of two branches practically: either the Lord Chancellor or the two Lords Justices, or the Lord Chancellor and one Lord Justice, have full jurisdiction. Generally the Lord Chancellor sits alone, and the two Lords Justices sit together; and you may go before either the one court or the other. But the appeals are divided between the two branches of the appeal court. For example, the Lord Chancellor may take appeals from Vice-Chancellors Stuart and Malins, and the Lords Justices from the Vice-Chancellor James and the Master of the Rolls. The business is arranged in that way. By the 30 and 31 Vict. c. 64, it is provided that the jurisdiction of the court of appeal may be exercised either by both of the Lords Justices 'when sitting together, or by either of the said judges when sitting separately, or by the Lord Chancellor when sitting with the said judges or either of them, provided that no decree made on the hearing of a cause or on further consideration shall be re-heard before the Lords Justices when sitting separately.' The object of the Act was despatch, the business of the appeal court being, at the time it was passed, greatly in arrear.

13,294. When a judgment is given by that court of appeal, is there a further appeal to the House of Lords?—Yes; it is an appeal then from the Court of Chancery; but it is not necessary, in going to the House of Lords, that you should go through a Chancery appeal court. You may appeal directly from the Vice-Chancellor or Master of the Rolls' judgment to the House of Lords, if the decree be enrolled. A decree or order by the Vice-Chancellor is not appealable to the Lords, but it must be made a decree or order of the Lord Chancellor; and that is done by enrolment.

13,295. Without discussion?—Yes; it is done by an officer after a certain number of days. If either party has any objections to the enrolment, he lodges a caveat; but if there is no caveat, the order is enrolled as matter of course. I have known appeals from the Court of Chancery to the House of Lords taken up *per incuriam* without the order being enrolled, and the appeal has always been dismissed as incompetent.

13,296. *Mr. Baxter.*—You spoke of taking evidence by affidavit: Do you find that where there is a conflict of evidence, that is satisfactory?—I do not like the affidavit system at all; but the objection to it is now very much mitigated by the opportunity which the opposite party has of cross-examining every witness who makes an affidavit in the cause. I mentioned what I described as the ordinary regular practice of the Court of Chancery; but I should say now that a system which is found very convenient in practice has very nearly superseded the regular ordinary system, and that is a motion for a decree. Instead of going through the regular course of examination of witnesses before the examiner, the plaintiff has the power, if he pleases, of making a motion to the court for a decree, in terms of the prayer of his bill. He gives notice of motion for a decree after a certain number of weeks. During that interval both parties file all the affidavits they rely on, and there may be affidavits in reply. These affidavits being filed, the party against whom they are filed may cross-examine before the examiner, or, if the court is satisfied it is a right course to take, in court; and then the motion for decree comes on in the same way as a cause,—being set down in the paper, it is disposed of in that way. There are more 'motions for decree' now than regular 'causes;' and it is found extremely convenient. If the court thinks it is not a case for giving an order or decree upon the motion, it has the power to direct further inquiry, or to say it shall come on after the examination of witnesses in the ordinary way.

13,297. *The Chairman.*—What is the advantage of that course?—I should say despatch and economy. It dispenses with long examinations of witnesses.

13,298. And that brings it back very much to proof by affidavit?—Indeed it does; but the proof by affidavit is more satisfactory from the knowledge the party has that his witness may be cross-examined.

13,299. *Lord Barcaple.*—Do you think there is a considerable number of causes in which the affidavit system saves expense?—Yes, I think so.

13,300. Where the parties know they cannot make better of it?—Where the parties know they cannot make better of it, they do not cross-examine. I have known many cases where the affidavit witnesses were cross-examined, very much to the disadvantage of the party cross-examining them.

13,301. *The Chairman.*—Do you find that these modes of expiscating facts in the Court of Chancery are satisfactory?—For the ordinary litigious business I think they are; but there is a large portion of the business of the Court of Chancery which does not consist of that class of business. There is administrative business for instance, and that is now very much simplified. There are the Trustee Relief Acts, under which a great many questions may be disposed of by the court. If a trustee has doubts as to how a certain trust fund which he holds ought to be distributed, he pays it into court, and gives notice to the parties that he washes his hands of it. The court will then deal with it. That is done by means of a petition by one party served on the other to have the money paid out to him, and the question is disposed of on that petition. Then, again, in administration suits, which are much like multiplepoindings, there is nothing but a summons taken out at chambers upon an executor to give in his accounts; and the administration of the estate may all take place without the intervention of the judge, unless points arise in the course of the administration procedure that require his decision. In these administration suits, which may be begun in that very simple way, merely by subpœna, or summons on the executor, you may get in the accounts, and bring the conflicting parties before the court, and you may have the points decided without going through the ordinary formula of bill and answer, or motion for decree, or examination of witnesses.

13,302. And there is no record of anything then except just the motion that is made?—If there are conflicting claims, the claim is put in and verified by affidavit in chambers.

13,303. These are suits for distribution?—Yes; or if an estate is insolvent, there are creditor suits.

13,304. *Mr. Baxter.*—Is that greatly done by the chief clerk?—Yes, in administration suits. Though it is done by the chief clerk, it is the act of the judge; but unless there is a point of law, or the parties desire the judge to give his mind to it, the chief clerk works out the detail.

13,305. *The Chairman.*—Do you think the mode of expiscating the facts which you have stated is a satisfactory one?—I think it is. You must have some record of what a witness says. I confess, however, that I prefer the witness being brought into court, and giving his testimony before the judge who is to decide the case. The only difficulty in the way of that course in every case is the time which it takes.

13,306. It is sometimes done?—Yes; it is sometimes done.

13,307. There was a case before Vice-Chancellor Stuart with reference to Young's patent?—Yes; the evidence there was taken in court, but it is not a very favourable specimen.

13,308. *Mr. Baxter.*—But you prefer that mode?—I prefer that mode.

13,309. *Lord Barcaple.*—There was another case which was also very long—the Spiritualist case?—Yes, that was very long.

13,310. *The Chairman.*—How long did Young's patent case last? Was it not thirty days?—I think so; but I cannot give the exact number of days.

13,311. *Lord Barcaple.*—Do these proofs before the judge frequently become prolix?—Yes.

13,312. Would you say they were more or less so than the proceeding before the examiner?—I do not think the parties are sufficiently under the examiner's control, and I do not think the examiner sufficiently exercises a judicial function. He considers himself rather as a conduit pipe for sending up the evidence as tendered.

13,313. But is the evidence more prolix before him than before the judge?—Yes, I think it is. I may refer to a case before the Lords Justices (*in re Mercantile Trading Company*) last Saturday, under a winding-up; and these windings-up occupy a very large portion of the time of the court. This question arose out of a blockade-running company. A dividend of 25 per cent. was paid on the capital within six months after the formation of the company, and in the winding-up it was alleged that that was a return of the capital. That was the only question there, and it was tried on affidavit; each of the affidavit witnesses was cross-examined at great length before the examiner, and certainly there was great prolixity in that case. It was very much animadverted on by the judges, both by Vice-Chancellor Malins, who gave the original judgment, and by the Lords Justices. I have known other instances of the same character. I think the examination before the examiners is generally much more prolix than when it is taken in court. The judge keeps them more under control.

13,314. *The Chairman.*—If the judge attempted to take the evidence in all the cases before him, the time occupied would be more than he could devote to it?—I think so; but the remedy for that is to have more judges.

13,315. *Mr. Gordon.*—Who pays the examiners?—The country.

13,316. Not the parties?—Not the parties, unless a special examiner is appointed. If the parties wish to have a special examiner so as to save time, or to get a person in whom they may have more confidence than in the official examiner, they are at liberty to do so.

13,317. *The Chairman.*—Or to go to the country?—Yes.

13,318. *Mr. Gordon.*—Must that be of consent of parties?—No; I think the judge will appoint him.

13,319. *Lord Barcaple.*—When a special examiner is appointed in a distant county, what class of professional person is he?—He is generally a barrister.

13,320. Sent from London?—Yes. I daresay you may have heard of the case of *Lord* v. *Colvin;* the special examiner appointed in that case was Mr. (now Sir Richard) Baggallay.

13,321. *The Chairman.*—There is a change proposed, is there not, in the system of procedure?—Yes; the change is a fusion,—to have common law and equity administered in one court. It is very much the Scotch system, so far as regards the consolidation of legal and equitable jurisdiction.

13,322. That will probably result in more causes being tried by jury?—I don't know that it will in causes of a proper equitable character. I think that trial by jury in the Court of Equity has been a failure. It was introduced about ten years ago, and there has been now and then a cause tried by jury.

13,323. *Mr. Baxter.*—But seldom?—Very seldom.

13,324. *Lord Barcaple.*—It is only intended, I suppose, for the trial of a special question?—It has not answered at all; and even in the Probate Court, where the parties have the option of trial by jury, in the great majority of cases they prefer the witnesses to be examined before the judge.

13,325. *Mr. Gordon.*—And also in the Divorce Court?—Yes, in the Probate and Divorce Court.

13,326. *The Chairman.*—What do you ascribe that to?—I think the parties are more satisfied with the opinion of the judge on the evidence than with the opinion of a jury.

13,327. *Lord Barcaple.*—Do you mean that as a general proposition, or in reference to the cases in these courts?—In reference to cases of that character—patrimonial cases. Cases involving the liberty of the subject stand on a different footing; also cases of libel.

13,328. *The Chairman.*—You think it applies to cases such as come before the Divorce and Probate Courts, and proper equity suits?—Yes; I am confining my observations to that class of cases.

13,329. In the new system that is proposed to be inaugurated, the parties have a power of selecting the mode of investigation into facts. It seems to have been suggested that the plaintiff may say that he desires to have the facts investigated by a jury, and the defendant may agree to that, or he may object to it; if he agrees to it, it is done if the judge thinks it a right course; if he objects to it, the judge determines whether it is to be by jury or not. Do you approve of giving that power to the parties?—I think so. That is the present practice in the Divorce Court. I don't know whether I am right or not, but from the cursory glance I had of the report, I see there is an option also given of referring to an arbitrator. I am not prepared to say that I approve of that. If parties please out of court to refer, let them refer; but I don't understand the judge shaking off his judicial responsibility, and referring the case to an arbitrator against the wishes of parties.

13,330. You know the system of dealing with cases of accounting in the Court of Session—namely, to remit them to an accountant? Would you suggest any mode by which the expense and tedium of that course of proceeding could be to any extent avoided?—The expense and tedium of that course of procedure are certainly very great. It is, I venture to think, a crying evil. I have known many instances where the merits of the case were completely smothered by the voluminous and complicated procedure before the accountants in reference to their reports. Two of these I may refer to. They both reached the House of Lords. The one is *Smith* v. *Donaldson*, 20 July 1864, 2 Macph. (H. L.) 86; and the other, *Chisholm* v. *Laird*, still depending. In each of these cases, which were suits for taking the accounts of private partnerships, the accountants' reports filled volumes. *Chisholm* v. *Laird* commenced in the year 1848, and after it had been twenty years in court, and the accountant had made four different voluminous reports, to which respectively objections were given in by the parties, and numerous judgments were pronounced, all of an interlocutory nature, the court at length gave leave to appeal to the House of Lords against these judgments, by the last of which a remit was once more made to an accountant to proceed with the accounting. The ground on which the leave was sought and granted was, 'that it would be best for all parties that it (the remit) should stand over until the principles of the accounting are finally determined.' Chisholm's case is the worst specimen of the kind I have ever seen.

13,331. *Mr. Baxter.*—You have nothing of that kind in England?—Nothing of that kind.

13,332. *The Chairman.*—Some parties won't do as they do in England,—take the advice of the court, and have the matter referred to an arbitrator. That advice was not infrequently given in that case. But can you suggest any mode by which the expense and delay of remitting cases to accountants might be avoided?—I think there ought to be attached to the court officers conversant with figures for the particular occasion. There is a great temptation for an accountant to spend money, and to make hypothetical reports; and they are very prone to hypothetical reports in the Scotch courts. If the accounts were taken by a paid officer, who had no motive to delay proceedings, and who acted upon his official responsibility, I think accountings would be very much simplified. An ordinary case of accounting, I think, ought to go at once to the accountant, if there is no defence to bar the action.

13,333. *Lord Barcaple.*—The parties very often adopt that course now; but, on the other hand, they also frequently concur in asking for the decision of one or two points, preliminary to the accounting, as instructions as it were to the accountant?—I think that is very proper.

13,334. *The Chairman.*—But you think that having two or three persons attached to the court who would prepare the cases of accounting for the court might

James Anderson.

shorten and simplify the proceedings?—I think it would very much.

13,335. Do you point at those persons being salaried officers?—Yes.

13,336. There is another class of cases which have given rise to a good deal of expense—namely, multiplepoindings, in which there are a number of claims. Can you make any suggestion as to how they might be simplified?—I think multiplepoindings are very unsatisfactorily dealt with by the Judicature Act. I have seen several instances of this, where the only point was a point of construction. In such a case as that I think no record is necessary. There may be a question when a person was born or when he died, and dates may be required; but wherever it appears that the question turns upon the construction of one or more instruments, there should be no record, or anything else, except production of those instruments. The instruments might be referred to in the condescendence annexed to the summons; or it might be begun by a petition, and parties could be heard on that. That is the way that these things are done in the Court of Chancery; the matter is generally disposed of upon petition, and the instruments are set out or referred to in the petition.

13,337. But if there are competing claims?—Even there no claim is given in. It turns often on mere construction. The parties have the petition intimated to them, and they appear at the time the petition is heard, and it is disposed of generally at this hearing. I think that might be done in a large number of multiplepoindings. If it is a multiplepoinding and exoneration, the trustee wishing exoneration, then it is practically the combination of a count and reckoning, and a suit for the construction of the instruments; and the judge might give his opinion upon the summons with the condescendence, or upon petition, if you adopt the petition form, as to the matter of construction, and he might refer the question of accounting to the accountant.

13,338. *Mr. Gordon.*—Are you not aware of the 30th clause in the Court of Session Act of 1868, which contains provisions remedying the matters objected by you?—So far as it goes, I think the change made an improvement. But I do not consider that it goes far enough. I think also in reductions a record is frequently very unnecessary. Take the case of a reduction *ex capite lecti*. In the recent case of *Barstow* v. *Black*, there were numerous appeals and cross appeals to the House of Lords. It was an action by the heir-at-law to set aside a deed *ex capite lecti*. There was no doubt that the deed was executed within the sixty days, and that the testator was ill of the disease of which he died. There were no facts in dispute; and the only question was as to the effect of prior instruments, as to which there were a great many nice questions.

13,339. But there was a doubt as to whether he died of that disease?—Originally.

13,340. And that doubt was not solved till after the record was made up?—Yes; a minute was put in admitting it.

13,341. In fact, it was very much a feeling on the part of the heir-at-law that he did not wish to investigate disagreeable circumstances, which led him to say that he would not go into that doubtful point?—But that instance does not affect my general opinion, that in many cases the decisions of these questions depend entirely on written instruments; and where a case depends upon that, I think a record quite unnecessary and mischievous.

13,342. *Lord Barcaple.*—Do you carry that so far that you would not have the defender put in any kind of pleading at all?—I would serve the summons upon him, or the petition, or whatever begins the suit. The petition, if this form be adopted, should be ordered by the judge to be heard on a given day; the parties would appear on that day; and if the judge thought it ripe for decision, he would give his judgment. If the parties on whom the petition was served wished to put anything on record, they might present a counter petition, and the matter would come on upon petition and counter petition, and judgment might be given at once.

13,343. You would leave it to the judgment of the defender whether he should put in a counter petition?—I would give him a discretion. If he thinks he has a case that is not embraced by the original petition, I certainly would give him, under the sanction of costs, the option of having a cross petition.

13,344. *Mr. Gordon.*—The case of Black was a peculiar case, from there being an heir-at-law and two or three sets of heirs of provision?—Yes.

13,345. *The Chairman.*—And it involved some very nice questions?—Yes; but records there were thoroughly unnecessary.

13,346. *Lord Barcaple.*—But you would leave it possible that the case might be disposed of in such circumstances as you have spoken of upon a summons, or whatever other initial writ there may be, and nothing else in the way of writing?—Yes.

13,347. When the cause is decided, and goes elsewhere, how is it to be discovered what cause it was that the judgment was pronounced in?—The cause goes up as it stood before the judge in the first instance in its integrity.

13,348. But it was no cause at all, except in so far as the summons disclosed something, and it was upon the statement of parties in the course of a discussion that the judge arrived at a conclusion?—The facts must all be in the petition. What the parties said in the way of reasoning may be said again in the court of appeal.

13,349. But the petition is the petition of the pursuer, or the summons is the summons of the pursuer, and the defender *ex hypothesi* has made no statement of any kind?—Because he deems that unnecessary. If he disputes the facts in the petition, he puts in an affidavit doing so. If he is to bring forward any facts of his own as the foundation of a claim on his part, then he has a cross petition. All the facts must be before the court.

13,350. Then the defender, if he has a case founded upon facts of his own, must state these facts?—Yes.

13,351. That is pretty much the existing system of procedure in the Court of Session, particularly since Mr. Gordon's Act was passed?—I have no doubt that Act has brought in a great many improvements.

13,352. *Mr. Gordon.*—The abuse is the unnecessary setting forth of contents of documents by the defender?—In making up the record, each party states the whole case *ab initio*.

13,353. *Lord Barcaple.*—That is a gross abuse?—But I am afraid in practice it is done.

13,354. Do you think there is any real use of the plea in law?—I think it is useful. I think it gives notice to the other side what the point is.

13,355. You do not have anything precisely the same in Chancery, have you?—In the bill there are generally a few concluding sentences: 'The plaintiff submits to the court so and so.' That is very much a statement of pleas in law, though it is not so called.

13,356. The theory of the plea in law is that all pleas in law that are to be made use of shall have been stated, and the party, strictly speaking, cannot win his case except upon a plea that he has stated on record. That is such a gross perversion of justice that all courts have always allowed pleas to be added. Now what is the use of pleas if a plea has to be added?—Merely to give notice to the other side.

13,357. *Mr. Gordon.*—Is there not an advantage in giving notice because it may enable the other party to add to his statement?—It may; but if you do not make it imperative that he shall put in his pleas, and even at the hearing give him an opportunity of adding pleas, you may mislead the opposite party. If a plea is stated for the first time at the hearing, the judge may dispose of it without entering it on the record, it being law which the parties are bound to know; and in giving his judgment, if it proceeded upon that plea, he would describe it as a plea raised for the first time at the bar. There is no use of sending parties back for that. This is done in the Court of Chancery very frequently, and particularly in the case of demurrers. You may put in a demurrer to a bill stating the ground.

That does not prevent you from stating at the hearing other grounds of demurrer *ore tenus;* but in that case it is a general rule that no costs are given if the demurrer *ore tenus* prevails. I think the practice in the Court of Chancery might be very usefully extended to the Court of Session, and the losing party might be enabled to appeal from a judgment of the Lord Ordinary to the House of Lords without going to the Inner House. That would save a great deal of expense; and I think that the theory of the Court of Session is the same as the theory of the Court of Chancery, that the judgment of the Lord Ordinary is not merely his judgment, but it is the judgment of the Court of Session.

13,358. *Lord Barcaple.*—And it is so extracted?—Yes, it so bears: 'The Lord Barcaple, Ordinary, and by him the Lords of Council and Session, decern and ordain,' etc.

13,359. *Mr. Campbell.*—Every now and then it happens that a Lord Ordinary decides a case avowedly upon the authority of a decision of the Inner House, which is no doubt immediately applicable to the particular case; but in such a case, do you think it a great hardship and disadvantage that the party intending to go to the House of Lords eventually should be compelled to go to the Inner House to get a decision registered which he knows must be pronounced there?—I have known many cases of that sort. I think it a hardship. The time and expense are thrown away.

13,360. *The Chairman.*—Does it not frequently happen, that in considering the case in the Inner House, it is more thoroughly expiscated, and is found eventually to depend on something different?—No doubt; but I think the losing party should have the choice of the court of review. I don't say that should be the regular course; but if the losing party chooses to forego the chance of winning in the Inner House, I think he should be at liberty to go to the House of Lords. The case may be so important that he may be determined to go to the House of Lords, and the sooner he gets to the end of it the better. I think there are far too many reviews in a cause.

13,361. But the other party may think, that if he loses in the Inner House, he may not be disposed to go to the House of Lords?—But he has got the judgment in the Outer House.

13,362. *Mr. Gordon.*—Suppose there is decree in favour of the pursuer, and the defender wants time, might it not lead to bad results, and in the case of a poor man force him to the House of Lords?—But you force him after he goes through the intermediate court.

13,363. *The Chairman.*—You would assimilate it to the power of appealing from the Vice-Chancellor to the House of Lords?—Yes; I think there are more appeals from the Vice-Chancellor direct to the House of Lords than after going through the intermediate court.

13,364. *Lord Barcaple.*—There is another mode of diminishing the number of reviews, namely, by abolishing the Lords Ordinary. The Vice-Chancellor is in a somewhat analogous position in England. Do you think the double judgment obtained through the existence of the Vice-Chancellor's Court is a valuable thing?—I think it is; and if the losing party is satisfied with the judgment, there is an end of the strife; but if he is resolved to go further, I think there is a great multiplicity of tribunals.

13,365. But what do you say to the proposition to abolish the judgment of a single judge in the first instance?—And to go at once to the Inner House?

13,366. Yes; to go to a court of probably three judges in the Court of Chancery?—I prefer the single judge in the first instance. We are more conversant in equity with the judgments of single judges. At common law, except the mere formal preparation of the case, the causes are heard before the full court, or at *nisi prius* before a jury in the first instance.

13,367. *The Chairman.*—But in Chancery you first come before a single judge?—Yes.

13,368. And then you have review in the Court of Chancery?—Yes, at the option of the losing party.

13,369. Do you approve of having first a single judge to dispose of the case, and then a review of his judgment by a plurality of judges?—Yes; I think so, subject to what I have said as to an immediate appeal to the House of Lords.

13,370. You think that is a good system in principle?—Yes. I think that system might be very much improved by dispensing with the unnecessary cross proceedings which are required not only in the Court of Chancery, but in the House of Lords. In a re-hearing it is not so much so, because the whole cause comes up at once; but take appeals in the Court of Chancery against judgments on portions of a case—the successful party must have a cross appeal, and in the House of Lords there must be a cross appeal. I think that is a very unnecessary and expensive proceeding, and might be dispensed with. I think that appeals to the Inner House from the Outer House, and to the House of Lords from the Court of Session, should be like the old advocations.

13,371. You think they should bring up the whole cause?—I do. There is a clause in the Act of 1868 to that effect. I approve of that very much. Further, I think there is no occasion for petitions of appeal to the House of Lords. A simple note given in to the clerk of Parliament should be quite enough to bring it up—like a note of advocation. But you have now to set out all the judgments.

13,372. *Mr. Gordon.*—Do you think that should bring up the whole case?—Yes; I think that would tend to reduce the number of appeals. A party is very reluctant to present a cross appeal if he thinks he is right as respondent in the main appeal.

13,373. *The Chairman.*—If the party who appeals does not wish to appeal on the whole matter of the judgment, but only a part of it, would you not give him an opportunity of saying so?—No, because the opposite party may bring up the remainder.

13,374. But if he does not mean to insist on anything more, should he be considered as an appellant on points in which he acquiesces?—He should not be strictly an appellant. If he is not satisfied, he should bring up the whole cause, and the House of Lords would be enabled to do complete justice between the parties.

13,375. What opportunity would you give him of setting forth the matter to which he limited his appeal?—I am talking now of the petition of appeal. The petition of appeal does not set out the reasons of appeal, or the grounds on which the appellant objects. I am confining myself to the petition. In regard to the cases, I think it should be optional to the respondent to put in a case or no as he pleases. At present a respondent cannot support a judgment of the Court of Session, or be heard by counsel, till he prepares a printed case. That seems to me to be a very unnecessary expense. I think the appellant should give in his case, and that the respondent should have a right, if he pleases to exercise it, of giving in a case also, but it should not be incumbent on him to do so.

13,376. There is a rule, I believe, in regard to printed cases in the House of Lords that they are printed in a quantity sufficient to give a copy to each peer, and to have some to spare?—That used to be so. There used to be 400 or 500 copies printed. It is now reduced to 100, and even that number is very unnecessary. But once the type is put up, I don't think there is much more expense. The great expense of printing is in the setting up of the type, and the difference of expense of 10 or 100 copies is little more than the expense of the paper.

13,377. *Mr. Justice Willes.*—Our points in the common law courts are very like pleas in law. A special case is stated, and each party must deliver to his opponent and to the judges the points which he intends to rely upon in the argument. They generally go into a sheet of paper, or if they are very long, then they cover a side of foolscap; but these are something like the pleas in law in the Scotch courts, and we find them very useful?—They rather go beyond that.

WEDNESDAY, 19TH MAY 1869.

Members Present:—

LORD COLONSAY.
THE LORD JUSTICE-GENERAL.
THE LORD JUSTICE-CLERK.
LORD BARCAPLE.
E. S. GORDON, Esq., Q.C.
A. R. CLARK, Esq.
JAMES CAMPBELL, Esq.
JAMES ADAM, Esq.
A. B. SHAND, Esq.
T. GRAHAM MURRAY, Esq.
CHARLES MORTON, Esq.
JAMES WEBSTER, Esq.
J. B. BAXTER, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

John Carment.

JOHN CARMENT, Esq., *examined.*

13,378. *The Chairman.*—I think you are Preses of the Society of Solicitors before the Supreme Courts?—I am, and have been so for the last two years.

13,379. You have been a great many years a practitioner before the court?—I passed as a solicitor in 1848; and for about six years before that I had charge of the Parliament House business in the office in which I afterwards became a partner.

13,380. You are in use yourself to attend a good deal in the court, are you not?—I am there almost daily while the court is sitting.

13,381. You have a good deal of court business in your office?—Yes.

13,382. There have been some recent changes in the forms of process, have there not?—Yes; by the recent Act considerable changes have been introduced.

13,383. Have you considered the causes of the cost and delay of the procedure in the courts?—I have. I have had occasion to consider these matters pretty fully. They have been a good deal discussed both with members of the profession, and by our society as a body.

13,384. Do you find that the recent Act has tended to accelerate business, and to get rid of some useless matters?—In many respects, I think, the recent Act has introduced very beneficial changes. In some respects, I think, its operation has been very unfortunate.

13,385. Would you state to us, in the first place, in what respects you think it has introduced beneficial changes?—I regard the changes as in the main beneficial. In particular, I think the system of adjusting the record is better than the old system. We are getting the records adjusted more rapidly and with less expense; and there is a greater tendency to simplicity, avoiding the repetition and quotation from documents, and other matters of that kind, that were of old too frequent; and my impression is, that if matters go on as they are now doing, we shall find the Act work exceedingly well in that respect.

13,386. Are there any other matters in regard to which you think it has worked beneficially?—I think that the mode of taking proofs before the Lord Ordinary—though that is not altogether due to the late Act—is a great improvement over the old system of taking proof by commission, especially when, as is now the case, the discussion upon the evidence takes place at the close of leading the proof. Then in regard to prorogations—and here it is fair to state that that many of my brethren differ from me as to this matter—of old the mode of granting prorogations led to great abuse; so much so, that an agent almost took it as a personal affront if the opposite agent refused to grant a prorogation. The effect of that was often to put agents in a very awkward position—between doing an uncourteous thing to a brother agent, and doing their duty to their client. At present no prorogations can be granted. No doubt certain evils may result from that; but my own feeling is, that upon the whole, that matter should remain as it is under the new Act.

13,387. Are there any other points on which you think the Act is beneficial—anything connected with the mode of taking proof, except what you have stated?—There are various other improvements introduced, but I cannot at this minute enumerate them. Regarding the Act as in the main beneficial, my mind has been more directed to matters in regard to which the Act was not working well.

13,388. Would you state the matters on which you think it is not beneficial?—The introduction of the Court of the Lords Ordinary, in my humble judgment, was an unfortunate change. The result of it was last session to throw the entire business of the Outer House completely behind; and speaking for myself, and I believe for others, I think the extent to which the sittings of that court were carried did give rise to great dissatisfaction and to very material inconvenience. As the Outer House rolls stood at the beginning of this session—putting ordinary debates and summary debates together—the number standing on the rolls was 118, while last year at the same date it was only 75, giving an increase of arrears of 43 cases. Undoubtedly the arrear in the Inner House was diminished; but I am not prepared to say that the price paid for that was not too great. Another thing which tended to increase the dissatisfaction was, that the business disposed of by that new court was exceedingly small. If I am not mistaken, they proceeded at the rate of about one case per day, and we all felt that it was a pity to stop the Outer House business for that.

13,389. *Mr. Baxter.*—You say the arrear in the Inner House diminished: may that not have arisen from business not coming in from the Lords Ordinary to the Inner House?—To a certain extent that would undoubtedly affect it.

13,390. *The Chairman.*—Are there any other matters connected with that Act of Parliament which you wish to mention?—I think that the summary debate roll is another unfortunate change; and it seems to me that the provisions of the Act of Sederunt of 1865 were greatly superior to what we now have. As the matter stands, if the parties are not prepared when the record is closed to renounce probation, or take a certain course, the case is necessarily sent to the summary debate roll; and though it is summary in name, unfortunately it is about as tedious, or more so, as the ordinary debate roll. Now, under the Act of Sederunt of 1865, the parties were allowed a certain time within which to make up their minds. When the record was closed the case was adjourned for eight or ten days, and very frequently by that time the parties were prepared to say what they would do. Speaking from my own experience, I should say it would be much better to revert to the provisions of the Act of Sederunt than to continue the summary debate roll. As it stands just now, it seems to me to be a great evil.

13,391. Are these two the principal matters which you have to refer to?—These are the main points. In regard to the motion roll, the Act introduced what was called the clerk's motion roll. That was a thing which our body generally, when it was proposed to introduce it into the Act of Parliament, were very

much in favour of; but, as it has turned out in practice, it is an entirely different thing from what we had anticipated. After the Act was passed, the court passed an Act of Sederunt which withdrew nearly all the motions from the clerk's roll; and as it stands now, it is really worse than useless, and serves no good purpose whatever. The clerk does not dispose of anything; the motions go to the Lord Ordinary in the end. Practically it is a grievance.

13,392. *Mr. Webster.*—A grievance as to delay and expense?—It has led to this, which is a thing we never had before, that when a motion is made before the clerk, it is not disposed of by him, but it is sent specially to the Lord Ordinary's motion roll; and I am told—I have not succumbed to the practice myself—but I am told it is becoming the idea that a counsel is entitled to a fee for making that motion.

13,393. *Lord Barcaple.*—You mean for making the motion before the Lord Ordinary?—Yes.

13,394. *The Chairman.*—In regard to the Court of the Lords Ordinary, you mentioned that they decided very few cases,—only at the rate of one a day?—Speaking generally, I believe that was so.

13,395. The causes that were sent to them were causes mostly upon proof, were they not—advocations in which proofs had been taken in the inferior court?—Undoubtedly. It is perfectly true that, as a general rule, the advocations which were sent to the Court of the Lords Ordinary were causes which did take a little more time to discuss than many other causes would.

13,396. And if they had been discussed in one of the Divisions, that would have to a corresponding extent retarded other cases there?—They must have to a certain extent retarded the other cases; but I am not prepared to say that judges sitting together for the first time, and not accustomed to deliberate together, or to deal with these matters, could get through their work with the same despatch as the Inner House could.

13,397. *Lord Barcaple.*—Do you know whether in point of fact the judgments were delivered more immediately after the debate, or less so than was the usual course in the court?—I had only two cases myself before that court, and it did not strike me that in that respect there was any material difference. I think one of them was decided the day it was heard, and the other was taken to *avizandum*, and decided some little time afterwards.

13,398. *The Chairman.*—You mentioned that, from the length of time that the Lords Ordinary were occupied in that court, the business of the Outer House fell into arrear: Do you mean by that to imply that the Lords Ordinary should not be employed occasionally as a court to work off cases, or do you mean that they should not be so much employed at one time as they were last year?—My own impression is, that the Inner House can have no difficulty in getting through their work without the assistance of the Court of the Lords Ordinary, and in my judgment the institution of that court is unnecessary. Of course I anticipate that the court are to avail themselves of the facilities which they have for giving additional sittings when necessary.

13,399. The court have been in use, have they not, to avail themselves of the power of having additional sittings; but you think they may avail themselves of that power to a greater extent?—To a certain extent, the court have undoubtedly availed themselves of these extra sittings; but I am aware that there has often been an impression in the Parliament House that facilities of that sort might have been more largely resorted to.

13,400. The session now begins on 15th October: that is an additional reason for expecting that the Divisions will overtake the business?—Yes. We were all very much in favour of that change. And the week allowed in February is not generally in our body regarded with much favour. We think if that week were abolished, the business might be got through without the Court of the Lords Ordinary sitting, and without prolonging the sittings of the Divisions unduly.

13,401. Do you not think that it might be rather an overtax on the judges to sit from the 15th October till they finished their extra sittings in spring?—That goes into another matter, as to which I have something to say, and perhaps it is better to say it now. It relates to the mode in which cases are heard. I have certain views which I should like to have an opportunity of stating to the Commission about that. My impression is that the work might be got through more rapidly than it is now; and with an improvement in that respect, the court, without taxing the judges unduly, which is certainly most undesirable, would be able to get through the business.

13,402. *Mr. Shand.*—Suppose a temporary expedient to be necessary at any time in order to diminish the arrears in the Division, do you think it is desirable to take all the Lords Ordinary away to form such a Division; or has it occurred to you that a Third Division might be formed in any other way, with less injury to the general business, for temporary purposes?—Of course, the necessity for such an expedient is a question which experience can alone settle; but if there is to be another court sitting, I am rather in favour of the present system. I think, to take a judge from each of the Divisions would not be desirable. I have a strong objection to a court of review of three judges; and I should much prefer that, if it be necessary to sit at all, the Court of the Lords Ordinary should sit as now regulated by the Act.

13,403. *The Chairman.*—Would you state your suggestion as to shortening the time of hearing causes?—In regard to the hearing of causes in the Inner House, as matters at present stand, the management of the rolls seems to me exceedingly unsatisfactory. Prior to 1853, the cases were put out for certain days, and every one knew when his case was likely to come on. If a country agent or a party desired to attend the hearing, he had little difficulty in doing it, and counsel knew when a case was to come on, and were prepared accordingly. As matters stand now, nobody knows with any degree of certainty what day a case is to come on. There are various objections to the system, but one result is that counsel cannot be so well prepared to discuss their cases as they otherwise would be; and to us who are behind the bar, it sometimes seems as if counsel, when they begin the argument, were getting up their case. We see counsel constantly reading to the court the record, and reading documents, and then the argument follows. Now I am certainly under the impression that hearings in the Inner House might, without any prejudice to the decision of the cases, be greatly shorter than they are. I think if the rolls were so managed that it was known when a case was to come on, that would conduce to greater expedition in disposing of the cases. It would also be a great improvement if senior counsel began in the Inner House. I think that would tend very much to shorten the discussion; because it is impossible for any one who has attended the court for upwards of twenty-five years, not to know that the time now occupied in hearing an Inner House case is probably at least double what it was of old. Formerly it very often happened that cases were disposed of upon an argument by senior counsel alone. Then, besides the management of the rolls, there is also the mode in which the hearing of cases is conducted: the adjournment of causes, splitting them up, and hearing a part to-day, and a part to-morrow, and a part forty days afterwards—for I had a case not long ago of that kind—necessarily lengthens the discussion, and it adds very materially to the expense. I am bound to say that of late years there has been a considerable amount of dissatisfaction with the Court of Session,—a sort of popular outcry against it; and so far as I can judge, the mode of dealing with cases in the Inner House has had more to do with the origin of that than anything else. To give an illustration, I have known a case, in which the amount at stake was exceedingly small, stand in the short roll for twelve successive days before it was heard, at a cost of £8 to the losing party for agents' fees alone, for attendances before the discussion commenced. Of old, when the court found they could not reach a case, a notice was sometimes put out the day before that such a case was postponed, and these things did not happen. I

John Carment.

have a note here of a case which was called a short time before the court rose, towards four o'clock; it was heard probably for half an hour,—and I have seen cases called at twenty minutes before four,—then it stood in the roll for seven days unheard, while other cases were taken up and disposed of. The first day on which it was heard was 17th May; and it was not taken up again till 26th May, when it was again called half an hour or so before the court rose; next day, fortunately, it did come on, and it was heard and decided. That was a case of no difficulty, and it took less than two hours the third day to dispose of it. Now there certainly was a great waste of time there. If it had been put down for a certain day, an hour and a half would have disposed of it.

13,404. *Mr. Baxter.*—What led to other cases coming in before the further hearing of your case?—I have not the least idea. We only get our cases on when the court calls them. That rests with the court, not with us.

13,405. *Mr. Gordon.*—What was the nature of the case?—It was an advocation about a removing, and only a very small matter was at stake.

13,406. Was it a summar roll or a short roll case?—A short roll case.

13,407. But the court was occupied with other business in the interval?—Undoubtedly.

13,408. Do you not know what the other business was, and what gave it a priority?—I have no idea as to that. But I am not at all mentioning an isolated case. I am stating what is at least a frequent practice. It is by no means an exceptional case.

13,409. What was the name of your case?—*Hally* v. *Lang*, 17th May 1866.

13,410. *Mr. Shand.*—What you aim at is, that where a case has been begun, it should become a summar roll case practically?—It was done in that way of old. When a case was delayed, it generally went into the summar roll, and had the precedence. But speaking with deference, what would strike an ordinary man is this, that it is not desirable to call a case twenty minutes before the court rises, and that when a case is called and the hearing of it begun, that case should have precedence over other cases. I don't see why the practice should not now be what it was of old.

13,411. *Mr. Baxter.*—You see nothing to prevent a case which has been begun from being finished?—I see nothing to prevent the system now being the same as it was before, and which wrought exceedingly well. The most startling result of the system is the increased expense. By the practice which now prevails, counsel get refreshing fees after every partial hearing. In the case I spoke of the fees to counsel were fifteen guineas, and to counsel's clerks £2, 5s. The agents' fees for attendance and for sending the refreshers were £6, 6s. 8d.; the total expense of the Inner House hearing being £24, 6s. 8d.

13,412. *Lord Barcaple.*—Was that for one side or both sides?—One side. Now, had that case been heard according to the old practice, it would have stood thus—Fees to counsel, seven guineas, being the fees sent the first day, and which were liberal fees; clerks' fees, 15s.; agents, £1,—making together £9, 2s.: so that the difference of expense on one side, arising simply from the mode in which the case was dealt with, is £15, 4s. 8d.

13,413. *The Chairman.*—Has anything occurred to you as to the mode in which the summar roll should be dealt with?—It would seem to me that there could not be much difficulty as to that. Saturday is now devoted to the summar roll. It might be taken, if necessary, one other day in the week, without mixing up the summar and the short roll on the same day.

13,414. You would take the summar roll not on all days, but on two days of the week?—Yes.

13,415. Are you aware that prior to 1853 the summar roll was six months in arrear?—I am quite aware that of old the summar roll was largely in arrear, and that after 1853 there was a marked improvement in that respect—that the summar roll was kept up so that no person could complain that cases in it were not heard.

13,416. You think that was done at the expense of the short roll?—I am not satisfied that the improvement in regard to the summar roll necessitated the change we have had in regard to the short roll.

13,417. Are you aware that prior to 1853 the short roll was two and a half years in arrear?—I remember that it was largely in arrear, and that led to the order for additional sittings.

13,418. Have you any further suggestion to make as to the hearing of causes in the Inner House?—In regard to reclaiming notes, I think there is a very general feeling that the time should be limited to ten days; it is now twenty-one days. Our body, in reporting on the bill of 1868, reported in favour of that change.

13,419. Do you think that ten days would give you sufficient time to communicate with your clients in the country?—I think it would, as a general rule. Of course there would be cases, where parties were in a remote district, that might involve a little hardship. Ten days might be a little scrimp in some cases; but, on the whole, I think the balance of advantages is in favour of the ten days.

13,420. What do you describe as a little hardship to the parties who could not reclaim in ten days? Would it not be a losing of their case?—No. A reclaiming note could be boxed; and a party generally knows beforehand whether he intends to acquiesce or not.

13,421. *Mr. Gordon.*—Are you aware that reclaiming notes were required to be given in within six days, in many cases, by the last Act?—Yes; and that is one great improvement. I had omitted to mention that.

13,422. So that it is only interlocutors on the merits that have a longer period?—Yes.

13,423. *Mr. Shand.*—The period of twenty-one days was fixed at a time when we had not the same facilities for communication in Scotland as now exist?—Yes. It has been twenty-one days ever since I remember; but, with railways, the facilities are now much greater. There is another thing that I may mention in regard to Inner House hearings. We often feel that hearings are very much lengthened by the interruptions in the course of counsel's speeches. I have seen a case involving a pure question of law, in which I don't think it is an exaggeration to say that the counsel were interrupted at least once every five minutes, if not oftener. Now that undoubtedly has a tendency greatly to lengthen the time occupied in the discussion, and without, so far as I can see, any corresponding advantage.

13,424. *The Chairman.*—You would prefer allowing the counsel to state the case in his own way, to forcing him to state it out of his own order?—Certainly. Sometimes it assumes the attitude of a discussion between the court and the counsel; and it has occasionally seemed to me, as if it were the court trying to convince the counsel, instead of the counsel trying to convince the court.

13,425. *Mr. Baxter.*—Would it not be very difficult to find a remedy for that?—The remedy seems to me very obvious, because the judges should listen patiently to what the counsel says. Of course it may be necessary to interrupt him, if he is stating what is immaterial, or is repeating himself; and it is quite right, when counsel has stated his case, that the court should ask explanations, or suggest additional views on which they wish argument; but what we object to is the constant interruption and asking of questions while counsel are speaking.

13,426. You spoke of calling a case at twenty minutes before four o'clock. Do you think the court should rise at half-past three, if it comes to a new case?—What happened of old was this,—that the court did not consider it necessary to rise at a certain hour, or to fill up their time to a particular minute. If they got through their work earlier, they rose. If their cases were not finished, they sat on to hear them; and I well remember the court sitting till six o'clock in the afternoon to hear out a case.

13,427. *The Chairman.*—Are you aware that in 1853 there was a remonstrance from the practitioners against sitting till five o'clock?—I am quite aware that

it is impossible to please everybody, and that what one desires somebody else objects to. I merely spoke of that as an exceptional case.

13,428. *Lord Barcaple.*—But do you speak of the court sitting on till five or six o'clock as a thing that prevailed during any number of years, or a thing that existed during some two or three sessions?—I certainly don't speak of it as a thing that ever was a prevailing practice. I only remember one instance of it in my own experience. I merely meant to illustrate, that it was not the practice of the court necessarily to rise at a certain hour, and to fill up their time till that hour came. I do not remember that it was ever the practice to sit so late as five or six o'clock; and I should not think it a commendable practice.

13,429. *The Chairman.*—You say you remember one instance. I think that was the day the court was going to rise for the Christmas recess, was it not?—No; it was at the end of the March session, and on that occasion they heard one case for seven hours. They desired to finish that case. My reference to it is purely as an exceptional case. I may also state that the cost of advisings is a matter of general complaint, because, as matters stand, we are supposed to have two counsel present on each side, and their clerks have to be fee'd, and the agents fee'd. The result of that is—I have made a note of it, and I can, if required, give the details—that to obtain the judgment of the court just now, costs £9, 2s. 8d. for the two sides.

13,430. On the day of advising?—Yes, and simply for attending to hear the judgment delivered. Now it does seem to us that this is out of all proportion to what most cases can afford; and it would certainly, in my judgment, be an improvement if the rule was laid down that a fee should only be allowed for a single counsel attending the advising of a case. The suggestion has been made, that the judges might write their opinions, and put them into process. I don't think that would do; but we all feel that advisings are much longer than they used to be. It is not uncommon to hear more than one judge go over in detail the facts of the case; and what strikes us is, that where the court are agreed, a single judge should deliver judgment; and it is not necessary that the others should do much more than express their concurrence.

13,431. *Mr. Webster.*—The delivery of long opinions consumes a considerable portion of the time of the Inner House?—Undoubtedly. I have mentioned all these things as matters increasing the time consumed in the Inner House. If we reverted more to what was the old practice, I think cases could be more rapidly got through, and more work done, in the Court of Session.

13,432. *Mr. Shand.*—Are there not many cases in which it is important for the party to have both his counsel present when a case is being advised, either with reference to the form of the judgment or the future procedure in the case?—There is a general impression that two heads are better than one, and there are cases in which a party may undoubtedly find it of advantage to have both his counsel present; but I think, as a general rule, that if a party desires that, one of the counsel should be at his own expense.

13,433. You would not make it an inflexible rule, then?—There are many cases in which it would involve no hardship to the losing party to pay for two counsel; but when you come to lay down a rule, I am afraid you cannot apply it to one case and not to another. It must be a general rule applicable to all cases.

13,434. *The Chairman.*—When you state that two counsel must be present at an advising, do you mean that, in order to ensure the presence of one, you must fee two, for I do not suppose the presence of two is required?—Well, there is a great deal of fictional attendance in the Parliament House, and it is a *fictio juris* that two are always present. What I meant was that two are fee'd.

13,435. And allowed by the auditor?—Yes.

13,436. *Mr. Murray.*—If both counsel were not fee'd, one might be taken by the opposite party?—That certainly is not a necessary result.

13,437. Would that not be so, according to the rules laid down by counsel?—There is a rule in regard to retainers, that if you do not instruct a counsel at a particular stage, the other party may take him; but I cannot imagine, that if it was considered a proper thing that only one counsel should be present, the Faculty would frustrate this by adhering to a rule of that kind.

13,438. At present is it not the rule that if you have not both your counsel at each important step of the cause, but you miss out one of them, he may be taken by the other side?—That is the rule.

13,439. Would the advising not be held to be an important step of the cause?—As it stands just now, it is so; but the object of my observations was to suggest that the present system should be altered.

13,440. *Mr. Shand.*—Would there not be a risk of the advising of causes being delayed if there was only one counsel employed, and he happened to be speaking in the other Division?—Of course there is an inconvenience there from a counsel taking the fees for work that he cannot do. But that goes into a very large question.

13,441. You do not suggest that if you have retained a counsel to hear the advising in a case, he should take no other business that day?—I don't know. When agents are paid for work, they are expected to do it; and I have never been able exactly to see why the same rule should not be applied to counsel.

13,442. A great part of the agent's work is done by substitute, is it not, in the Court of Session? An agent may have five or six clerks attending each to different cases at the same time?—Undoubtedly he may.

13,443. *The Chairman.*—I suppose an agent has not a power in himself more than a counsel, of being in two places at once?—Certainly not. I may state that the feeing of two counsel does not altogether secure you against that risk, because all of us have seen advisings going on when neither of the counsel was present.

13,444. *Lord Barcaple.*—Is the fee to counsel for advising, a fee at all in the same ratio as for attending the debate?—The fee for an advising to senior counsel is 2 guineas, and 1 guinea, or very often 2 guineas, to the junior. In the estimate I gave, I allowed 4 guineas for the two counsel.

13,445. Would it not be well if, by an arrangement of the fees upon the whole cause, you could manage to have the benefit of the attendance of your counsel—junior or senior, as the case might be—at the advising, if that should prove to be necessary?—That would completely get over the difficulty suggested by Mr. Shand; and of old—though some of my brethren have not quite the same recollection of that as I have—certainly in our office, the practice till recent years was not to fee separately for an advising. The counsel, when the papers were sent to him, got what was supposed to be an adequate fee for dealing with the whole cause, and if from any unforeseen circumstance the discussion was prolonged beyond what was anticipated, he got an additional fee; but it was not supposed to be necessary, if counsel were adequately fee'd at first, that, as matter of etiquette, an additional fee should be sent for other attendances; and, so far as I have been able to find from our books in former years, we were not in the practice of sending a separate fee. I have taken twelve Inner House cases from our books prior to 1853, and in only one have I found that a separate fee was sent for an advising.

13,446. *The Chairman.*—Have you anything more to say about the Inner House?—I think that exhausts what I have to say as regards that matter.

13,447. You are not satisfied in regard to the motion roll in the Outer House: have you any suggestion to make as to what should be the course of procedure?—My idea is, that all the motions should be made at chambers. At present, when the motions come before the Lords Ordinary, the Inner House meeting at ten o'clock, great inconvenience results from our not being able to get counsel to attend to the motions; and

John Carment.

although the agent is at the bar, who probably would have to tell counsel what to say if he were present, the Lord Ordinary does not take the assistance of the agent. Of old it was not uncommon in the Outer House for the Lord Ordinary to ask the agent what he had to say. I have certainly seen some of the judges do that; and what I suggest is, that the clerk's motion roll should be entirely abolished, and the motions taken up as they were before the recent Act; that the judge should sit at chambers in dealing with the motion roll; and that if counsel are there, they should be heard, but that the agents should transact the motion business if counsel are not present.

13,448. What do you mean exactly by 'chambers'?—I don't mean that it should be done in the judge's house; but that, till the motion roll is finished, the judge should be supposed to be sitting at chambers, so that agents might discuss the motions.

13,449. Then what you mean by the judge sitting at chambers is, that he should hear the agents or counsel as either happened to be there?—Yes.

13,450. And that the judge should hear the motions instead of the clerks?—Yes. So far as my experience has gone, the motion roll, as now conducted before the clerks, is worse than useless.

13,451. Have you any suggestion to make about trial by jury?—I am quite aware that with many of my brethren trial by jury is not very popular; but my own impression is, that our law as to that matter should stand as it is at present, because there are only certain classes of cases peculiarly fitted for jury trial which are necessarily sent to a jury, and it remains to be decided whether other cases are fit for jury trial or not. I don't think that can be put on a better footing. I should be exceedingly sorry to see jury trial abolished. It would be contrary to the spirit and tendency of the age. I don't expect that can ever be accomplished, and I don't think it would be desirable.

13,452. *Lord Barcaple.*—Are there any cases at present which must necessarily go to a jury?—Probably not. I forgot that a recent statute had so far altered that.

13,453. *Mr. Shand.*—Practically, however, there are certain cases which always go to trial by jury?—Yes.

13,454. *The Chairman.*—You think that jury trials should continue to exist, and that there are some classes of cases which it might be very desirable to send to a jury?—Yes.

13,455. Have you any other suggestion?—In regard to jury trial, I think that a great part of the prejudice against it arises from the mode in which trials are conducted. Within the last ten or fifteen years the length of jury trials has been very much increased. Of old it rarely happened—unless it was a heavy case—that it went over till the second day; but now cases go on sometimes for eight days on end, and I cannot help thinking that many cases might be tried in half the time they now occupy.

13,456. *Lord Barcaple.*—Does anything occur to you in regard to the way in which these cases are lengthened? What creates the unnecessary length of them?—I don't think any intelligent agent attending a trial of that kind can fail to see what it is that lengthens the trial.

13,457. Then what is it?—One constantly sees discussions got up about little matters which occupy time, and which are really not material. And in regard to the examination of witnesses, one often wonders what all this examination is about, and what it has to do with the case. Of course I do not pretend to be so versant in these matters as counsel; but it has often seemed to me that the evidence might have been taken in half the time, and half these discussions avoided.

13,458. *The Chairman.*—Do you allude chiefly to the examination or the cross-examination?—I have seen both in the examination and in the cross-examination what seemed to me over-examination. Of course I speak with great deference on a matter of that sort.

13,459. *Mr. Baxter.*—Then you think it is a lengthening out of the case by counsel: is that it?—It is the system. At the same time I must say we never had more able or intelligent counsel at the bar than we have now.

13,460. *Lord Barcaple.*—Is there also an excess in the number of witnesses who are brought?—Unquestionably; and that goes into another matter—namely, the expense of jury trial. One constantly sees more witnesses brought up than are necessary, and a great many more documents recovered under diligence than have anything to do with the case. The witnesses brought up are sometimes examined in order that their expenses may be got, when if they had not been there, the case would have been closed without them.

13,461. Does it occur to you how the bringing of unnecessary witnesses is to be got over? What leads to it in the meantime?—It is a little difficult to say; but practically it arises in this way: Precognitions often come up from the country at a very late stage; the Edinburgh agents are hurried, and the counsel are hurried. The agent does not like to take the responsibility of fixing what witnesses should be cited, and who should not. He has a consultation with counsel, and counsel very often have little time to go through the papers with the numerous cases which are pressing on them, and they think it always safe to bring the witnesses; in short, to err on the safe side. The fact is that people get nervous about jury trials, somehow or other, in Scotland. I have always felt that they might be managed differently; but in point of fact they are not.

13,462. *The Chairman.*—Can you suggest to us how they could be managed differently? What remedy would you propose?—I have no doubt that by the combined action of the court and counsel and agents the matter might be put on a much better footing than it now is. It is one of those matters which you cannot reach by enactment; but by the prevalence of a better feeling, I think you could accomplish the desired result. Of course we look to the court to take the lead in these matters; and if they were to discourage the over-examination and lengthening out of cases, that might tend to it. I believe that counsel and our branch of the profession are all agreed that matters are not in a very satisfactory state at present, and that cases might be tried in a shorter time.

13,463. *Lord Barcaple.*—You say that witnesses are sometimes examined in order to entitle the party to charge the expense of bringing them up. Is there an understanding in the profession that if they are examined, the party is necessarily entitled to put them into his account?—In the case of a pursuer, I think the rule is, that he is not allowed the expense of witnesses who are not examined; and certainly I myself have done this;—when counsel have advised that certain witnesses should be cited, and it did not turn out at the trial that they were necessary to be examined, I have said to the counsel, 'Now you must examine these others very shortly, otherwise we shall lose the expense of bringing them up.'

13,464. *The Chairman.*—The negative that you cannot get them unless you examine them is established; but is there any positive rule that all the witnesses examined are to be paid for?—I don't know any instance in which the expense of witnesses examined for the pursuer has been disallowed. I think it would require rather an extreme case, because the answer made to it by the auditor is that the court have allowed the evidence, that they considered it material, and that therefore he must allow the expense.

13,465. *Lord Barcaple.*—When the witness has not been examined, does not the auditor look into the precognition?—I think the rule is, that where a witness for the pursuer has not been examined, the expense is disallowed. In regard to the defender, the auditor looks at the precognition; but a defender's witness is very frequently allowed although he has not been examined, because he may have been brought up to meet some branch of the pursuer's case which was not gone into.

13,466. *Mr. Murray.*—Do you not think that the court are over tender with counsel in not stopping them when they are manifestly wasting time? Don't you think the court might interfere oftener with advantage?—One often sees cases in which we would almost ex-

pect the judge to say, 'It is quite unnecessary to have further evidence as to that matter, unless the jury have a difficulty.' Matters are over and over again proved in the course of a trial, as to which there is no doubt.

13,467. *The Chairman.*—Have you not frequently heard the court say, 'Surely you have had enough on that point?'—That just shows the extent to which the abuse prevails.

13,468. *Lord Barcaple.*—Sometimes the court do not interpose effectively in that way; but did you ever see a jury ineffectual, when they interposed by saying that they had heard enough of it?—I don't remember that I have.

13,469. *Mr. Clark.*—Do you ever remember a jury interposing?—I don't know that I could recall just now an instance of that, but I think it sometimes happens. There is another matter that leads to great expense—namely, the adjusting of issues. I had a case not long ago which cost thirteen fees to counsel to get issues adjusted. We had eighteen different attendances in that case. There is a provision in the recent Act, that if both parties agree, the record may go to the jury without an issue; but I am afraid that as our records stand, we are hardly yet in a position to dispense altogether with the adjustment of issues.

13,470. *Mr. Shand.*—Are you aware that there was a case tried last sittings on the record without issues?—I did not know that.

13,471. *Mr. Gordon.*—What was the nature of the case which you have mentioned in which issues were adjusted?—It was rather a troublesome case undoubtedly, or what I have stated could not have happened. It arose out of one or more bankruptcies, and related to a cargo of sugar, and stoppage *in transitu*.

13,472. *Mr. Clark.*—Is it the case of Adamson, Howie, and Co.?—Yes; and I cite it as an exceptional case.

13,473. *Mr. Gordon.*—Was it an extreme case?—It was extreme in regard to the length of time occupied, and the number of attendances; but there are a number of cases in which it costs a great deal of expense and trouble to get issues adjusted.

13,474. *Lord Barcaple.*—With our present forms, does it occur to you that in any considerable proportion of the cases you could send them to a jury without adjusting an issue? What form of verdict would you take from the jury?—Not as the records have hitherto stood; but I do think that we have begun a considerable improvement under the new Act in the shape of records, and I am under the impression that it may turn out soon that in short and simple cases the record may go to the jury. I don't think we are ready for that yet.

13,475. But in a case having various complicated grounds of action, and various grounds of defence, and various admissions by a pursuer against a defender, could it be sent at present with any practical effect to the jury without any issues being adjusted?—I think not. We are not in a position to go farther at present than the recent Act carries us. There is another matter which I have been asked to state to the Commission, and it is this: The court of late years have often declined to grant commissions even for the examination of havers, except to counsel. Within the last few months a party required to recover some documents in Glasgow, for a jury trial coming on there. He could have got numerous commissioners in Glasgow perfectly competent to do the work, but he could not under the present system get anything else than a commission to counsel; and for a couple of hours' work he had to take the counsel and his clerk to Glasgow, at a cost of £11, 12s. Now, the feeling in our body is, that it is a mistake to limit these commissions to counsel. There are many cases in regard to the recovery of documents which an intelligent country procurator is quite competent for; and even in regard to the examination of witnesses, it seems to us that the present rule throws a burden on the parties which increases the cost of litigation, without any corresponding advantage.

13,476. *Mr. Baxter.*—That must be a recent practice, for I have taken commissions from the Court of Session?—It is very much the practice now.

13,477. *Lord Barcaple.*—In that statement of the practice of the court do you include the Outer House?—Yes. I am quite aware that the rule is not universal; and perhaps one judge does it, and another does not. I myself got not long ago a commission to an agent in a country town; but I know it is a very general subject of complaint just now, that it is refused in many cases.

13,478. *The Lord Justice-Clerk.*—Can you mention any case in the Second Division of the court in which an application to appoint as a commissioner a professional man at the place where the examination is to be conducted, has been refused within the last two or three years?—I cannot state any case of refusal. The rule in both Divisions seems to be to grant these commissions to counsel. The matter has been brought under my notice as Preses of the Society of Solicitors, and I have no doubt that I could furnish the Commission with a number of instances of what I have stated.

13,479. *Lord Barcaple.*—As a general rule, the party, in moving for a commission, does not propose the name of any commissioner?—No.

13,480. He simply moves for a commission?—Yes.

13,481. And unless the parties concur in proposing a commissioner, the court take that matter in their own hands?—It rests entirely with the court.

13,482. *The Chairman.*—Is there any other suggestion which you wish to make?—I think not as to Inner House procedure. In regard to petitions under the Entail Acts, it seems to be understood that it is necessary to set forth the whole clauses of the Entail Act which are founded upon. Many agents would be quite willing not to insert these in framing petitions, but they don't know how the court would deal with that. I have seen petitions under some of the old Acts for selling land to redeem the land tax, and I was struck with their conciseness—simply referring to the statute and the clauses, without setting them forth. It seems to me that it would be a great improvement if the court would let it be understood that it is not necessary in entail petitions to insert the clauses of the Act founded on, but simply to refer to them. In the Teind Court, when petitions for feuing glebes were first presented, parties set forth the clauses of the Act, and the court intimated that that was not necessary. Then, in regard to actions of reduction, where a party has an interest to oppose a reduction, it is exceedingly difficult to get a decree with any reasonable speed, because the form is, that if you have any objection to the title—and this is put forward in almost every case where delay is an object—you can give in a preliminary defence, which is first disposed of. Now I don't see any reason why the procedure in reductions should not be assimilated to that in other processes. The defender should state his whole defences at once, and then, upon a motion for an order to satisfy the production, the Lord Ordinary should deal with that matter, and decide whether the production should be satisfied or not.

13,483. That would get rid of a good deal of delay?—It would.

13,484. On the other hand, in some cases, might it not add to the expense if it was required that the whole merits of the case should be set forth on record before dealing with that, if there was a refusal to satisfy the production?—Under the present form of process I don't think it would, because when preliminary defences in a reduction are given in, you must answer the whole averments in the summons articulately, whether they relate to the merits or not; and practically, when preliminary defences are lodged in a reduction, they embrace, in my experience, everything almost that is afterwards put in as the defences on the merits. Under the old form it was different; and a short defence was lodged applicable to the preliminary matter simply.

13,485. *Mr. Shand.*—It is a common practice now, is it not, to include defences on the merits in the preliminary defences, with the view of holding that very paper as the defences on the merits at the next stage?—So far as my experience goes, I should say that in the majority of cases—perhaps in nine out of ten—the

John Carment.

defences given in as preliminary are afterwards held as defences on the merits.

13,486. *Mr. Gordon.*—Are there not some cases in which it is the privilege of the defender to stand on his title to exclude investigation into his title, without being obliged to plead upon the merits until the pursuer has established that he has a title to challenge it?—Undoubtedly; but that privilege would not be in the least impaired, because, as the form now stands, he has to meet the whole statement of facts in his preliminary defences. I cannot see that any practical inconvenience would arise.

13,487. At present he is not obliged to make his whole statement, or to do more than show that the pursuer has not a title to inquire into his title?—That involves answering articulately the whole condescendence of facts for the pursuer.

13,488. *The Chairman.*—Have you any other suggestion?—I don't see any reason why actions of proving the tenor should be Inner House processes, instead of being dealt with in the Outer House like any other action.

13,489. If they were Outer House processes, would you allow a reclaiming note?—Certainly. I would put a proving of the tenor on the same footing as any other action, let it be originated in the Outer House, and the proof be taken there; and if either party desired to reclaim, let it be open to do so.

13,490. It very often happens that nobody appears to oppose a proving of the tenor. In such a case, suppose the Lord Ordinary thinks there is enough proved, but it afterwards turns out that the deed exists, or that it is different from what appears from the proof, what would happen then? A proving of the tenor is sometimes a very delicate matter, and the court has to guard the interests of parties who cannot be present in the suit?—Undoubtedly that is so; but the result would be this, that what the court now do, the Lord Ordinary would do; and if the parties were satisfied with his judgment, they would acquiesce in it. If there was only one party present, and the Lord Ordinary did not see meet to hold the tenor of the deed proven, that party would have it in his option to reclaim to the Inner House.

13,491. But if the Lord Ordinary did think there was enough proved, and there was no party opposing, it would not go further?—I am not merely giving my own suggestion in this matter; it was considered by the Society of Solicitors when they reported on the bill of 1868. We considered it carefully, and reported in favour of making it an Outer House process.

13,492. Have you any further suggestion? — In actions for the giving up of tutorial inventories, the present system is cumbrous and expensive to a degree; and I would suggest that it should not be necessary to appoint a delegate, which is a useless form, or to lodge the inventory in triplicate. There are often inventories with long descriptions, and these require to be written out in triplicate, which serves no purpose except to create expense. What occurs to me is, that tutors should lodge their inventories with the Accountant of Court in the same way as is required by the Pupils' Protection Act.

13,493. *Mr. Morton.*—And you would dispense with the process altogether?—Yes. Then, in actions for choosing curators, there is a form at present, that if parties are out of the jurisdiction, you must petition the court to dispense with citing them. That is always granted when it is asked; and it would be as well to supersede altogether the necessity of presenting such a petition. Judicial factories, properly so called, are not as yet put under the control of the Accountant of Court, and it is not easy to understand why they should not be so, as well as other factories. I believe it arose from an omission in the Pupils' Protection Act when originally framed, and we suggested that it should be put into some of the recent Acts; but that has not been done. There can be no reason why these factories should not be under the control of the Accountant of Court. We also asked that some provision should be made by which, if the Signet Office is to be continued, summonses should be signeted, although partly printed and partly written. At present, however long a summons is, a manuscript copy has to be made for the purpose of being signeted, and for no other purpose.

13,494. *Mr. Baxter.*—Do you see any use for keeping up the Signet Office?—Certainly not. That is one of the things that our body complains of. The late Lord Advocate proposed to alter that matter; but some opposition got up, and it was dealt with as it now stands in the Act of 1868. I may state that our body of solicitors transacts nearly two-thirds of the whole business before the court, and we cannot understand why we should not be allowed to bring summonses into court without the intervention of a Writer to the Signet. The signet is the idlest form in the world: it is merely stamping the document with a scarcely perceptible stamp. Teind summonses, Commissary summonses, and other writs in our court, are signed by clerks of court; and what occurs to us is, that the form of adhibiting the signet to summonses should be abolished, and that they should be signed by the clerk of court in the same way as Teind summonses are signed by the Teind-clerk.

13,495. *The Chairman.*—By any of the clerks of court?—Yes, by any of the judges' clerks.

13,496. *Mr. Murray.*—Why should not the agent sign them?—A summons is a writ supposed to be issued by somebody; and I think it should have the authentication of the clerk of court. It should issue under the authority of the court.

13,497. *Lord Barcaple.*—A Sheriff Court summons is signed by the Sheriff-clerk?—Yes.

13,498. *Mr. Gordon.*—Might it not occasionally give rise to delay if a clerk were required to sign it, which delay would be avoided if the agent signed it?—Of course, an agent is always nearer his own summons than a clerk of court; but, as our summonses now stand, I don't think it is a desirable change that they should be issued without the intervention of an officer of court.

13,499. What check is the adhibiting of the signet to the summons?—I don't understand the object of it.

13,500. Has any evil resulted from a summons being issued signed by an agent?—I am not aware of it.

13,501. *The Chairman.*—Have you any other suggestion to make?—With regard to the appointment of factors, there is often just now considerable hardship in the case of small estates, from the expense of getting a judicial appointment, and a judicial discharge being so heavy as it is; and it seems to me these matters might be very much simplified. Petitions for the appointment of factors are almost invariably drawn by the agents, and I think it should be considered chamber work: the agent should sign the petition;—it should be presented to the Lord Ordinary, and dealt with as a Bill Chamber proceeding now is. In that way, a factor could be appointed for an expense of about £6, instead of double that sum, as now. Then, in regard to discharges, it is at present necessary to present a separate petition for a discharge: it would be much better—as the process is always supposed to be a subsisting process—that when the factor has wound up the estate, he should simply lodge a note craving the accountant to examine and audit his accounts; and that upon this being done, and the accounts found correct, the accountant should append his docquet as he does now, that the case should then be enrolled, and that on a simple motion the discharge should be granted. As an illustration of what happens at present, I may state that this occurred: A judicial factor brought a multiplepoinding to distribute the estate under his management. The matter was discussed, the estate distributed, and the factor exonerated of his intromissions. He then applied to the judge for an order to get up his bond of caution; but the judge thought that could only be done under a formal petition for discharge; he so ruled, and the estate was burdened with the expense of about £20 for that.

13,502. Was the expense of the petition £20?—It was not a case of my own, but I was told of it; and my recollection is, the expense was stated to amount

to that. It frequently happens that the expense of a discharge amounts to something like that sum.

13,503. Have you any other suggestion?—In regard to appeals from the Sheriff, under the former Act the party was allowed six days to advocate, and after these six days the party who had got the judgment was entitled to extract. By the recent Act, that has been extended to twenty-one days. Now, since the abolition of the provision as to caution, appeals seem to be rather more resorted to for purposes of delay than formerly; and it occurs to me that this extension of time is not very judicious, and that it would be better to let that matter stand as it did before the late Act.

13,504. *Mr. Baxter.*—Do you mean the finding of caution?—No; I mean the time for extracting. Under the old Act, a party could not force back the process for extract till six days had elapsed; under the new Act, that time has been extended to twenty-one days. I see no reason for that extension.

13,505. *Mr. Shand.*—Do you approve of the abolition of caution in these cases?—When our society was reporting on the bill, that matter was very fully discussed, and there was great diversity of opinion about it. I am not prepared to say anything against it; it is a matter which must be tested by experience, and there has not been time to test it as yet.

13,506. *The Chairman.*—Can you give us any suggestion as to economizing and expediting accountings?—That is partly connected with another matter. I think our whole system of clerks of court is a bad one. It seems to me that a great deal of the work that is now done by reporters paid by litigants should be done by the clerks of court; and if that matter could be put upon a better footing, I think there might be an accounting clerk—an officer of court—versant in these matters, who would do that sort of work. Our accountants are men of the highest eminence and integrity; but it is not a good system that a reporter should be paid according to the size of his reports; and I think if any system could be devised by which that kind of work and other work should be done by an officer of court, it would be a great improvement on the present system.

13,507. *Mr. Webster.*—With the present establishment of clerks of court, that is out of the question?—I don't know what you mean by the present establishment, because I don't think that the clerks of court are by any means overburdened with work. It would be quite inapplicable to the existing clerks of court, because they have not been appointed on that footing, and they have not had the necessary training; but I don't see any reason why, if the petition business, for instance, was distributed amongst the five Lords Ordinary, the existing staff of Outer House clerks, probably with somewhat increased salaries, should not undertake all the work. And in regard to the Inner House clerks, I don't think they would be unduly burdened though the remits which the court not unfrequently make to professional men were made to the clerks of court, and I should think it would be more satisfactory to the court to have that work done by their own officers.

13,508. *The Chairman.*—Would you have them to attend in court during the sitting of the court?—I think that the attendance of one of the Inner House clerks in court would be quite enough.

13,509. And you would leave them to arrange which of them should attend?—Yes.

13,510. Have you anything to suggest about multiplepoindings, or do you think the late Act sufficiently simplifies them and reduces the expense?—There are a great many of these matters as to which I am quite satisfied with the late Act, until we have some further trial of its working. In regard to various matters, there has not yet been time to judge of its effects. In many of its provisions, it was a step in the right direction, and I think it should have a fair trial.

13,511. *Lord Barcaple.*—Does that last observation include the matter of the change made upon the records, which generally I understand you to approve of? At present, in the great majority of cases where the defender makes a statement, there is no answer to it by the pursuer. Have you been able as yet to judge how that works?—I have considered that matter, but I have not yet had sufficient experience of it to enable me to give an opinion.

13,512. You mentioned, in regard to proofs before the Lords Ordinary, that that mode of taking the evidence has led to much less expense of time than when it was taken by commission. Does it occur to you that there is any other benefit got in the mere taking of the evidence, by its being before the Lord Ordinary? Is the proof itself shorter when it is written out?—I think, upon the whole, the proof is shorter, and that fewer witnesses are examined. Of course cases varied very much of old: sometimes the proof was very long, and I have seen it as concise as could be wished; but I think it is an advantage to have the proof taken before the judge who is to deal with the evidence.

13,513. But have you observed whether the proofs taken before the Lord Ordinary are, as a general rule, shorter or longer than the proofs taken by commission?—My impression is that they are shorter, but I have not tested that matter. Cases varied very much of old, and it would be difficult to strike the average.

13,514. Have you attended many of these proofs?—Not many.

13,515. Have you found the controversy which you spoke of as prevailing in jury trials, prevailing also in the proofs?—To a certain extent it prevails; but I think it prevails far more largely in jury trials, and, so far as my experience goes, I should think there is comparatively little of it before the Lord Ordinary.

13,516. Has that been your experience?—Yes.

13,517. You have said you think that benefit has resulted from the debate being taken immediately at the end of the proof. Do you rest that upon your experience of cases that you have had, or do you say so because it appears to be a good thing in itself?—My own experience as to these is somewhat limited; but in any cases I have had, I considered it an advantage that the hearing should take place when the evidence was fresh in the minds of counsel and of the judge. It conduces to despatch and also to economy.

13,518. In the cases which you have had, was the question mainly one of fact alone, or were they cases involving questions of law of considerable importance and difficulty?—Chiefly questions of fact.

13,519. Suppose the case to involve important and difficult questions of law, does it occur to you that it is a reasonable way of dealing with it, that it shall be argued at the end of the proof by one counsel on each side, without any reply?—Of course in all these matters there are advantages and disadvantages on either side, and I have no doubt that cases do occur in which nice questions of law are raised, and where it might be an advantage to have a more deliberate discussion; but, taking the cases as a whole, I think the present system is a good one, and I don't think it would do to introduce any exception, because, if it was made discretionary, the result would be that in almost every instance the discussion would be postponed.

13,520. Taking the cases which go to proof before the Lords Ordinary, are there not a very large proportion of them which do involve exceedingly important questions of law?—Undoubtedly some of them do.

13,521. Do you think it is a good mode of disposing of very important questions of law, that the judge should have to decide them, having only heard one counsel on each side, the speeches being taken on the spur of the moment at the end of the proof?—I don't think it is always on the spur of the moment, because counsel know beforehand what points are likely to arise; and even in the course of taking the proof, counsel have time to think over the matter, and to refer to their books. I don't doubt that individual cases can be pointed out where it might be better to have an adjournment so as to have the matter more fully considered; but, so far as I can judge, the present system is not a bad one.

John Carment.

13,522. Are there not a great proportion of cases in which there is no difficulty at all about the fact when the evidence has been led?—There are many cases of that kind.

13,523. But where there is a great deal of difficulty about the law?—Undoubtedly.

13,524. *Mr. Gordon.*—Do you not know that adjournments sometimes do take place where the case involves important points of law?—I know that formerly it used to be so.

13,525. The 32d section of the Act provides that no adjournment shall be allowed except on special cause stated in an interlocutor, and that the evidence shall be summed up by one counsel on each side at the conclusion of the examination of the witnesses, as in the case of jury trials. Might not the cases to which you have alluded, if not already falling under the clause as to adjournment, be provided for by an enactment, that where important matter of law is involved, the argument may be adjourned?—The objection would be, that it is exceedingly difficult to say what an unimportant matter of law is. I am afraid that if an enactment of that sort were made, it would be found that almost every case fell within its scope.

13,526. *Lord Barcaple.*—Suppose that a really difficult point of law is raised by the defender's counsel in his argument, how is that to be dealt with under the existing practice?—I should imagine that it is in the discretion of the judge to do what is necessary to have the case fully argued. Although the general rule is that one counsel opens and another answers, and that ends the discussion, I cannot suppose the meaning of the Act to be, that whatever new points the defender's counsel may raise, the other is to have no reply. The object is to have a fair discussion.

13,527. Then, do you interpret the clause as giving four speeches if the parties wish it?—No; what I interpret it as meaning is this, that parties are to be heard by one counsel on each side. That may generally mean that they are to have one speech each, as in jury cases; but manifest injustice might arise in the case which has been put, if the pursuer's counsel did not make some reply; and my understanding is that any judge, in these circumstances, would do what was necessary for the justice of the case.

13,528. Are you aware whether there has been a third speech in any case since the Act was passed?—I am not aware.

13,529. You have said that you think the summary debate roll does not work very well; but the result now is that every case goes to a roll—either to the general debate roll or to the summary debate roll—immediately on the cause being ready for discussion?—Yes.

13,530. Does it not occur to you that it is proper that there should be a general roll of causes, into which every case should go when the parties have joined issue by closing a record?—I can only judge of that from practical experience, and not as matter of theory; and my experience is, that the summary debate roll works more unsatisfactorily to the profession and to litigants than the Act of Sederunt of 1865 did. I am not prepared to say that the summary debate roll might not have been so managed as to serve the purpose intended; but at present, in a large number of cases, the debates are full debates, and the result is that there may be a case thirty or forty down the roll which could be disposed of in a few minutes, but it stands on the roll for a month unless both parties can be got to go up and mention it; and it is very seldom that both parties are equally desirous to go on. Under the Act of Sederunt of 1865 the parties would have gone up within a day or two after the record was closed, and got an order for proof.

13,531. I thought you said you could not get two parties to agree to go up?—It was different under the Act of 1865, as the case was in the motion roll, and parties went up when the case was called. In referring to the summary debate roll, what I said was that you could not get two parties to go up together and ask the case to be taken out of its order.

13,532. But does it not occur to you that, as causes are prepared and records closed, they should one by one go down in their order in the roll of court, leaving the mode of afterwards disposing of them to be determined according to the nature of the case?—I think I have substantially answered that. I am not prepared to say that that is necessary, because the Act of Sederunt of 1865, which dealt with that rather differently, worked exceedingly well.

13,533. Was there not this great objection to it, that causes in which there was a proof to be taken, no matter how small and unimportant that proof might be, immediately got precedence? There were numerous provisions for compelling proofs to be rapidly taken, either by jury trial or otherwise; and a cause that involved points of great importance, but no proof, stood over?—It is impossible to devise any plan that shall be absolutely free from disadvantage. I am not prepared to suggest any new mode of dealing with cases; and as between the summary debate roll and the Act of Sederunt of 1865, I have no hesitation in preferring the latter.

13,534. The two do not exactly deal with the same matter; but since the passing of the Act of 1868 the Lord Ordinary knows what causes there are with closed records depending before him, and that is a change upon all previous procedure; he had no means of knowing that formerly?—He had not.

13,535. Is it not very desirable that every court should know what causes are ready to be disposed of?—Undoubtedly the system has that advantage.

13,536. Without its being a summary debate roll, it would have that advantage, if all the causes, immediately upon the record being closed, went down in a roll, and then, according to their nature, were disposed of under regulations made for that purpose?—I should like to see the regulations, and then I might be able to judge whether they would accomplish the end designed; but I think there would be some difficulty in framing them.

13,537. You think the regulations in the Act of Sederunt of 1865 were good regulations?—What I meant to say was, that I preferred the Act of Sederunt of 1865 to the present system. Of course every human system is attended with disadvantage, more or less; but as between the two, I prefer the Act of Sederunt of 1865. I did not mean to say that it was perfection, or the best that could be devised.

13,538. *Mr. Gordon.*—The Act of 1865 provided that where parties did not renounce further probation, the case should be adjourned; and then if they did not consent to renounce probation, there should be an interlocutor pronounced, appointing an issue or a proof, or a debate on the cause?—Yes; the parties were heard summarily at the end of the motion roll.

13,539. What is the difference between being heard summarily at the end of the motion roll, and being sent to a summary debate roll?—The practical difference is this, that under the Act of 1865 summary meant summary, and the cases were taken up within a limited period; as it stands now, the summary roll means a roll which is never got through.

13,540. Does not that arise from the circumstance of the Lords Ordinary having been employed a good deal last winter in hearing advocations?—That helped it. Whether it might not in different circumstances have wrought better, I am not prepared to say; but in existing circumstances it has wrought ill.

13,541. *Lord Barcaple.*—Does it look as if there was to be any improvement this session?—No doubt a little more progress is being made.

13,542. Do you know anything about the amount that is coming in to make up for that?—I know that I have a case in one of the Lords Ordinary's summary debate rolls, which stood not far from the top of the roll for some time last session, and it stands No. 4 still.

13,543. *Mr. Shand.*—You have said that a case which might be disposed of in a few minutes is frequently delayed for a long time. Would there be any difficulty in the Lord Ordinary going through the roll,

and taking up those cases which it was evident would come either to orders for proof or issues, letting those in which there must be a heavy debate, stand?—I am afraid there would be some practical difficulty in regard to that. The Lord Ordinary would require to announce that all the counsel and agents having cases in the roll should appear before him. I don't see how that is to be managed. He must hear the parties.

13,544. Does not a slight examination of the case show whether there must be an inquiry into fact?—No doubt the Lord Ordinary, by looking at the records, might pick out a case here and there.

13,545. The cases are all on the roll for a particular day: might he not dispose of those that are so dealt with?—If the roll had been dealt with in that way, it might have wrought differently.

13,546. *Mr. Clark.*—You alluded to one case in which thirteen fees had been sent to counsel for the adjustment of issues. Was that the case of Adamson, Howie, and Co.?—Yes.

13,547. Was it a case involving a large amount?—I don't know what you call a large amount. The amount was considerable.

13,548. Between £4000 and £5000?—I don't think it exceeded £4000.

13,549. Was that a case of unusual difficulty?—It was rather a nice case, and I cited it as an exceptional case.

13,550. Did not the adjustment of the issues involve discussion upon relevancy in the Outer House?—I think so.

13,551. And did it not involve discussion on the relevancy before the Inner House?—It did.

13,552. Did not the Inner House put it out a second time to be discussed upon relevancy?—It was put out repeatedly.

13,553. It was heard on the relevancy in the First Division, and they took it to avizandum; but a point had been omitted upon which they ordered further argument?—I don't remember it so distinctly as that, but I know that the question of relevancy was discussed. It was a case of difficulty.

13,554. And all that was involved in what you said was the adjustment of issues?—Yes; it all arose on the adjustment of issues, in settling the form of issues which should be sent to the jury.

13,555. And which largely settled the right of the pursuer to recover?—I don't know that.

13,556. *Lord Barcaple.*—Would not that discussion have been necessary whether it had been the practice to adjust issues before a jury trial or not? Would it not have been necessary before determining that the case should be tried?—Not the discussion which we had in that case. There would have been a discussion before the Lord Ordinary on the relevancy, and he would have dealt with it.

13,557. That was what the Lord Ordinary did. He could not in point of form pronounce a judgment, but he reported that the case was maintained to be irrelevant, and he gave his views on the relevancy as fully as if he had pronounced judgment?—The course of the case was quite different from what it would have been if it had been a discussion on the relevancy heard first before the Lord Ordinary, and then appealed to in the Inner House and decided.

13,558. *Mr. Clark.*—Were there not three discussions in succession on the relevancy,—one before the Outer House, one before the Inner House, and another, by order of the court, before the Inner House?—I can give every calling of the case, and what was done at each, if that is of any importance. I have it all noted.

13,559. *Mr. Shand.*—It has been suggested that agents in the country should have the power of practising in the Court of Session. What is your opinion upon that subject?—Our society dealt with that matter in reporting on the bill of 1868; and what we reported was, that we saw no objection to country agents following their cases to the Court of Session; and that we did not see why it should be restricted to agency merely, or why they might not, if they chose, discuss their cases in the Court of Session as they do before the Sheriff. Our body had no objection to that course being adopted.

13,560. What is your own opinion upon that matter?—It is scarcely a practical question. I myself see no objection to all procurators being admitted by the authority of the court, and practising wherever they like. I see no objection to the abolishing of all monopolies; but practically it is impossible that country agents can practise in Edinburgh, and it would merely be a means of introducing the English system of doing business on agency terms.

13,561. When you say you see no objection to their practising, I presume you mean practising as agents?—Yes, that is what I mean.

13,562. *The Chairman.*—Have you any other suggestions?—Yes, I have some suggestions as to the Teind Court; and there are various other matters in the programme furnished to me, on which I should like to state my views.

(*Examination adjourned.*)

THURSDAY, 20TH MAY 1869.

Members Present:—

LORD COLONSAY.
THE LORD JUSTICE-GENERAL.
THE LORD JUSTICE-CLERK.
LORD BARCAPLE.
E. S. GORDON, Esq., Q.C.
DR. BARCLAY.
JAMES CAMPBELL, Esq.
JAMES ADAM, Esq.
A. B. SHAND, Esq.
T. G. MURRAY, Esq.
CHARLES MORTON, Esq.
JAMES WEBSTER, Esq.
J. B. BAXTER, Esq.
ADAM PATERSON, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

JOHN CARMENT, Esq. Examination continued.

13,563. *The Chairman.*—You had some further suggestions to make to the Commission?—There is one thing which I omitted to advert to yesterday in speaking of petitions for the appointment of factors. I explained that, by allowing these to be signed by agents, and by superseding petitions for discharge, the expense might be reduced to a very small sum; but I omitted to refer specifically to the fee-fund dues, and that my view was that, if not in all cases, certainly in cases of small amount, the fee-fund dues should not be exacted. These amount to about £1, 18s. on each petition.

13,564. *Mr. Baxter.*—You referred yesterday to the management of the Inner House rolls now and at a former period, and you gave us an instance of the expense of a case heard under the old practice, and a case heard under the present system. Would you state whether it

John Carment.

was an exceptional case that you gave us, or a sample of what usually occurs now?—I am sorry to say that it was by no means an exceptional case, and I can furnish the Commission with as many similar instances as they please. It is a thing, unfortunately, of almost everyday occurrence; and the evil, unless it has been diminished very recently, has been on the increase.

13,565. Have you any statement of an average of cases?—Some time ago, in order to satisfy my own mind as to the working of the thing, and to make sure that I was not theorizing, but proceeding upon facts, I had our books gone over, and selected twelve Inner House cases as dealt with about the time I commenced to attend Parliament House business in 1842 and downwards, and I then selected—taking them very much at random—twelve Inner House cases as these have been dealt with for the last three or four years; and I can state the result of that comparison in figures, showing how the expense has been increased by the mode in which the rolls are managed, and the hearing of the cases conducted.

13,566. Would you be kind enough to give us it?—In the twelve cases from 1842 to 1852 there were only two in which the hearing extended over more than one day. One of these was a troublesome question of accounting, and the other a proving of the tenor, which was continued to print an additional document. In the rest of these cases, the hearing was concluded on the day for which they were put out. In only one of these cases had there been written argument. Taking next the twelve cases commencing in 1865 and coming down to December last, there is only one of them where the hearing was completed in one day. The others occupied, some two days, some three, and in one instance four days. None of them were heavy cases, but just the ordinary run of Inner House cases.

13,567. *Mr. Adam.*—Were these cases taken just as they occurred in your books, or were they selected?—They were taken as fair samples of the ordinary run of Inner House cases, avoiding cases of unusual length or difficulty.

13,568. *Mr. Baxter.*—Can you give us the expense of both sets of cases?—In regard to the twelve cases during the last few years, there is this to be taken into account, that not only was a longer time occupied in hearing them, but they stood in the roll for days without being heard, at a cost of 13s. 4d. each day for attendances. There is only one of the twelve that was taken up on the day it was put out; the others stood, some of them two days, three days, four days, five, six, nine, and one of them twelve days in the roll, besides the days on which the hearing took place.

13,569. These are the recent cases?—Yes. Then, in regard to the expense of the hearings, I have struck an average of each set of cases; and I find that in the first set, the average of the twelve for fees to counsel was £8, 1s.; fees to counsel's clerks, 17s. 6d.; agent's fees, £1, 7s. 2d. In the second set of cases the average of counsel's fees was £18, 12s. 9d.; clerks, £2, 11s. 10d.; agents, £5.;—making a total of £10, 5s. 8d. for the first set, as compared with £26, 4s. 7d. for the second set. It is right to state that a part of that excess is due to a somewhat increased scale of fees to counsel. In the office in which I was bred, we were not remarkable for feeing counsel beyond what was considered necessary. Of late years everything has risen, and counsel, for the same work, receive rather a larger fee than formerly; so that, irrespective of anything in the management of the rolls and the mode of hearing cases, I should have expected that the expense of counsel's fees would have been a little larger.

13,570. To what do you impute the uncertainty of a case being heard on the day for which it is set down?—I consider it a very unfortunate result of the present system, that neither counsel, nor agent, nor client, nor country agent can tell with any degree of certainty beforehand when a case is to come on.

13,571. Does that arise from the quantity of business set down on the roll for the day?—It arises from the way in which the rolls are managed,—from a long roll of cases being put out, and the uncertainty as to how long previous cases may take. I am aware that there must always be a certain amount of difficulty about the management of the rolls, but I am under the impression that the present system is capable of great improvement. There is also another evil connected with it. A country correspondent sometimes writes to us: 'I am not satisfied that the Sheriff's judgment is right; can you tell me what it would cost to get the opinion of the Inner House?' Of old we could have approached the amount with a reasonable degree of certainty; but now we are obliged to say, 'It is impossible to tell,—it may be £20, or £30, or £50,' because, as I stated yesterday, there was a cost of £8 in one case incurred for attendances before it came on. I do not doubt in the least that the judges are most anxious from their point of view to manage matters in the best possible way, and I am merely stating how it strikes us from our point of view.

13,572. Do you consider it of importance often to have your client or country agent present at an advising?—It may be said that it is not of much practical importance, but that is not my view. I think it is of the utmost consequence that a client should have it in his power to attend and hear his case discussed. It is of great importance in a country like ours that the Court of Session should command the complete confidence of the public; and I cannot conceive anything more conducive to that end than that a litigant should attend in court, hear his cause ably argued, and see it carefully considered by the judges; and the result will be, that though the decision may be against him, he feels that every justice was done to his case. At present he cannot have that satisfaction.

13,573. *Lord Barcaple.*—Do I understand you to say that it is your experience that cases are not only less certainly heard on the day when they are put down, and more frequently heard in portions upon more than one day than they used to be, but also that the argument upon them actually occupies much longer time than it used to do?—Certainly I intended to say so. My recollection is, as matter of fact, that the arguments now are considerably longer than they used to be, and as matter of theory it is precisely what I would expect to result from the system that is now followed.

13,574. Do you attribute that greater length of the debates to any one cause; and if so, what is it?—I am not prepared to say that I do. Of course one must take into account this, that of old, in cases of importance or difficulty, we had written argument, the effect of which was that counsel did not consider it necessary to plead the case at such length in the Inner House; and I think the effect of that training was, that even in cases where there was no written argument, the counsel were not so—I don't like to use the word prolix, but whatever the suitable word may be—as they are now. That is the result of my observation.

13,575. In those days, was it not a common thing for the President of the Division to say to the counsel, where there had been written argument, 'Well, gentlemen, are we to have any further argument in this case;' and to be answered, 'We don't think that necessary; we leave it upon the writing?'—I don't remember at this moment that precise thing; but I think this very often happened—and I remember a particular instance of it—where the case had been fully argued in writing, but we thought it advisable that there should be some further argument, because one is never sure whether the judges may have thoroughly studied the papers, and the senior counsel got up and said he had a few observations to add; but the discussion was very short. Senior counsel alone spoke.

13,576. I think you said yesterday that the senior counsel always spoke first?—I did not mean exactly to say that. The discussion was often left entirely to senior counsel in the Inner House. I would just like to add, as to the mode in which Inner House cases are now dealt with, that from my position as Preses of the Society of Solicitors, I have the means of knowing pretty accurately what the sentiments of my brethren are on that matter; and I believe I am right in saying

that the feeling of dissatisfaction with the present system is almost universal.

13,577. Have you observed any change on the general character of the causes which have been coming into the Court of Session since you began to practise, in reference either to their amount and importance, or to their complexity and the number of important and difficult questions which they involve?—Of course one judges of that by his own experience. Our own Parliament House business has been of late years considerably larger than it was when I entered the office; and in a mercantile country like ours it is what one would expect, that new and complicated cases should arise. My experience is, that we have had probably heavier and more complicated cases of late years than the general run of cases formerly, though we had of old a number of heavy cases. If you take a general average, I am not prepared to say that they are more difficult and important questions now than they were twenty-five years ago.

13,578. Have you directed your attention to that point?—No; I am only stating what occurs to me at the moment.

13,579. You were asked yesterday as to a case which was said to involve about £4000 in one aspect of it,—whether that was not a case of great importance. Was that, according to your experience of the causes now coming into court, a case of unusual amount, or materially beyond the average?—Certainly. In our own office the bulk of our cases do not involve anything like £4000. The majority of them relate to smaller matters.

13,580. Do you mean to sums under £1000?—Some of the cases that have cost us most in fees to counsel, in the list which I gave, did not involve matters of £30, apart from expenses; and therefore we felt the amount of the fees to be a hardship. The case which stood in the roll for twelve days without being heard, and cost so much for agents' fees, was a paltry case, at the instance of a man who was dismissed from a friendly society on the plea that he was drunk, and he got some £5 of damages.

13,581. Was that an advocation?—No. The action was raised in the Court of Session.

13,582. *Mr. Gordon.*—Was it a jury trial?—No. The court intimated that they thought we were wrong, and that we had better settle the case on the easiest terms we could. They would have found against us, and we settled it on that expression of opinion. In regard to the case of Adamson, Howie, and Co. referred to yesterday, it seemed to be supposed that my version of it was not correct. Now, I have looked into it since, and I find that I was right; and that the expense to which I referred was almost solely connected with the adjustment of issues, and arose mainly from the pursuer presenting issues in the first instance, which were latterly found to be unsuitable for the trial of the case. The issues were ultimately drawn by the court, and the result was that the pursuer abandoned the action. We were sued with reference to the same sum by a different party. The pursuers of the two actions, I believe, made some arrangement, and ultimately we had to pay; but the statement which I made yesterday was correct.

13,583. *Lord Barcaple.*—I don't think it was suggested that your statement was not precisely correct; the question was rather as to how the case could have been otherwise disposed of than by a full argument upon its legal merits?—The point was, whether the bulk of the expense related to the adjustment of the issues or not. The view suggested was, that it was caused by the discussion on the relevancy. My impression at the time was—and looking at the details of the case has confirmed me in it—that the expense was caused almost entirely by the procedure in connection with the adjustment of the issues.

13,584. *Mr. Gordon.*—But did that not involve the relevancy?—Unquestionably. It was disputed that the pursuer was entitled to any issue at all, and that question was involved.

13,585. The case was disposed of upon the irrelevancy of the claim?—No, the issues were allowed; and after they were settled, the pursuer abandoned the action.

13,586. *Mr. Paterson.*—Was it not brought under your notice, that what led chiefly to the compromise of the case of Adamson, Howie, and Co. was this, that two bankrupt estates were waiting the result, and that being pressed by creditors, they just divided the sum in dispute?—I suppose it was so, and that the delays of the law wearied the parties.

13,587. *Mr. Gordon.*—Written pleadings were given up about 1850, were they not?—I think so. Latterly they were seldom resorted to, and they gradually came to an end.

13,588. Do you propose that any statutory provision should be made as to the rolls of court with reference to the hearing of cases; and if so, can you suggest what that statutory provision should be?—I am afraid I could not. We have often seen statutory provisions which, after they were made, did not accomplish the result aimed at. It does not occur to me that the end could be attained by statute.

13,589. Is it not a matter for regulation by the court from time to time, according to what seems to be most suitable for the convenience of agents, counsel, and litigants?—Our idea is, that the convenience of litigants is often very much lost sight of.

13,590. You say it would be an advantage in many cases that the country agents and the clients should be present at the discussion of their cases. Do you propose that the expense caused by their attendance should be charged against the unsuccessful party?—No; in the case of a client, certainly not; but I think it is always desirable that a litigant should have it in his power, if he pleases, at his own expense, to attend and see how justice is administered. In regard to the country agent's expenses, that is connected with another subject; and I am not prepared to say that it would be fair to a losing party to subject him in the expense of the country agent attending the discussion. I would rather object to that.

13,591. Then what you have said really leads to no practical result so far as regards statutory provision?—I have not suggested that it should be dealt with by statute. What I meant to say as to the parties was, that from the mode in which the rolls are managed and the cases put out, they have not, as a general rule, the opportunity of attending the discussion.

13,592. Have not a number of cases recently come before the court connected with the insolvency of banks and with railways?—Yes; there have been very heavy cases of that sort.

13,593. These cases have occurred very much since 1850?—Yes.

13,594. *The Chairman.*—Have you any further suggestions to make?—In regard to the extractor's office, one very essential matter is, that after a case has been fully litigated and decree got, there should be the utmost facility given for speedy execution. As it stands at present, the first thing is nine days in the minute-book. Now it seems to me that to the extent of nine days that is a very useless form, and that it might with advantage be shortened, if not got quit of altogether. It also frequently happens, that if at the end of a session a party gets decree against his opponent for a sum of money, and also for expenses, he cannot get an extract till next session, because, according to the existing forms, the extractor will not extract till the expenses have been taxed and the amount decerned for. The only way, in these circumstances, of getting a speedy extract is to write a minute abandoning the claim for expenses, in order to secure the principal sum. Now it does seem to many of us that this is a matter which the court might rectify at once, by causing it to be understood that in all these cases the extractor might give an interim extract for the principal sum, and let the decree for expenses be extracted after the auditor's report has been approved of. At present there is a manifest grievance, which often leads to great injustice.

13,595. *Mr. Gordon.*—There is a power to obtain immediate extract, is there not?—No.

John Clarment.

13,596. When the court pronounces judgment, may they not, upon application, allow it to be extracted as an interim extract?—I think they might, but in practice they don't. I have not made an application of the kind myself, but I am told that the court have refused in such circumstances to grant interim extract.

13,597. *Lord Barcaple.*—Does it appear to you that there is any real benefit in the existing practice, by which it is necessary, in order to get a decree for the expenses, that a party should come back to the court with the auditor's report, and get a formal decree? Might the court not, with equal advantage, decern at once for the expenses as they shall be taxed, so that the decree would be good for them immediately upon the taxation, unless there should be an appeal against the auditor's deliverance?—I am very glad that has been suggested, because it is a thing which I have regretted was not adopted in our practice. It seems to be a useless form, that the court should approve of the auditor's report when there are no objections to it.

13,598. And it is an expensive form?—It costs £2.

13,599. And in vacation it is productive of great delay?—Yes.

13,600. It is done in the way I have mentioned in cases of decree in absence?—Yes; these are the only cases in which it is done.

13,601. *The Chairman.*—What time would you allow a decree to be read in the minute-book before being extracted?—The reading in the minute-book should be dispensed with altogether as a bar to extract. The extract always takes a fortnight, and often longer, before it is ready; and if a party had any cause to show,—which rarely happens,—the reading in the minute-book, while the process was in the extractor's hands, would serve the purpose, and the extract could be stopped. I think the process might be sent to the extractors within twenty-four hours after the judgment was issued.

13,602. Would you apply that to a decree in absence?—I cannot see that there would be any practical evil resulting from it, because it is often in decrees in absence that, if you are to save anything, it is of most importance to have rapid execution; and as it always takes about a fortnight to get an extract, the issuing of the extract would be stopped if the party was reponed. The running in the minute-book should not prevent the process going to the extractor.

13,603. *Mr. Gordon.*—Does it always take a fortnight before you can get an extract?—I was taking a fortnight as the minimum time. At the end of the session it is impossible, with the amount of work thrown upon the extractor, that it can be got in that time.

13,604. *The Chairman.*—What is your next suggestion?—I would like to add to what I said yesterday about proofs before the Lords Ordinary, that in stating my preference for these over the previous system of proof on commission, I was not simply expressing my own view, but also what I know to be a very general feeling amongst my brethren on that subject.

13,605. *Lord Barcaple.*—Would you mention what was the particular ground of complaint against the old system of commissions?—For one thing, it was exceedingly difficult to bring a case to an end. The proof went on from day to day with constant adjournments, and the defender had it in his power to get up evidence after the case of the pursuer was disclosed; and we all know that in some classes of cases evidence can be manipulated. That was an evil; and latterly, so far as my experience went, the general rule came to be that there was a proof in replication. In my opinion the system of proofs on commission was latterly becoming an intolerable nuisance.

13,606. Could not the objection which you more particularly refer to have been got rid of by precisely the same regulations which have been applied by statute to proofs before the Lords Ordinary—viz., that they shall go on peremptorily on the day when the proof is fixed, and be brought to a close without adjournment?—Of course regulations might have been made for obviating some of the greater evils of proofs on commission, but I am not sure that they would have been effectual, because a commissioner has not the same authority or means of enforcing regulations that a judge has. Moreover, we all felt that, looking to the state of some of the rolls in the Outer House, it was not necessary to pay large fees to commissioners and their clerks for doing what some of us thought to be judicial work. It appeared to us that the state of the rolls was not such as to prevent the Lords Ordinary, without any undue pressure upon them, from taking the proof themselves. We had also this in view, that there is always an advantage in a judge having the witnesses before himself, and seeing how the evidence is given. All these things combined lead us to prefer the present system.

13,607. In regard to the expense of proofs by commission under the old system, you are aware that that was partly caused by the proofs being taken by commissioners who were not official persons. Has it occurred to you whether that might be got over to a certain extent, if it were otherwise desirable, by having commissioners or examiners, whose duty it should be, as officers of the court, to do such work?—Of course the fees paid to a commissioner would be got quit of if the work was done by an officer of court who was not paid by the parties. But if my recollection is right, the old system is the one that now exists. Of old the court took the proofs, and the taking of proofs by commission was an innovation. The original idea was the one to which we have reverted—viz., that the court took the proof.

13,608. There are undoubtedly cases in which it is desirable that the judge should see the witnesses; but I suppose there are other cases in which that is of less importance?—Certainly.

13,609. Is it consistent with your experience that there are a considerable number of cases in which there is no serious dispute as to the veracity of the witnesses?—No doubt of it; but, as a general rule, it is much better that the judge should see the witnesses, than that he should not.

13,610. If there is no dispute about their veracity, why is it better?—Dispute about veracity is one thing; but, apart from that, there is a great deal in the mode in which a witness gives his evidence which I think enables a judge to deal with a case more satisfactorily than merely reading the evidence in a proof taken on commission. The only answer I can give is, that according to the best consideration I have been able to give to it, the present system is a much better one than the former system.

13,611. Has the present system not led to much greater expense? According to the present system, in the great majority of cases there are two counsel on each side attending throughout the whole proof. Does that not lead to a great increase of expense?—I believe that the expense of taking proofs before the Lord Ordinary is greater than it need be. One of the things we all feel is, that the fees are sometimes larger than they require to be. But I am not prepared to say, looking on the other hand to the length of time occupied by proofs on commission, to the greater number of witnesses generally examined, and to the fact that the commissioner and his clerk were paid, that the expense now is greater than it was under that system. I have not instituted a comparison between the two; but if I were to state my impression, I should say that, on an average of cases, it would be found that the cost now is greatly less than under the old system.

13,612. Putting aside the expense of the commissioner and his clerk, is the expense increased by the present system, by which the whole proof is ordinarily attended by two counsel on each side?—I am not prepared to say that it is, because the time occupied is immensely shorter. Under the old system, there were generally both counsel and agent in attendance,—always one counsel; and my impression is, that the time now occupied on an average of cases is greatly less than one-half of what it was formerly, so that the balance of expense must be in favour of the new system.

13,613. Do you mean that the hours actually occupied in examining witnesses is less than one-half of what it used to be?—I mean that the whole time occupied in taking the proof must be less than one-half. Of course, where there were broken hours, and agents had to go to the place where the commissioner was, there was a great deal of time consumed.

13,614. Do you mean time occupied in travelling?—No; I mean the time occupied in attending the proof on commission. Of course the parties must go to the place where the commissioner sits. Taking the thing overhead, I think the time occupied in taking proofs on the present system must be at least one-half less than was occupied by proofs on commission.

13,615. Were there not a very large number of cases in which the proof was taken without the attendance of any counsel at all?—Not in my experience. Of late years, in almost every instance, we had counsel, though of old that was not so much the practice.

13,616. Was not the commission frequently executed where the witnesses were? Supposing that the witnesses were resident in Wick, was the commission not frequently executed in Wick?—It always came to be a question of what was the cheapest mode,—whether it was cheaper to take two counsel and two agents, and a commissioner and clerk, to where the witnesses were, or to bring the witnesses to where the commissioner was; and we always decided according to the expense.

13,617. Was it not a very common thing to have a commission issued to a gentleman resident on the spot,—the Sheriff-substitute very frequently in those days,—and to have the proof attended only by the country agents, who knew the whole facts, and who knew the witnesses, so that there was no travelling or attendance of commissioner or counsel or Edinburgh agents?—At one time that was very much the practice; but I think I am warranted in saying that latterly that was not so, and that in almost every instance the commission was granted to a counsel. In almost all important cases counsel attended also for the parties.

13,618. What made the profession go back from that old practice?—I am quite aware that some of the judges don't take very kindly to the new system; but there is a very strong feeling in the profession in its favour, and I think that if it was wrought as a recognised institution it would get on remarkably well.

13,619. *Mr. Webster.*—In cases where witnesses were examined on commission, and a debate took place afterwards, was there not always the expense of two copies on each side, for the use of counsel, of the depositions of the witnesses—all of which is saved under the present system?—I had omitted to advert to that. Of course we always had to print the proof or to make copies, and that is an expense which is now entirely saved.

13,620. *Lord Barcaple.*—Has that not to be done now?—If the case goes to the Inner House, it has to be done; not otherwise.

13,621. How many of your cases in which you have had proofs have not gone to the Inner House?—I think the last we had did not go to the Inner House.

13,622. But I suppose the great majority of them do go to the Inner House?—I am not prepared to say that the great majority of them go to the Inner House. Of course a large proportion of all cases of any importance in the Outer House do go to the Inner House.

13,623. And when they go to the Inner House, the proof has not been taken by any of the judges by whom the case is decided?—Of course not. You cannot have that in a court of review.

13,624. *Mr. Baxter.*—What is the use of having two counsel to attend the proof?—In the last case of the kind I had, we took two counsel, because we were not sure, if there was only one, that he would attend. The result was, that during a part of the time the proof was going on I was there alone, without any of the counsel.

13,625. Supposing the counsel to be absent for a time, how do they get the thread of the story?—I don't think that in practice they are very long absent.

13,626. *Mr. Webster.*—What is your opinion as to the system of a decision by one judge in the first instance reviewed by four other judges, or of having the case at once argued and decided by the four judges?—I am strongly in favour of continuing the present constitution of the court. I should regard it as a misfortune if we had not an Outer House and an Inner House, because we have no appeal after the Inner House, without going to the House of Lords; and in my own experience, I have frequently seen that the real points on which a case turned were not fully understood till the final hearing in the Inner House.

13,627. *Lord Barcaple.*—Understood by the parties, do you mean?—By the parties and the judge. I may safely say that I have seen repeated instances, where if there had been but a single hearing, injustice would have been done; and I regard it as one of the best features of our system, that we have the case first considered by the Lord Ordinary, and then carefully considered in the Inner House. I should regret very much to see that system altered.

13,628. *The Chairman.*—What is your next suggestion?—Our body, in reporting upon the Act of 1868, suggested that considerable changes should be made in the Teind Court. My own view is that it should be abolished as a separate jurisdiction. I don't see any reason for keeping up the Teind Court as an entirely separate court from the Court of Session. In regard to augmentations, they might be granted by either Division of the court; and it would be a great improvement if augmentations were prepared before the Lord Ordinary, because at present, when the Teind Court meets only once a fortnight, and the heritors have to be held as confessed, and the rental is repeatedly taken to see, where there is a large number of heritors, that leads to a fee to counsel for each motion, and it causes a considerable loss of time and considerable expense, without, so far as I see, any corresponding advantage.

13,629. *Lord Barcaple.*—Is that not all absolute formality, which might be done in the Teind Office?—It is entirely a formal matter. There might be a provision by which objections should be lodged to the rental, and that if none were lodged, the rental should stand. If the Teind Court was got rid of as a separate jurisdiction, Teind causes might be brought before any Lord Ordinary in the Outer House like other cases. I see no reason why that should not be so, not only as to augmentations, but also as to valuations and approbations, and other Teind processes; provings of the tenor are perhaps more delicate, but there is no reason why the ordinary run of cases, and petitions for feuing glebes, should not be dealt with as Outer House matters. The forms of summonses should also be assimilated to those of ordinary actions. In regard to the Teind Office as it stands just now, it is exceedingly unsatisfactory. I don't mean to say anything against the officers, who are all most excellent and intelligent persons; but if a case is to be in the roll on Monday, it must be enrolled on the previous Wednesday,—why, I have never been able to discover; but that is the rule; and an interlocutor pronounced on Monday cannot be got till Friday; it is not written out or signed,—why, I don't know. These things would not exist if there was not the separate jurisdiction for teinds. We regarded it as a very beneficial thing that the Mondays should be utilized for the sittings of the Teind Court, but there is a very natural unwillingness to bring out the judges if there is but a small roll; and it happened twice last winter, that we had a notice of this kind, that as only two or three cases were enrolled, the sitting of the Teind Court had been postponed by consent of the agents. Of course when it was put to an agent, Do you wish the judges to sit for your case? no agent would like to say yes; but I think it is unfortunate that the matter should be in that position.

13,630. *The Chairman.*—Were these cases enrolled merely for a formal motion?—I think it exceedingly likely that that was so; but it is always unfortunate, because no one can tell what the effect may be of not getting a formal motion disposed of at the time it ought to be taken up. We cannot follow that out to its consequences.

13,631. *Lord Barcaple.*—Do you know what time

John Carment.

was in point of fact, on an average, occupied by the sitting of the Teind Court on the alternate Wednesdays?—I could only guess at it. It was often very short, but I have seen it occupy two hours or more.

13,632. You say you would abolish the separate jurisdiction of the Teind Court. Do you mean that you would also abolish the Teind Office and the Teind-clerk as a separate institution?—I think that office should be abolished, or at least entirely remodelled. The ordinary process work would fall in with the work of the other clerks of court as part of their ordinary business. But in regard to the preparation of schemes of locality, that must be done by a special officer. At present the delay is exceedingly great,—I suppose from the amount of work thrown on the party responsible, because it sometimes takes nearly two years, after a remit to the clerk, before the interim scheme of locality is ready. That is certainly an evil.

13,633. Do not a large number of the interlocutors pronounced in the motion roll of the Teind Ordinary require a clerk to prepare them who is thoroughly familiar both with Teind procedure, and also with the bearing of the particular step upon the existing state of the locality, and, it may be, on preceding localities in the parish?—I am quite aware that it requires a certain amount of training, and of course, while the thing is new, there would be some inconvenience in that respect; but one would expect the clerks to be intelligent men, and there are existing forms applicable to all cases. No doubt at first there would be inconvenience.

13,634. I am speaking of something beyond styles—viz., the application of the order that has been got to the existing state of the process and the rights of the parties in connection with what has previously taken place?—I should expect the agents to assist in keeping that right. Some of us think there is a great deal too much formality in the Teind Office, and that we would be better without it.

13,635. There is a great deal too much formality, but the existing institution of teinds in Scotland is so excessively conventional, and every locality depends on so many previous proceedings, that it is a very technical matter?—If that was held to be a very serious objection, it could be obviated by continuing a clerk specially for teinds.

13,636. That is what I am pointing at. In regard to the augmentations, does it occur to you that it is consistent with the ordinary practice of the country, in constituting a body who are to exercise a function so purely administrative as that of the Commissioners of Teinds, in fixing the amount of an augmentation, to hand it over to a body so small as a court of four judges; and do you think that it would be good for one of the ordinary courts to have the entire responsibility of that matter laid upon them?—That is a larger question; and my view is, if I was to go into it, that the court was not the best tribunal for it. The whole system of allocating stipends might be put on a different footing.

13,637. From what you said formerly, it was rather to be assumed that you were recommending that the fixing of stipends should be handed over to either the First or the Second Division, to be there disposed of by four judges, or, in the possible absence of one of them, by three judges. Would that be satisfactory to the heritors on the one side, and to the Church on the other?—I do not see why they should be less satisfied with the decision of the Division than they are with the decision of the whole court. Five judges are now a quorum of the Teind Court. Of course one would expect that, in awarding augmentations, there would be mutual communication and concert between the heads of the Divisions, and that the same system would be observed as far as possible. But I don't see why the change to the Divisions should be less satisfactory than the existing system.

13,638. Would there not be a risk of people—possibly erroneously—saying that such a case had been dealt with in a particular way because it happened to be in such a Division, or because such and such a judge did not happen to be present?—No doubt things of that kind might be said, and possibly are said now.

13,639. It does not involve any judicial work. There is no law whatever in determining whether a minister is to get 18 or 19 chalders?—It is very much a matter of discretion. One of the chief advantages of abolishing the Teind Court would be in regard to the work before the Lord Ordinary in the Outer House. At present, it is the most difficult thing in the world to get any Teind business done; and an ordinary debate drags through a whole session.

13,640. *Mr. Webster.*—What are your views as to the Bill Chamber?—That is another matter which is not in a satisfactory state; and I would suggest that the Bill Chamber should be abolished as a separate jurisdiction, and that Bill Chamber work during session should be done by any Outer House judge at chambers; that in vacation there should be a vacation judge as there is now, who would transact that sort of work. Bill Chamber cases often require great despatch; and from the way in which the roll is managed now, and the amount of work thrown on the junior Lord Ordinary, it is often difficult to get a pressing case through. I think it would be an advantage that the Bill Chamber should be abolished, and that each Outer House judge should take up Bill Chamber business. There might be a difficulty of the same sort as was suggested in reference to the Teind Court, that there are certain formal matters with which, from long practice, the Bill Chamber clerk is more familiar than the other clerks. Of course what one acquires, others may acquire; but that difficulty could be met by having a separate clerk if necessary.

13,641. *Lord Barcaple.*—Would it meet your view to relieve the Bill Chamber judge of the other summary business that is thrown upon him just now?—Scarcely. I think there is an advantage in not having work split up amongst so many different offices.

13,642. But that summary business which is called the Bill Chamber must be done by somebody?—Yes.

13,643. Well, does it appear to you that it is disadvantageous that it should be done during session by one judge who is pretty continuously applying his mind to that particular class of business?—I think it would be better if it were distributed among all the Lords Ordinary, and parties were not restricted to the junior judge.

13,644. What advantage would that be?—Because, as it stands just now, when several cases occur, all requiring despatch, it is difficult to get through them.

13,645. You mean proper Bill Chamber cases?—Yes; every case is put to the roll, and is generally discussed by counsel; but one often cannot get counsel, and as a practical matter there is a grievance just now.

13,646. That must be a very recent practice?—I don't think it is so very recent.

13,647. I never heard that every case was supposed to be discussed by counsel?—I don't mean to say absolutely every case, but every case of any importance.

13,648. I don't think anything approaching to that require to be discussed by counsel?—A large proportion of the Bill Chamber cases in which there is any real discussion are put to the motion roll; and I think it will be found that in by far the larger proportion of the cases so put to the motion roll, counsel are employed.

13,649. That is the choice of the agents?—I am not sure that it is. It is supposed to be so; but if cases were dealt with at chambers, many an agent would discuss them there who does not do so at the bar.

13,650. What do you mean by chambers?—Chambers I understand to be this: that the judge is not sitting with counsel at the bar, but as an unrobed judge, and that agents can discuss the cases before him quietly and calmly.

13,651. Is there not a good deal of that in the Bill Chamber practice?—There is to some extent; and what I desiderate is more of it.

13,652. If so, would the disseminating the business over all the judges cause a greater difficulty? They must all sit in chambers for that business?—I should have thought that would have lessened the difficulty, because it would be less trouble to each of them.

13,653. There is no difficulty in respect of trouble; but the fresh Bill Chamber cases generally come in about mid-day, or a little after it, and the judge is then in court; but if you required all the judges suddenly to turn from their other work, as the junior Lord Ordinary has at present to do, would that not be inconvenient to the suitors?—I think not. My impression is, that practically the abolition of the Bill Chamber, and the adoption of the course I have suggested, would work better than the present system.

13,654. *Dr. Barclay.*—Do you mean that all the judges of the Inner House and the Outer House should do that duty?—Certainly not; only the Outer House judges. Then there are certain writs which are at present signed by the Bill Chamber clerk, and these I think any judge's clerk should sign.

13,655. *Mr. Shand.*—Do you know that a good many people share the opinion which you have expressed as to the Bill Chamber?—I believe the opinion is pretty generally shared by my brethren.

13,656. *The Chairman.*—In speaking of judges' clerks, I suppose you mean the depute-clerks of Session attending the Outer House judges?—That is what I mean.

13,657. *Mr. Shand.*—In Lanarkshire, where there are three or four Sheriff-substitutes, and in Edinburgh, where there are several Sheriff-substitutes, do they not all exercise very much the functions of Bill Chamber judge?—Very likely it is so; but I do not know that.

13,658. *Lord Barcaple.*—If the business of the Bill Chamber is to be divided among the Lords Ordinary, a party presenting a note in an urgent case must go to the clerk of one of them, and find the Lord Ordinary in order to get a first order,—an interim interdict, it may be. The junior Lord Ordinary at present makes arrangements by which that can readily be done. Do you assume that the five Lords Ordinary are to make the same arrangements?—No.

13,659. What would be the result?—I assume that during session the Lords Ordinary would generally be found when they were wanted; and I assume that if a particular judge could not be found, some of his brethren would be found, and that there would be no difficulty in finding a Lord Ordinary to do it.

13,660. Then you would make this arrangement, that although the process is in the office immediately connected with a particular Lord Ordinary, if he is not found, another Lord Ordinary shall pronounce an order in his place?—That is matter of detail; and I do not anticipate any practical difficulty in arranging it satisfactorily.

13,661. *Dr. Barclay.*—You have seen mutual interdicts between two parties?—Yes.

13,662. What if one party should go to one Lord Ordinary, and the other to another Lord Ordinary?—The same thing would happen as happens now in other cases: the one Lord Ordinary would remit to the other. There would be no practical difficulty. As to the clerks of court, the court have settled by Act of Sederunt that the offices should not be open in the evening, but that they should be open from two till five o'clock. Now they are not in point of fact open at two o'clock. I don't know how that arises, but it is a good deal complained of.

13,663. *Lord Barcaple.*—Is the present arrangement, if it were fully carried out, a convenient one?—I was rather against it, but I yielded to the opinion of my brethren. I must say the practical inconvenience resulting from it has been less than I anticipated.

13,664. When you say the office is not open at two, what exactly do you mean?—The auditor's office shuts at three; and I believe it sometimes happens that when it is necessary to get an account marked at the clerk's office, in order to lodge it with the auditor the same day, there is difficulty in getting it done.

13,665. Do you mean that the clerk's office is sometimes not open till three?—I don't say that; but it is not open at two.

13,666. *The Chairman.*—Can you state in a few words the practical evils of the Bill Chamber being allowed to exist, and the practical advantages which you anticipate from its abolition?—As it stands just now, the Bill Chamber is not open the whole day. It is open from ten to twelve, and from two to four; the clerks are sometimes there and sometimes in the court, and there is often a difficulty in getting what we want at the time we want it. Then I think, as matter of expediency, it is desirable to centralize work as much as possible, and that instead of having to go to a separate office for all matters of that kind, all these judicial matters should be transacted by one tribunal, not having the Bill Chamber as a separate jurisdiction, but having the work done by any of the Outer House judges. I think there is a simplicity about that which recommends it. The present system keeps up a separate machinery for a kind of judicial work which it seems to me is very much of the same kind as what the judges are doing every day.

13,667. What part of that machinery could be dispensed with advantageously?—I think that the whole machinery of the Bill Chamber might be dispensed with—I mean as a Bill Chamber. A party wanting an interdict should apply to any judge through that judge's clerk.

13,668. Do you think he would in that way have greater facility of getting at the judge? If he can get at the Bill Chamber judge through a clerk called the Bill Chamber clerk, is that different from getting at another judge through his clerk?—Possibly not; but I know that in practice there is a very general feeling that things are not got so readily under the present system as they might be under a different system. It is difficult to go into the details.

13,669. As it is a separate office, with a separate clerk attending it, can you suggest any mode by which it would be more accessible during the whole day, because there is a period of time when the other clerks do not attend either?—That opens up another question. I have a strong idea that all clerks of court should be clerks of court and nothing else, and that a Bill Chamber clerk who devoted his whole time to it, and had nothing else to do, would probably be able to make different office arrangements. I don't mean to say that the present holder of the office does not do everything that is necessary, but I think that an office where the clerk was to devote his whole time to the administration of it might be more satisfactory than as it now stands.

13,670. What are the hours that are devoted to it now?—From ten to twelve and from two to four during session.

13,671. *Lord Barcaple.*—Is it not the case that the Bill Chamber clerk, or the assistant Bill Chamber clerk, is called on at all possible hours of the day, and sometimes of the night, at his own residence?—He is occasionally applied to at his residence, undoubtedly. I do not remember having had to go to him at night.

13,672. And he comes to the judge's house with the parties?—He generally marks the paper, and the agent goes to the judge.

13,673. *Mr. Webster.*—The pursuers and complainers in the court attach great importance to the power of selecting their judge, do they not?—They do. Every party likes to select the judge who is to deal with his case.

13,674. Is it not one of the complaints against the Bill Chamber that that power is practically not in existence, and that parties are tied to one judge so long as he continues to be junior judge?—Undoubtedly one of the chief advantages of a change in the system would be, that instead of being obliged to bring all these cases before the junior judge, the parties would have the selection of the judge, as is allowed to them in other cases.

13,675. *The Chairman.*—Is there any great advantage in having the selection?—I think there is.

13,676. To the pursuer?—If I was a pursuer, I would certainly like to select my judge.

John Carment.

13,677. If you were the defender, would you like to select your judge?—Very likely I would. But you must give the selection to one party; both can't have it.

13,678. If there is a selection, you must do so?—The Legislature has sanctioned the principle that the pursuer is entitled to select his judge.

13,679. *Mr. Shand.*—Is it not often of consequence to select a judge who has had experience of a particular kind of work; for example, interdicts in railway cases or entail cases? Under the system which you propose, would not that advantage be secured?—Certainly it would.

13,680. *Mr. Webster.*—Have you anything to state as to the Sheriff Court?—In regard to the constitution of the Sheriff Court, it seems to me that there is no part of our judicial system that has wrought better or given more general satisfaction than the existing system, and I should regret to see the double Sheriffship abolished. I am aware that in our body there is a considerable feeling in favour of the abolition; but I don't think they are at all agreed as to what they would substitute if the double Sheriffship was abolished. I have not heard any suggestion made of anything that in my judgment would be better, or nearly equal to the existing system.

13,681. *The Chairman.*—Would you be disposed to extend the jurisdiction of the Sheriff?—Yes. I think that our legislation has proceeded upon the principle of a gradual extension of the Sheriff's jurisdiction; the limit of finality, for instance, might be extended to £50.

13,682. You mean the limit of exclusion from the Court of Session?—Yes; excluding review in cases up to £50, instead of limiting it to £25, as as present—probably with power to the losing party to ask a case on any question of law where the value is above £25. Then there is a class of cases which I think should be excluded altogether from review, unless where there is difference of opinion—viz., actions of aliment in filiation cases. I think that where the Sheriffs are agreed, unless the limit exceeded £100, which it could scarcely do, the judgment of the Sheriffs should in all cases of that kind be final; and I further think it would be an advantage to make it incompetent to raise such an action in the Court of Session. The court very much discourage it, but still it is competent to bring such an action. I think it is also an evil at present, that where defenders reside in different counties, very small matters require to be brought into the Court of Session; and I should say that in cases up to £100 the Sheriff should have jurisdiction even where the defenders are not all within his county. Where persons are equally liable in an action, any one might be selected; or where one is primarily liable, and others are cited for their interest, the forum of the principal debtor should be sufficient. It is found to be a hardship that for exceedingly small sums one has to go to the Court of Session. I don't see also why, where jurisdiction is founded on a Sheriff's warrant, it should not be competent to sue a foreigner in the Sheriff Court where the sum is under £100. Then, in regard to suspensions, there seems no reason why the Sheriff's jurisdiction should not be extended, and the restriction to £25 in the Act of 1838 repealed, so as to make a suspension to any amount competent before the Sheriff. I think it is also a hardship that proceedings for the protection of a wife's property under the Conjugal Rights Act should not be competent before the Sheriff. There is also another class of cases in regard to which serious evils arise,—cases where rights of property of very small amount are concerned, and where nearly the whole value of the subject is sometimes swallowed up in a Court of Session process. In all cases when a question as to the right of property arises in a possessory question, I think the Sheriff should have jurisdiction if the annual value of the subject does not exceed £25. That was taken in one of the recent Acts as the limit of the Sheriff's jurisdiction in actions of declarator of irritancy *ob non solutum canonem*. Some extraordinary removings are not competent before the Sheriff. I think all removings should be competent before him.

13,683. When you speak of heritable subjects of the value of £25, what do you mean?—I mean £25 of annual value. In connection with the Sheriff Court there is an abuse which one sometimes sees in cases coming up to the Court of Session. I refer to long reclaiming petitions drawn on very unimportant matters; and my idea would be that the Sheriff Court procurators should not be allowed more for a reclaiming petition than for an oral debate. I had a case lately where the expense of the petition amounted to nearly £10 for a very small case.

13,684. *Mr. Baxter.*—You have had no practical experience in the Sheriff Courts?—No; but one sees from advocations occasionally how business is conducted there. In regard to the House of Lords, there is a very general feeling that the time within which appeals are competent should be shortened.

13,685. *The Chairman.*—It is now two years?—Yes; and it should be limited to six months.

13,686. Can you suggest anything in the way of limiting expense in the matter of the appeal committee, or otherwise?—The expense of an appeal at present is very heavy. There are a number of the fees which might be reduced; but I have great doubt whether it is desirable, as matter of public policy, to diminish very much the expense of an appeal to the House of Lords. There is, however, one improvement which I have often thought might be made, and that is, that substantial caution should be required, just as was required before the late Act in regard to appeals from the Sheriff Court to the Court of Session. The caution at present required in the House of Lords is merely nominal. I think a party appealing should find substantial caution for costs in the event of his being unsuccessful.

13,687. *Mr. Shand.*—Do you know the cost of a prorogation for putting in an appeal case?—I know it is very expensive. Cases have come under my notice of what we would consider here very exorbitant fees. No doubt, if it was desirable to make appeals cheap, it might be done.

13,688. *The Chairman.*—Have you any other suggestion?—In regard to the Commissary Courts, as matters stand just now, a party can make up a title to heritable estate before the Sheriff of Chancery, irrespective of the domicile of the deceased party, and in that court all Court of Session procurators have a right to practise. In the Commissary Court we cannot obtain confirmation, where it is necessary to present a petition, without employing a Sheriff Court procurator. Now, we cannot see why the administering to moveable estate should not be put on the same footing as proceedings for administering to heritable estate; and our suggestion is, that it should be competent for the Court of Session procurators to take whatever proceedings are necessary for obtaining confirmation to moveable estate.

13,689. *Mr. Baxter.*—Suppose you had the power of becoming Commissary Court procurators?—We can lodge the inventory just now; but if a petition requires to be presented, we have to employ a Sheriff Court procurator. All that I mean is, that we should be allowed to conduct the necessary proceedings before the Sheriff. It is also an inconvenience at present that one requires to go to the Commissary of the domicile of the party; and I think that matter should also be assimilated to the procedure for administering to heritable estate, and that it should be competent to obtain confirmation before the Commissary at Edinburgh, wherever the deceased resided. There is another matter connected with the Commissary Court—viz., that every deed requires to be recorded of new in the Commissary books. It is difficult to see the reason of that, or what purpose it serves, because, where a deed has been already recorded, it seems reasonable that it should be sufficient in the Commissary Court to make a note of the register where it is recorded, and of the date, and any one requiring to search the Commissary records could at once trace the deed.

13,690. *Mr. Murray.*—Does what you have mentioned not arise from this, that the Commissary record is not a legal record, but is only kept for the purpose

of the Inland Revenue?—I fancy it is kept for fiscal purposes.

13,691. You cannot get an extract of a deed from the Commissary Court?—I thought they could give you an extract if it was wanted. I may also state that by the existing form it is necessary, where one includes English assets, to lead proof of the domicile before the Sheriff. That sort of proof does not necessarily settle any question that may arise as to domicile; and it seems to me that it is a useless form, and that it would be sufficient to set forth the domicile in the affidavit, without putting the parties to the expense of leading proof.

13,692. *Mr. Webster.*—As is done in England?—Yes; I believe proof is not required there.

13,693. *The Chairman.*—If the change which you propose were introduced in the Commissary Court, would it not trench considerably upon the emoluments of the local Commissaries?—I don't think it would, because the emoluments which would be interfered with, must in any individual case be exceedingly small. Of course if it was made competent to confirm in the Edinburgh Commissary Court, that would increase the business there.

13,694. It would increase the business in Edinburgh?—Yes; and if you give the right to the Court of Session procurators, the country procurators would lose to a certain extent.

13,695. What I mean is, if the business were brought to Edinburgh, would that not trench on the emoluments of the district Commissary-clerks?—Certainly it would, where they are paid by fees. I misapprehended your Lordship's previous question, and thought it referred to agents. It would increase the fees in Edinburgh which are accounted for to Exchequer. *John Carment.*

13,696. *Mr. Murray.*—Do you see any objection to conjoining the offices of Sheriff-clerk and Commissary-clerk?—I am very much in favour of centralization. I think it conduces to efficiency, and I don't see any reason why there should be a separate staff.

13,697. As the offices fall vacant, the two might be conjoined in the counties?—It is my impression that they might be conjoined with advantage.

13,698. *Dr. Barclay.*—At present certain intimations in the locality are given on a petition being presented. If they were concentrated in Edinburgh, might there not be a chance of an intimation being given to the wrong person?—Intimation is now made edictally, and the record is published weekly.

13,699. *Mr. Gordon.*—Have you any other suggestion to make?—No. Permit me to add, that I have been requested by our society to bring under the notice of the Commission the terms of the old Act of Parliament relative to the appointment of principal clerks of Session. Writers to the Signet may be appointed, but Solicitors before the Supreme Courts are not mentioned. The Act as to depute-clerks allows solicitors to be appointed; and looking to the position which our society now occupies, we think it should be made competent to appoint members of our body to the office of principal clerk also.

FRIDAY, 21st MAY 1869.

Members Present:—

Lord Colonsay.	James Adam, Esq.
The Lord Justice-General.	George Harrison, Esq.
Lord Barcaple.	A. B. Shand, Esq.
E. S. Gordon, Esq., Q.C.	James Webster, Esq.
Dr. Barclay.	J. B. Baxter, Esq.
A. R. Clark, Esq.	A. Paterson, Esq.

The Right Hon. LORD COLONSAY in the Chair.

Charles Scott, Esq., examined.

13,700. *The Chairman.*—You are a practising member of the Scotch bar?—I am. *Charles Scott.*

13,701. How long have you been so?—Since 1848. I passed in 1847, but I did not commence practising till 1848.

13,702. You have had a good deal of experience of the working of the machinery of the court?—I have had a very large experience of it, and also of all the inferior courts.

13,703. I believe you have been furnished with a note of points as to which the Commissioners are inquiring. Have you any suggestions to make with regard to them?—In regard to the constitution of the Court of Session, I think that, if one or two slight alterations were made, it could not be further improved. My opinion is that the system of Lords Ordinary and Divisions is the best that could be devised for a Supreme Court; and I observe that the English lawyers are now anxious to have a similar system. I have thought over a great many other plans, but I do not see any that would work so well. The only alterations that I would propose are two: 1st, That where it becomes necessary for clearing off arrears to have a Third Division, it should be formed of one judge from each of the two Divisions, and one judge from the Outer House, so as not to interrupt the business of the Outer House. In the second place, I think it is inconvenient, and produces evils, that any one Lord Ordinary should be alone competent in a particular class of cases,—for example, Bill Chamber cases or petitions,—because it throws a very heavy amount of business on the least experienced judge, and whenever he begins to acquire experience, the business passes to another, who is also inexperienced.

13,704. Do you apply that remark to Teind causes also?—Yes.

13,705. Your suggestion is that they should go indifferently to any Lord Ordinary?—Yes; and particularly Bill Chamber cases, because they throw an excessive amount of work upon the junior judge.

13,706. Have you considered how the work of the Bill Chamber clerks could be managed?—If the alteration I propose were made, I suspect there would be no Bill Chamber clerks; at least I don't see how they could work between the different judges.

13,707. *Lord Barcaple.*—Do you say that from the apprehension that it would not readily work, rather than from any necessity, in point of principle, for there not being separate clerks?—I see no necessity for it on principle.

13,708. You mean no necessity in principle for the abolition of the Bill Chamber clerks?—None.

13,709. *The Chairman.*—Do you see any reason for having more hours for the reception of papers by the Bill Chamber clerks than in the offices of the other clerks?—The kind of business is more pressing and

Charles Scott.

urgent; and I have sometimes seen inconvenience experienced from the Bill Chamber Office not being open. That, however, was a good many years ago.

13,710. Supposing the business to be distributed among the Lords Ordinary, do you think it would be an advantage to have a clerk in attendance in the Bill Chamber at times when the depute and assistant clerks are engaged in the Parliament House?—I think it would.

13,711. To keep the Bill Chamber Office open?—Yes.

13,712. *Lord Barcaple.*—Even at present there is more attendance given in the Bill Chamber Office than in the other offices?—Yes.

13,713. And your suggestion is that it is doubtful whether there is sufficient attendance in the Bill Chamber Office at present?—Yes. Bill Chamber cases frequently require immediate despatch, and often arise so unexpectedly, that the office would require to be almost always open. The clerks in attendance could relieve each other; and if the Bill Chamber business were competent to all the Lords Ordinary, one judge or other could always be accessible during session, at any reasonable hour.

13,714. *The Chairman.*—Might there not be inconvenience if the teinds were divided among the Lords Ordinary?—I speak with a great deal of doubt about teinds.

13,715. But your general view is that all the business should be distributed among all the judges, if that can be conveniently done?—Yes, for the reasons stated.

13,716. Have you any observation to make as to the jurisdiction of the court?—I think the jurisdiction of the court ought to be privative in all questions of status. My experience of these cases is, that whenever they are not allowed to go in absence, the parties always contest to the last; and cases of divorce, as well as every other case of status, would be quite certain to come to this court for review. A distinction has been taken between cases of divorce and cases of separation and aliment; but I have always found that the latter are more keenly contested than the former. They lead to a much more inconvenient result for the parties than even divorces, and they raise very delicate questions. They generally lead to great discomfort and degradation to one or both of the spouses; and they would always be appealed to the Court of Session, even if they were allowed to originate in the inferior court. I think, therefore, it is much better to leave that matter as it is at present.

13,717. Do you include in that observation declarators of marriage and of legitimacy?—Yes; and of bastardy. I ought here to remark that such processes are now very cheaply conducted in the Supreme Court, even if cheapness were the only element to be taken into account; but in such important matters the judicial qualities of the court are also to be considered, and these are very much higher in the Supreme Court. With regard to undefended divorces, there is sometimes even more delicacy, and there is also the risk of collusion. I have sometimes seen defenders assoilzied in such cases.

13,718. Have you any further observation to make in regard to this matter?—With respect to questions involving the *nobile officium* of the court, I think no alteration should be made. I am also of opinion, that wherever you have a case which goes to jury trial, that should take place in the Supreme Court.

13,719. *Lord Barcaple.*—There is no case at present which it is settled is to go to jury trial, if it is raised in the inferior court?—In a case raised in the inferior court there is an appeal for jury trial.

13,720. There is an appeal in any case, when a proof has been allowed, if it is above £40; but it may be disposed of, if no such appeal is taken, by a proof in the inferior court?—The party in the inferior court has the privilege of coming to the Court of Session.

13,721. *The Chairman.*—Is your proposition that jury trial should be confined to the Supreme Court?—Yes.

13,722. You mean that you would not extend jury trial in civil causes to the inferior court?—Yes; and I come to that conclusion, not only from the nature of jury trial, but from actually seeing its working in criminal cases in the Sheriff Courts.

13,723. *Mr. Baxter.*—Do you not think it works well in the Sheriff Courts?—I don't think the Sheriff has the same influence with a jury, or that his observations or charge to the jury are so good as the charge of the judge in the Supreme Court. I have noticed that particularly in regard to the charges of Sheriffs in criminal trials, and I have sometimes been struck with the contrast between the grasp taken by the jury of the substance of the case, and the biassed and imperfect charge of the judge. It would be worse in civil cases.

13,724. *Mr. Paterson.*—Does that observation refer to Sheriffs-principal or to Sheriffs-substitute, or to both?—To both.

13,725. *Lord Barcaple.*—In the case of a Sheriff-principal, it may be that in the following week he may be addressing a jury in the Supreme Court?—Yes. I am not referring to all the Sheriffs, either principals or substitutes; I am speaking generally. There are many exceptions. My remark has no application to the Sheriffs present, nor to Dr. Barclay.

13,726. *Dr. Barclay.*—You have stated that the Sheriff has not the same influence with a jury that a judge of the Supreme Court has. Do you mean influence in favour of acquittal or conviction?—What I particularly refer to is, that in their summings-up to the jury they do not take that impartial view of the evidence that I find taken by most of the judges of the Supreme Court that I have heard charge juries. The result is that they have not the same weight with the jury, and the jury often goes quite against the charge of the Sheriff.

13,727. In which direction does the bias to which you have spoken lie?—Generally for conviction. The charges in the Supreme Court are much more delicately balanced, and more impartial than the charges in the Sheriff Courts.

13,728. *Mr. Harrison.*—Do you think the Sheriffs do not take the same pains with the case that the judges of the Supreme Court do?—I think that the Sheriffs are careful and painstaking, but generally they are not equal in intellectual standing.

13,729. *Dr. Barclay.*—Is it not because they have not the same experience in criminal trials?—Some of them have larger experience in criminal cases; but they are not so qualified to benefit by it. I have had great experience in these cases in Sheriff Courts.

13,730. And you are generally very successful?—I have been successful sometimes.

13,731. *The Chairman.*—Have you anything to state as to the cumulative jurisdiction?—I think it stands very well at present.

13,732. Do you think it would be expedient to give to the Sheriff Courts jurisdiction in reference to small questions of heritable right?—I have certainly seen cases where there was great hardship from such questions not being competent in the Sheriff Courts, and if it were practicable to fix a limit, I think it might be expedient to do so; but the difficulty would be to have a simple rule.

13,733. As to the appellate jurisdiction, the recent Act has had some effect on that, has it not?—Yes; the expense of an appeal is certainly very much lessened, and I think it might be still more lessened in small causes, by dispensing with printing, and allowing only one counsel to be charged against the other side. I have got made out an account of the expense of such an appeal from the Sheriff Court under the new Act, in an ordinary cause which runs the ordinary course, and I find the amount is £8, 8s. 8d.

13,734. That is the expense on one side?—Yes; and adding something for any item that may have been omitted, I should say that £10 would be the cost on each side of an ordinary appeal. I am assuming that there is no printing, and only one counsel charged.

13,735. *Dr. Barclay.*—It is not an actual case that you are giving?—No. The items in the account are these:—

ACCOUNT OF EXPENSES IN APPEAL.

(Copy Record sent from country; no Printing; and one Counsel.)

Paid Fee-Fund Dues,	£0	15	0
Entering Appearance,	0	13	4
Borrowing Process,	0	2	0
Instructing Counsel,	0	6	8
Moving in Single Bills,	0	6	8
Fee for Agent going over Record,	1	1	0
Attendance at Hearing,	1	0	0
Instructing Counsel,	0	6	8
Fee to Counsel and Clerk,	3	10	6
Attendance procuring Copy Interlocutor,	0	3	4
Writing Letter therewith,	0	3	6
	£8	8	8
As some letters and incidents may be necessary, say	£10	0	0

13,736. *Mr. Adam.*—You mean that that is the necessary expense?—Yes; £8, 8s. 8d. includes all the necessary items, and I have got the account revised by an agent. I think there ought to be no difficulty in having a simple process of appeal for small cases, and another form for larger cases.

13,737. *The Chairman.*—What simplification would you make for small cases?—It would require very little simplification if the court would do as I have seen them do,—ask no print, but allow the copy of the record made in the Sheriff Court to be sent up to the Court of Session and used, and not require more than one counsel on each side. I don't think any further simplification would be required, except that the clerk of court might in such small cases himself at once enrol the cause for debate.

13,738. *Dr. Barclay.*—Have you seen cases disposed of without printing in the Inner House?—I have seen it in reclaiming notes in cessios. I have had very heavy cases of that sort, with a proof extending in one instance over 500 or 600 pages of writing, before Lord Justice-Clerk Hope, and I argued them—his Lordship having the Sheriff Court record and proof, and I having a copy.

13,739. Was that not done on account of the poverty of the party?—No; in such cases it is not necessary to print the record, under the statute. I have done that several times; and the result was conform to the justice of the case.

13,740. *The Chairman.*—You say you would do that in certain cases. How would you classify them? As to the amount at stake, or with reference to the nature of the cause?—The amount at stake, I think, in pecuniary causes.

13,741. Irrespective of the amount of oral proof?—Yes; I think the court would arrive at a perfectly satisfactory result from the hearing of the speeches of the two counsel, the President of the Division having the record and proof before him, and thus having the power of check. I suggest that for this reason, that I think, with our present extended system of suffrage, an appeal court that is not useful to the great body of the people is not in a proper position.

13,742. In the case you mentioned, the judge had the record copy of the proof, and you had a copy: was that copy made for you?—It had been used by the procurator in the Sheriff Court.

13,743. The other side required a copy, I suppose?—Yes; I presume they also got their copy sent up from the Sheriff Court.

13,744. *Dr. Barclay.*—Would you explain what effect the extension of the suffrage has on the mode of procedure?—The existence of no court is safe, unless it is suited to and popular with those who legislate for the country. I don't think any court is safe that is not in that position. In my opinion, such a court ought not to be safe.

13,745. *Mr. Baxter.*—Have you made out any note of the expense of an appeal, taking into account the printing?—It would be difficult to do that; but, on the average, with an ordinary print, it might bring it up to about £15 a side; and if there were two counsel, it might come up to £20.

13,746. It has been represented to me that the average expense of an appeal is £50 a side?—I don't see how that can be, unless there be some special matter to account for it. There may be an additional proof led.

13,747. *Dr. Barclay.*—Your estimate is made up, I suppose, on the footing of the case going direct from the Sheriff to the Inner House?—Yes. Under the recent Act, appeals always do so.

13,748. *The Chairman.*—As to the expense, something would depend on the amount of fees given to counsel?—No doubt; but I think there should be some sort of scale as against the opposite party. The fee to junior counsel is generally 2 guineas for a small appeal, but I have allowed 3 guineas in my estimate. With regard to the speed with which appeals are disposed of now, I don't think any improvement could be made in that respect. I have seen an appeal which appeared in the single bills on a Friday put out on Tuesday in the week after, and decided that day.

13,749. *Dr. Barclay.*—Does the alteration made by the recent Act, abolishing caution in appeals from the Sheriff Court to the Court of Session, meet with your approval?—Yes; I think that the expense is so small, and the time that an appeal occupies so short, that there is not the same necessity for caution that there was before. When I came first to the bar, there was great necessity for the rule as to finding caution, because an advocation then took about two years to dispose of, and there was a great amount of writing and copying, and different stages of discussion. Now there is only one stage of discussion; and I think the very utmost time that an appeal can remain, if it be pushed on, is about a month, unless the state of the rolls prevent it. An appeal to the Supreme Court may often be more speedily carried through than an appeal to the Sheriff, and indeed occupies less time than used to be occupied in finding caution under the old system. It is owing to this speed that worthless or untenable cases are now more rarely appealed. In about half of the cases which I have had before me for appeal, an opinion has been taken on the point in dispute, and where this opinion was unfavourable, the appeal was not taken.

13,750. Then there is less inducement to appeal for the sake of delay?—There is none now. When I came to the bar, about half of the cases were for delay, and their disappearance was one cause of the diminution of the rolls. I don't think I could say that within the last two years I have seen more than two or three cases brought for delay, and there certainly was no delay given or got.

13,751. *Mr. Adam.*—Would you be inclined to increase the sum beyond which an appeal is not allowed?—No; £25, although it appears a small sum to us, is a very large sum to the great majority of people; and if you shut out an appeal under, say £50, you virtually deprive almost the whole population of the benefit of the court.

13,752. *Lord Bercaple.*—Do you not, on the other hand, give them somewhat of a countervailing advantage in defending them against being dragged through an expensive litigation about a comparatively small sum?—No doubt that is an advantage in cases where the litigation would be tedious and expensive. I think that cannot happen now in many appeals, and would be still less likely under the simpler system I have suggested for small cases. Farther, a more extended irresponsibility would be very corrupting to the inferior judges, and tend greatly to deteriorate their judicial character.

13,753. I suppose that small causes, as a general rule, are less complicated, and involve less difficult points than cases of greater moment?—I don't know that.

13,754. *Mr. Adam.*—In small cases, would you think it right to require the consent of the judge to an appeal?—No; I think that would put the judge in a

Charles Scott.

very delicate position. It would cause great dissatisfaction if he refused leave.

13,755. *Dr. Barclay.*—Would you allow an appeal in cases below £25, where the Sheriff-principal came to a different opinion from the Sheriff-substitute?—I would scarcely be inclined to interfere with the present limit.

13,756. *Lord Barcaple.*—There is another class of cases in which there seems to be a peculiar rule in regard to the right of appeal—viz., suspension. There may be a suspension in the Sheriff Court to the amount of £25; but it seems to be held that the same suspension, although the sum charged for is not above £25, may be brought in the Court of Session?—Yes.

13,757. Have you noticed such cases?—Yes.

13,758. They are not very uncommon?—I don't think they are common—suspensions on bills under £21—in the Supreme Court.

13,759. Does not that seem to be an inconsistency, that if it be competent to appeal to the Sheriff in that form of suspension to the extent of £25, that class of cases should not be dealt with as other classes of cases, and that £25 should be the limit under which they should not go to the Court of Session?—Looking to the questions often involved in suspensions, I would not be inclined to make them privative to the Sheriff under £25. Suspensions of bills are about the most difficult cases that come before a court.

13,760. You give the choice entirely to the suspender of which court he will go to?—Yes. I cannot say that I have had above one or two cases of suspensions of bills under £25.

13,761. *The Chairman.*—Have you any further observations to make in regard to appeals?—There is one matter in regard to which I have found great inconvenience and evil, where a party has to go to the Circuit Court instead of coming at once to the High Court, if he chooses. I have had several cases from Glasgow and elsewhere, where that was virtually a denial of justice, and in one instance caused the party many hundred pounds of loss.

13,762. *Dr. Barclay.*—Have you found in these cases that the judges on circuit frequently certify to the High Court?—Sometimes they do.

13,763. And the expense in the Circuit Court is thrown away?—Yes.

13,764. *The Chairman.*—You are now alluding to appeals in civil causes?—Yes.

13,765. *Dr. Barclay.*—Are there any appeals in civil causes except under the Small Debt Act?—There are various statutory appeals. There was one police case where I was counsel in a suspension of the judgment, where a cab proprietor in Glasgow had gone to London to contest the last police bill for Glasgow, and got, as he thought, a special clause introduced, allowing unlicensed hackney coaches to stand at railway stations; he had a large number of cabs, half of them licensed and half unlicensed, and he put an equal number of each kind at the railway station. A complaint was brought against him for this, and he pleaded the statute; but the magistrates convicted him of an offence against the Act, and fined him. He appealed, and his appeal lay to the Circuit Court. But in the interval they brought another case against him, and I think they convicted him in eight cases, and announced their intention of going on convicting him till the circuit came. In order to avoid that, he brought a suspension to the High Court, but it was found incompetent; and the result was, that he had to give up the privilege which he thought he had obtained, and get all his cabs licensed, simply because, if he had waited till the circuit, he would have been ruined by the accumulation of fines.

13,766. *The Chairman.*—Then you think it should be competent in such a case to come at once to the court in Edinburgh?—Yes, in the same form.

13,767. *Dr. Barclay.*—You would do away with the appeal to the circuit?—No. In the general case they would go to the circuit; but where they choose, let them come to the court in Edinburgh.

13,768. *The Chairman.*—I understand the point of your citation of this case is, that the appeal to the court in Edinburgh was found to be incompetent, and therefore the party had no remedy but to go to the circuit?—Yes.

13,769. And not being able to get redress till the circuit came round, he was in the meantime subjected to a continuous assault. You think he ought to have had the power of coming at once to Edinburgh?—Yes.

13,770. Then it was not an appeal taken to the circuit for mere delay?—Oh no; it was a *bona fide* case.

13,771. You would still leave the power of appeal to the Circuit Court?—Yes.

13,772. *Mr. Adam.*—Do you happen to know the result of the appeal to the circuit?—It never was carried out. The appellant was obliged to get licences.

13,773. *Dr. Barclay.*—Could he not have appealed every one of the convictions?—But if he had been found wrong, he would have had to pay all the fines, and probably after several convictions would have been sent to jail. The amount of fines would have been ruinous.

13,774. But it would have been the same if he had appealed to the High Court?—He would have had to pay the first fine; but he would have got the point decided before the other cases were brought against him.

13,775. *Mr. Shand.*—But the party abandoned his case on the merits at the Circuit Court?—He had licensed his cabs by that time.

13,776. And he did not ask a decision on the merits?—No; because the evil was irretrievable. I have known a great many more cases of that sort.

13,777. *The Chairman.*—What is your next suggestion?—I think there ought to be a power given to any civil court to state a special case for the opinion of the High Court.

13,778. You think that in any inferior court the parties should have power to prepare a case, and submit it to the High Court?—Yes, with the consent of the judge.

13,779. *Mr. Shand.*—Or do you mean that the judge should have that power?—Yes.

13,780. *Dr. Barclay.*—In all classes of cases, small debts included?—Yes. There are some points on which the judge feels himself very much at a loss what to do in small debt cases; and I think there would be no abuse of it if the parties could not do it without the consent of the judge. The sum nominally at stake in such cases is often small, while the actual interest is very large.

13,781. *The Chairman.*—To relieve his difficulty?—Yes.

13,782. *Lord Barcaple.*—Would you apply the same thing in the Sheriff's ordinary jurisdiction?—I think it can be done under the Act.

13,783. *Mr. Shand.*—I suppose it is only in those cases in which just now review is excluded that you would give that remedy?—Yes; there are some cases which, though of small amount, really decide very serious interests. There is also a class of cases where I think it could be introduced with advantage—viz., where a referee or arbiter felt himself in a difficulty.

13,784. *The Chairman.*—You think he should be allowed to consult the court?—Yes.

13,785. Upon a case stated?—Yes.

13,786. Prepared by him?—Yes, or by the parties with his consent, or by his desire.

13,787. Stating his difficulty?—Yes.

13,788. *Dr. Barclay.*—Do you apply that to all references,—not only judicial references, but also submissions?—It is more to submissions that I do apply it. I think judicial referees might get over the difficulty better than other referees.

13,789. *Mr. Paterson.*—Might not an arbiter, when in the least degree puzzled about a case submitted to him, take an opinion of counsel as it were from the court, and decide according to that opinion, and in that way pocket his fee without doing the work?—It might be so in the case of some arbiters, but I would scarcely expect it.

13,790. Might not that encourage parties to have all their disputes settled by arbitration, knowing that the court was behind the arbiter, to keep him right?—It might have some effect. But I think the court is coming to be so much speedier and cheaper than an arbiter, that an arbiter will not be so much preferred now.

13,791. *Lord Barcaple.*—Have you observed whether the practice of going to an arbiter has increased or diminished in your time?—I don't think I can speak to that. I have been in a great many arbitrations of different kinds, but I never found an arbitration cheaper than the court, or more rapid. It is a very inferior kind of remedy in most cases, and the unsuccessful party has no respect for the judgment, and often sets himself to see how he can get rid of it.

13,792. *Mr. Webster.*—And when an arbiter dies, the whole falls?—Yes.

13,793. *Mr. Baxter.*—Do you think the judicial business of the court has increased in quantity and in importance of late years?—I think that up to the passing of the late Act there was a diminution in the rolls, but that was owing to reasons entirely unconnected with the popularity of the court. In the first place, the cases brought for delay had to a great extent disappeared,—I mean comparing them with what they were when I came to the bar, when there was an immense number of them.

13,794. *Lord Barcaple.*—Do you apply that observation to causes generally?—Yes.

13,795. That is, there is a much smaller number of causes in which the defender appears merely for the purpose of delay?—Yes; and there has been a great number of statutes cutting off cases that were previously competent to the Court of Session, some of them of a very important kind. This I think was going in the wrong direction. Instead of withdrawing the cases from the court, it ought to have been made fit for the cases.

13,796. *Mr. Baxter.*—How do the cases stand in point of importance?—Very much the same, I think. The causes are much more *bona fide*.

13,797. *Mr. Gordon.*—Are these not more important, from the number of bank cases and railway cases?—Yes. I omitted to notice these; and there are also many other important cases in regard to companies.

13,798. *Mr. Baxter.*—Do you consider the judicial staff of the court at present more than is required for the due despatch of the business?—Even at present I don't think so; and for this reason, that the business is not up. I think the best test of that is whether the business is all done, or whether there is business before them. I think a court is not in a proper state unless its business is up.

13,799. *Mr Shand.*—And in point of fact there have been a great many duties thrown on the judges in recent times which they did not formerly perform, particularly in regard to inquiries into fact by the present system of proofs. That occupies the time of the judges to a very large extent, compared with what it used to do?—Yes; the Lords Ordinary, as a universal rule, come to court at ten o'clock and sit till three or four, and I have been before some of them till six o'clock. I have often been before Lord Barcaple long after four o'clock.

13,800. Don't you think it desirable that the judges should be more assisted than they are, by the clerks of court doing work in chambers?—I think that might be done, but it does not seem popular at present with the agents. To make it work well, you would require highly qualified clerks.

13,801. Even with that assistance, you don't see your way to any diminution of the judicial staff?—No. I have been informed by agents, and I believe from my own practice, that since the late Act passed, the business of the court has been gradually increasing.

13,802. *Lord Barcaple.*—You mean the business coming into court?—Yes; during last session and this session.

13,803. *Dr. Barclay.*—Do you refer to original cases, or to cases under appeal?—Both; but the increase is not so great in appeals as in cases of original jurisdiction.

13,804. *Lord Barcaple.*—Have you observed whether proof in some form is taken in a larger number of causes than formerly?—I think so.

13,805. Can you explain how that has happened?—There were a great many more decisions on relevancy than now. Farther, I think commissions worked very badly.

13,806. But I understand you to say that a larger proportion of causes were formerly decided without any proof being taken?—Yes.

13,807. The bad working of commissions does not seem at first sight to be the reason of that?—They had two alternatives formerly,—either a commission or a jury trial,—and they got over the difficulty in some way.

13,808. What did they do?—Sometimes they adjusted admissions.

13,809. Was that a very bad thing?—It was; when they had to give up what they thought the true state of the facts.

13,810. If they had to give up what they thought the true state of the facts; but if what was not the true state of the facts, that was not a bad result. Is not the taking of evidence in any form very much the most expensive part of litigation?—I think it is. It is what causes the great proportion of the expense.

13,811. Does any plan occur to you for diminishing the amount of evidence that is being taken in causes in court?—I have heard affidavits spoken of.

13,812. Have you any opinion with regard to that?—I think that, unless on incidental points, that would be a very dangerous kind of evidence, and would lead often to more expense, if it is to be as in England, where the party is entitled to cross-examine the deponent. Besides, I think that a party, outwith the presence of the judge and his opponent, might be led to swear to a manipulated affidavit, which he would require afterwards to adhere to at all hazards. But an affidavit might answer for a case where a motion is made for a mandatory, and it is denied that the party is out of the country, or for cases of that sort.

13,813. But, on the merits of the cause, what is it that appears to you to be unsatisfactory about the system of affidavits, worked as it is in England?—There is no means of cross-examination when the affidavit is taken. Farther, there is the other objection I referred to.

13,814. They do cross-examine in England?—That may be, but it is done afterwards in court. The expense is then much increased.

13,815. *The Chairman.*—It is in the power of the party to have the person who made the affidavit cross-examined if he chooses: consequently the affidavit is made in the knowledge that such a power exists, and is very often exercised. But if the party does not move to have the deponent cross-examined, he accepts the affidavit?—I am told that the English lawyers are endeavouring to get rid of that system, so far as it refers to proof on the merits. It has worked very well in services; we have it in such cases.

13,816. *Lord Barcaple.*—Are there not many points that are not admitted by an opponent on the record, but which he would admit at once if he saw proof that satisfied him that you were prepared to appear in court and swear to it?—That may be.

13,817. *The Chairman.*—Would it not have the effect of bringing the party to consider the veracity of his statement on record? A statement put on record at present is a sort of pleading: it is not the party himself pledged to it, and he does not feel committed to it. But if he deponed to it, his opponent might say, 'This is a respectable man—I don't believe he would swear falsely; and therefore I will not insist in my statement?'—I have no doubt it would have that effect in many cases.

13,818. *Lord Barcaple.*—You have said that there is a greatly increased amount of *bona fides* in litigation. That being so, and a party having quite honestly said he does not admit the things stated by his opponent, he does not personally know them, and he leaves his

Charles Scott.

opponent to show how the matter really stands, he would be very well satisfied with the affidavit of respectable persons who are in a position in which they must know the facts?—In a case of that kind it would work very well.

13,819. Are there not many of these cases in modern practice?—A good many; a great many, I think.

13,820. *Mr. Adam.*—That would be something like extending the oath of calumny to ordinary cases?—Yes; but not altogether the same. It would be an oath to details.

13,821. *Lord Barcaple.*—It would do away with one of the leading evils that now exists in the expense of proofs which might be taken in that less expensive way, would it not?—Yes, if the other party was satisfied. If not, it would add to the expense.

13,822. In very many cases?—Yes.

13,823. *Mr. Paterson.*—Would you go the length of suggesting an *ex parte* affidavit in any case, sufficient to determine a disputed matter of fact in favour of the opponent?—No. That would lead to great evils.

13,824. You recommend it subject to the power of cross-examination? Who is to put the cross-interrogatories?—I understand that the party appears before the court; but I can scarcely say that I recommend it. The report of the English Judicature Commission appears to wish to get rid of these affidavits, except on incidental points.

13,825. *Dr. Barclay.*—In the case of a witness whose evidence was required for a jury trial, have you not seen the court sending down a commission with interrogatories, both in chief and in cross?—Yes.

13,826. And nobody attending but the commissioner?—I have not seen that.

13,827. *Mr. Shand.*—Is it matter of notoriety that several of the leading members of the bar have been repeatedly offered places on the bench, and have declined?—I have heard so.

13,828. To what do you attribute that?—It must be because their practice is more lucrative, or in some cases it may be political ambition.

13,829. *Lord Barcaple.*—There may be other causes?—These are what I have heard it generally attributed to.

13,830. *Mr. Shand.*—Is it to any extent attributable to the want of inducement in the shape of remuneration?—That is one reason which I have stated.

13,831. Is that the reason to which it is mainly attributed?—Yes, by public opinion at the bar.

13,832. *The Chairman.*—Does that arise from the salaries of the judges being too small, or the emoluments of the counsel being too great?—Some people might say both, but certainly the salaries of the judges are too small.

13,833. *Mr. Harrison.*—I suppose it is the tendency of the multitude in the present day to rush to one or two barristers, and give them the whole business?—Very often.

13,834. *The Chairman.*—Have you anything further to say as to the pleadings and procedure in the court, including the investigation of facts?—With reference to the pleadings and procedure apart from proof, I think that the leading object ought to be to come at the substance of the case as quickly as possible; and although it is almost as speedy now as in any court in the country, there are still one or two alterations which might make it speedier, and more to the satisfaction of the litigants. At the outset of the cause, when the summons has been served, I think it ought to be in the power of the parties, if they choose, instead of defences, to lodge a joint minute with an issue, or a joint minute with a special case, or a joint minute with a reference to oath, on the footing—agreed to in the joint minute—that the result should conclude the cause. I have seen many a case where parties were compelled to lodge defences to prevent decree, where there was nothing but a question of fact which could have been quite well stated in an issue.

13,835. Do you contemplate that the judgment should be pronounced by the Lord Ordinary, subject to appeal to the court?—Yes.

13,836. In a reference to oath, it would be on the import of the oath?—Yes.

13,837. *Lord Barcaple.*—Do you mean that the special case should go to the Lord Ordinary?—Yes.

13,838. At present special cases go *per saltum* to the Inner House. Do you see any objection to that?—None. A special case has the advantage of reducing the whole elements of the cause to a question of law, not complicated by irrelevant facts, and a record generally contains a good many of them. I find that the special case is becoming more popular every day, and they are increasing in number. I have myself recommended them in a great many cases. They satisfied every requirement of the parties.

13,839. And was that course adopted?—Either that course was adopted, or the parties settled after the special case was adjusted. It seemed to bring them to the definite question at issue.

13,840. *The Chairman.*—Have you, in adjusting the special case, found much difficulty in bringing the parties together?—The agents come together.

13,841. Do you find them easily brought to accord in regard to what the facts stated are to be?—It is sometimes difficult; but if they really wish to avoid delay and expense, they do come to a conclusion. One party prepares the case, and it is sent to the other party to revise, and there are mutual adjustments.

13,842. And in the course of time, if the special case is popular, it will become more habitual to concede unnecessary points?—Yes.

13,843. *Mr. Adam.*—Do you see any objection, when the record is closed and probation renounced, to allow the parties to go to the Inner House—both parties consenting to that course?—I would object to that in the general case, and I would object to the Lords Ordinary being turned into a chamber. I have thought over that a great deal, and I find that when the case is new, and the points are not defined by any judgment, one judge is the most satisfactory tribunal. You come much more familiarly into contact with the mind of the judge, and he with your argument, than where there are four or more judges. They are finding out this in England.

13,844. *Lord Barcaple.*—It involves an entire double procedure and double expense, however?—There may be a reclaiming note in some cases.

13,845. There is a reclaiming note in most cases?—No; I should say that in more than half the cases within my experience there is not a reclaiming note.

13,846. Of final judgments?—Yes. Besides, as I understand, the advocates of a chamber do not propose to make it final. They propose a chamber above a chamber; and I have no doubt the reclaiming would be the same as from a Lord Ordinary,—I mean if the appeal were to an independent tribunal really consisting of different judges. Two or even three chambers, occasionally resolving themselves into an appeal chamber, could not possibly get through the business of the court. On the other hand, if there were no appeal within Scotland, it would be a great misfortune, and would necessarily lead to a more accessible appeal tribunal in London, and ultimately to the transference of the Supreme Court to London. Further, if the court were transformed into two or three chambers, half a dozen men would attach themselves to each, and the rest of the bar would be annihilated, thus sapping the very foundation of the Supreme Court.

13,847. *Mr. Shand.*—You highly approve of the system of special cases?—Yes.

13,848. And of these cases being disposed of by the Divisions rather than by a Lord Ordinary?—Yes; although I cannot overlook the disadvantage of there being no appeal within Scotland.

13,849. If the parties, by renouncing probation, have made their cases special cases, why should they not go to the Inner House?—If they put their case into the proper shape of a special case, and not into a lengthy or vague record, I see no objection, if you once fix down the definite facts that the court have to go on, and save them from wading through the record.

13,850. But if that is done upon a record by state-

ments and answers, and the parties have agreed on the facts or ascertained the facts by minutes, why should that not be treated as a special case?—I was not adverting to the settling of the facts by minute. But then the minute must be a proper special case, stating a few definite facts, and ending with a question of law. Almost all the minutes which I see only admit a few minor facts, and bring the case to no definite point whatever. The minute, to go to the Inner House, should be a proper special case, and exclude everything not in it.

13,851. But in that case, do you think Mr. Adam's proposal could be a good one?—I think it might. On this point I may say that though records are much improved, I think they might be still further improved by the parties in respect of brevity.

13,852. *Lord Barcaple.*—Have you observed how the new system is working, by which the defender having given in his defences, and there not being a demand for revisal, or if there is such a demand, it not having been sanctioned by the Lord Ordinary, the record is closed *simpliciter* on the summons and defences, with no answer of any kind to the defender's statement, if he has made a statement?—I have seen no reason to complain of that, so far as my own practice is concerned.

13,853. The statement, if properly made, gives fair information to the pursuer of what case the defender is to make?—Yes.

13,854. But the other object of the record, in the old sense of the word, is not attained, if in any way limiting the disputed facts of the case by obtaining admissions. Does it occur to you that there is a practical evil resulting from that?—In some cases there is; but in the great majority of cases I think it sufficiently fixes their statements.

13,855. Do I understand it to be your opinion, that upon the whole matter the balance of convenience and advantage is in favour of the new system?—I think decidedly so.

13,856. *Mr. Shand.*—It is a great advantage, is it not, to be able to close the record at once, upon a general denial, either expressed in a minute, or understood without any minute?—Yes.

13,857. And where the parties can narrow the case by admissions, that can be done, and is done, in the summary debate roll?—Yes.

13,858. The parties can then, by minutes of admission, admit enough to enable the court to dispose of the case?—Yes; but I have very rarely seen them do so.

13,859. You think that system works well?—I think so. There are particular cases, which are much in the minority, where it is right that there should be an answer to the statement.

13,860. *Lord Barcaple.*—In these cases you have to satisfy the Lord Ordinary that there should be revisal?—Yes. I think also that on adjustment a pursuer is entitled to reply to the answers to his condescendence. That somewhat narrows the case, even where there is no revisal.

13,861. There is a mode in which that object is attained in England—viz. by asking the court to allow special interrogatories to be answered. Suppose the defender wishes the pursuer to admit or deny certain specific points, he may go to the court with interrogatories prepared, and ask that the defender be appointed to answer these on oath?—I think that might work very well in many cases.

13,862. It might cause some little expense, but it might greatly limit the expense of a proof, and make it unnecessary to bring certain witnesses; or it might even make a proof altogether unnecessary?—I suggested a provision of that kind some time ago.

13,863. *Mr. Clark.*—Could the interrogatories be adjusted, do you think, without the intervention of the judge?—On the application to settle them, I think the judge would require to interfere.

13,864. Do you think that expense and delay might be saved by getting an officer of court to do it?—I don't know any that could be entrusted with it.

13,865. *Mr. Gordon.*—Might it not be done in this way: interrogatories might be prepared, and the judge appealed to only in the event of there being any objection?—Yes. There is a little difficulty just now, which the court could easily correct, as to the effect of not putting in a minute of denial of the defender's statement.

13,866. *The Chairman.*—What is the doubt?—Different judges have different opinions about it. For example, in the First Division some of the judges seem to think that if the pursuer does not put in a minute of denial of the defender's statement, he is held to admit it.

13,867. *Lord Barcaple.*—The pursuer has never had an opportunity by law of saying that he either admits or denies it?—That is just the doubt. It is held by some that the old system remains as to that.

13,868. But that would not be exactly the old system. On the old system he abandoned the right to revise, on condition of that explanation, but now he does not abandon anything?—That is just the point as to which one would like to know whether all the judges are of the same opinion. I am obliged to put in a minute of denial, for safety.

13,869. *The Chairman.*—You think that ought to be settled?—I think so.

13,870. *Mr. Shand.*—An Act of Sederunt would do it?—Yes. I mention this because, in the First Division the other day, the Lord President asked me if there was a minute of denial, and luckily I had a minute of denial in; but some of the judges do not think it necessary.

13,871. The statute does not provide for anything of the kind?—No.

13,872. *The Chairman.*—Have you any other suggestion about pleading?—Sometimes the Sheriff's judgment is brought under review by suspension or by reduction. Now, where nothing is wanted but a review of the judgment on the same grounds as were stated in the Sheriff Court, I think it ought to be by simple note of appeal,—in the case of a suspension, craving suspension, and in the case of a reduction, craving reduction, and let it just go, like an appeal at present, to the Division.

13,873. *Mr. Clark.*—How would you serve the appeal where the process has been extracted?—You go to the single bills and get a warrant for production of the process, just as in a reduction at present you get from the Lord Ordinary a warrant to get the process. I see no use of stating over again in a record the grounds stated in the Sheriff Court.

13,874. *Mr. Gordon.*—But in suspensions at present you require to go over the same grounds?—You have a note of suspension, and that has to run the course of the Outer House. I don't see any more reason for having a record, or for going through the Outer House in mere review by suspension or reduction, than in review that used to be by advocation. And in the single bills the question of sist would arise.

13,875. *The Lord-Justice General.*—An appeal of that kind would require to be served in the same way as an original summons?—In the same way as a note of appeal in a sequestration.

13,876. How is that done?—By a messenger serving it.

13,877. *The Lord Justice-General.*—On what induciæ is the respondent called?—I think it is eight days. Then under the warrant you would get the Sheriff Court record, and you have all the grounds there the same as in an advocation.

13,878. *Mr. Shand.*—Do you think the service might be by post?—Just now an appeal is just served by letter.

13,879. Do you know that jurymen are now cited by post letters?—Yes.

13,880. And that on the late circuits it has been found that the attendance was quite complete?—I don't know a single case where there was any miscarriage.

13,881. *Mr. Adam.*—Do you think a certificate by an agent or an agent's clerk, who is responsible, should be taken as sufficient evidence of service, as is done in the Bill Chamber?—I think that might work well enough. There might be some cases where it would be doubtful.

Charles Scott.

13,882. *The Chairman.*—Have you any suggestion to make as to juries?—With reference to juries, I think it is a pity that jury trial should get into desuetude. I have had a very large experience of juries, and I think I may safely say that I recollect no case where they were very far from the substance and justice of the case.

13,883. *Lord Barcaple.*—You are speaking specially of civil causes?—Yes. I have thought a good deal on this subject; and for the purpose of a decision upon a question of fact, I don't know that a mind which has been highly cultivated in one direction is the best judge of it. I think you get a more satisfactory decision from average men brought together, than from a man highly cultivated in one direction.

13,884. And a more satisfactory decision on a point of fact depending on common matters from twelve minds than from one?—Yes; they neutralize each other's specialties.

13,885. *Mr. Adam.*—From twelve minds instructed by one educated mind?—Yes; I think it is a very satisfactory tribunal for most kinds of cases. There are complicated accountings, and other cases of that kind, which are unfitted for jury trial; but where it is a question of fact that can be put into an issue,—a question of fact not involving arithmetical calculations,—I have found them always very satisfactory, whether they were against me or for me. The only necessity is to diminish the expense of jury trial. That is the only difficulty now in the way of jury trial, and that was the real cause of its unpopularity,—the long time that each trial occupied, and the expense of the jury. The expense of the witnesses is just the same as in a proof, except for the longer time occupied.

13,886. *The Lord Justice-General.*—Have you any suggestion to make with a view to diminish the expense?—I think a shorthand writer would diminish it.

13,887. *Lord Barcaple.*—In what way?—I have very often seen delay caused by the judge taking notes, by having to wait for the judge. Some judges take notes much more rapidly than others; but in the general case it is impossible for a judge, if he takes down the evidence correctly or properly, to be so quick as a shorthand writer.

13,888. He cannot write so quickly as a shorthand writer; but, after all, he cannot go quicker than the evidence?—No.

13,889. Does an ordinary judge not generally go just as fast as the evidence goes?—If he does so, he must be omitting a great deal that is said.

13,890. Why?—I have often had to wait, while the judge was taking his notes, to watch the judge's pen, that I might know when to go on.

13,891. *The Lord Justice-General.*—Do you find generally that you have to wait much?—Not very much at each question; but the whole delay comes to be large.

13,892. *Lord Barcaple.*—Do you think that the judge has not quite as often to wait for the counsel?—Sometimes, I daresay.

13,893. *The Lord Justice-General.*—Don't you think that is the more common case?—I scarcely think so. A counsel gets into a bad practice of not being prepared to put his questions quickly; but certainly any counsel that I have seen, much employed in proofs, put their questions more rapidly in succession in a proof than in a jury trial.

13,894. Why should that be?—Owing to the shorthand writer taking the proof.

13,895. How does the employment of a shorthand writer make the counsel more ready with his questions?—It does not make him more ready; but he has not to wait.

13,896. You mean it enables him to be faster?—Yes; and he rapidly gets skilful in doing it.

13,897. *Mr. Gordon.*—Are you judging from your experience in proofs before the Lords Ordinary?—Yes.

13,898. Your experience is, that the questions are put more rapidly in proofs than in jury trials?—Yes.

13,899. *The Chairman.*—Do you think that jury trials occupy longer time now than they did when you were first engaged in them?—I have not noticed much difference; if anything, I think they are shorter.

13,900. You don't recollect the period when perhaps a couple of cases or more were tried in a day?—No.

13,901. *Lord Barcaple.*—But you think that latterly there has been rather an improvement in that respect?—I think so, within my time.

13,902. *Mr. Shand.*—It happens occasionally now that cases are disposed of in a day?—Yes. In the majority of cases, all the evidence is taken in a day.

13,903. *Lord Justice-General.*—In connection with the diminution of expense, don't you think that the judge in taking notes is enabled to condense the evidence a great deal more, and to make the notes a good deal shorter, than if it were taken by a shorthand writer?—No doubt of it.

13,904. Does not that conduce to save expense afterwards if the notes come to be printed?—It must necessarily save some expense in printing, although about that there are very exaggerated notions; but the shortening of the evidence in taking it down is a very perilous process.

13,905. Do you think in practice that the substance of the evidence is not fairly represented in the judge's notes?—The bones of the evidence are there, but very often neither the body nor the spirit is there.

13,906. *Lord Barcaple.*—Is it not more likely, if the judge is abstracting it, that he will give the spirit without the body?—No doubt; but the difficulty is this, that it is very often not the true spirit of the case, but the spirit as the judge conceives it. The counsel, when he begins his case, generally knows much better than the judge can do the points which he is to make; the judge has the record and the issue, but that is all; and he very often looks on something in the evidence as not important, which appears to the counsel to be important, and which afterwards turns out to be important.

13,907. I don't think the suggestion is that he leaves out things, but it is that he shortens the expression of them?—It is very difficult to do that, without leaving out the substance also. Sometimes it is on the expression that the opinion of the jury turns.

13,908. *Lord Justice-General.*—But if a particular line of evidence with which the pursuer commences his case is important, and the judge is not aware of that, must it not be the fault of the opening speech?—It may be, to some extent.

13,909. Must it not necessarily be so?—Not necessarily.

13,910. Do you think an important line of evidence should not be indicated and explained in the opening speech?—I don't refer so much to the omission of a line of evidence, as of some fact which bears strongly on the case when other facts come to be linked along with it.

13,911. That is a particular fact?—Yes.

13,912. But if the counsel says to the judge at the time, 'This will turn out to be material,' the judge will invariably take it down?—Yes; but I have seen a difficulty about that. I have also seen unwillingness expressed, and also a treatment of the request in such a way as to prejudice the jury against the importance of the evidence. A counsel will suffer a good deal rather than contend with the judge, especially in presence of the jury.

13,913. *The Chairman.*—If a shorthand writer takes down what passes, question and answer, and that is afterwards written out and printed, don't two evils result from it: in the first place, that there is great expense occasioned by its length; and in the second place, that there is a great deal of matter which is of no value, and it is difficult to find in it what is of value?—There may to a certain extent be something of that kind, but I cannot say that in cases that I have had, I have seen the disadvantage. I could put before your Lordship a great many printed proofs, from which I don't see that very much could be spared. It has the advantage of being an exact photograph of the evidence. Farther, no shorthand writer employed in my cases ever extended the evidence in the shape of

question and answer, unless in some special matters, as where the counsel put a leading question. An incompetent shorthand writer may do so; and I have seen one or two proofs extended in that form. But such a shorthand writer ought never to be employed; and such a thing could not happen if the judge employed the shorthand writer, as I hold is contemplated by the Act.

13,914. Have you not seen a good deal of questioning that came to nothing?—Yes. I have also often seen the judge, with the consent of the counsel, direct the shorthand writer to draw his pen through such questionings.

13,915. *The Lord-Justice General.*—Is it not liable to the objections to which all other photographs are liable,—that certain unimportant things loom very large?—No doubt there are disadvantages connected with it; but these unimportant things will not loom very large in the eye of the court.

13,916. *The Chairman.*—Have you any other suggestions to make with a view to secure speed and economy in jury trials?—No.

13,917. Or as to the form of pleading? Do you think the way they are addressed on the evidence is a good system?—I think so.

13,918. *Lord Barcaple.*—Do you think that counsel could in any way limit the amount of evidence and the number of witnesses, of which there is so much cause of complaint in jury trials?—It is a very delicate thing to do, because a jury in Scotland is very exacting. If you leave anything unexplained, they are sure to suspect something. But a case is often overlaid.

13,919. *Mr. Gordon.*—You have expressed an opinion in favour of jury trial. What do you say to the system of trial by the Lords Ordinary without a jury?—I think that works very well, subject to review. A trial before the Lords Ordinary, not subject to review, was possible before, and is possible still; but it turned out the most unpopular system of all. There were two ways in which it could be got,—by taking the Lord Ordinary as a jury, or by getting specific points which the Lord Ordinary determined without review; but there were some cases which went to the Divisions in law, and there being no review on the facts, they could not get at the law, and the moment that came to be known in the profession, there never was any other proof in that form.

13,920. *Mr. Shand.*—Is it not very expensive to have the notes taken in shorthand, and thereafter printed at great length, and made the subject of debate in the Inner House?—It certainly is expensive—more expensive than the judge's notes, where the shorthand writer is unskilful; but you will never get any process that has not disadvantages. I am comparing the present mode of procedure with what I was accustomed to before, and I find that it is an immense improvement, and that it gives great satisfaction to the agents and the litigants.

13,921. *Lord Barcaple.*—What are you comparing it with?—With the only alternatives we had—viz., a jury trial or a commission, or the Lord Ordinary not subject to review.

13,922. You are comparing it, among other things, with jury trial?—Yes, in cases unfitted for it.

13,923. But in cases fitted for a jury trial, does it occur to you that the mode of dealing with them by a proof before the Lord Ordinary is better?—No; I prefer a jury.

13,924. If a case goes before a jury, there is something very nearly approaching to finality on the day of trial?—Yes.

13,925. *Mr. Shand.*—Do you think that any unpopularity which attaches to jury trial to any extent, arose from the uncertainty of verdicts,—I mean from the fact that they were allowed to be somewhat easily disturbed during a certain period by new trials being granted?—There was some dissatisfaction for some time, owing to one or two cases in which there had been three trials.

13,926. Have you not heard it remarked on in the profession that new trials were granted on too slight grounds?—Not further than that sort of dissatisfaction which I heard expressed for a short time.

13,927. *The Lord-Justice General.*—What time was that?—I think about two years ago. I cannot exactly state the time.

13,928. *Lord Barcaple.*—For some years prior to the passing of the Evidence Act, did you observe whether jury trial had been increasing or diminishing?—I don't think I could speak to that.

13,929. You are aware that there were jury trials at the sittings, and there were also jury trials during the session, before the Lords Ordinary? You are not aware whether, putting these two together, the number of trials had not been gradually increasing?—My impression is, that they were gradually increasing, but I cannot speak distinctly to that.

13,930. *The Lord Justice-General.*—If a jury trial is conducted fairly, and with a due regard to economy, would you expect that, or a trial before the Lord Ordinary with review in the Inner House, to be the more expensive proceeding?—I think a trial before the Lord Ordinary with review would be the more expensive.

13,931. *Mr. Baxter.*—Why so?—The original expense would be the same, I think, if jury trial were fairly conducted.

13,932. *The Lord Justice-General.*—Except the expense of paying the jury?—Which is only £6 now.

13,933. *Mr. Paterson.*—It is pretty strongly put in the report of the Commission of 1834, that the result in jury cases was in some instances due more to management at the bar than to the intrinsic merits of the case. What is your experience as to that?—That is not my experience. Of course, good management must always have its effect, whether before judge or jury.

13,934. *Lord Barcaple.*—Did not that refer to the then existing form of proceeding at the jury trial, by which it was in the choice of the defender to get the last word?—I think so. In most cases, with a good charge, the system of jury trial is about the best possible for expiscating facts.

13,935. *Mr. Paterson.*—Did it never occur to you that the jury gave more weight to evidence plausibly and confidentially given, than they did to evidence that was hesitatingly or diffidently given, though both witnesses might equally be speaking the truth?—I think they are very quick at noticing the difference of character in witnesses—often quicker than the judge.

13,936. Take the case where the pursuer and defender are both examined in the same trial, is there nothing in the risk of that sometimes occurring?—They might take an idea that a hesitating man was dishonest, but I don't think they are more liable to do that than a judge.

13,937. *The Lord Justice-General.*—You think a judge is quite as liable to such a prejudice as a jury?—I think one judge is quite as liable to it as twelve jurymen. I have seen a judge make gross mistakes as to the character and credibility of witnesses. I wish to remark, in regard to the matter of proof, that so far as I have seen, the determination of a question of complicated fact is about the most difficult task that anybody can have to do. It is more difficult even than deciding a question of law; and I don't at all agree with the observation which I have heard made as to distinguishing between the finality of a judgment on the fact and of a judgment on the law. I think a judge goes as often wrong on the fact as on the law, and the fact is truly the substance of the case; the law merely arises out of it.

13,938. *The Chairman.*—What inference do you deduce from that observation?—I deduce this, that the suggestions for making the Lord Ordinary final in questions of fact go in a wrong direction altogether. If the judgment on fact is erroneous, argument on the law is mere trifling. I have particularly felt this in suspensions in Justiciary, where nothing but law could be urged; and it was impossible not to feel that kept away from the fact, you were merely arguing upon shadows and fancies. The points argued were often mere trifles,

Charles Scott.

while the true question, and almost only important question, was, whether the panel was guilty in point of fact.

13,939. *Mr. Baxter.*—We were told in London, on very high authority, that in questions before juries at the instance of private parties against railway companies, and tenants against landlords, and servants against masters—in short, the weak against the strong—the leaning was always in favour of the weaker party. Have you found that?—I have not found that in cases by servants against masters. I think the leaning generally is in favour of masters. The jury is generally composed of masters. In the case of a railway company there may be that feeling at some particular time, when many serious accidents have occurred; and I have seen cases of that kind, where the feeling was against the railway company and against companies generally; but I don't think it was an unwholesome one.

13,940. *Mr. Shand.*—Did you ever see a verdict of a jury in favour of a master where the judge had not stated in the strongest possible way that he considered the master ought to win the case?—I have. In a question between master and servant, I don't think the jury at all favour the servant. I have seen juries give verdicts in favour of masters under great temptations to do the opposite. I had one trial, which lasted three days, before Lord Barcaple, by a servant against a master; and although the jury were severely tested, their verdict was for the master.

13,941. *Mr. Clark.*—Has a railway company much chance?—It runs rather a risk.

13,942. Or an insurance company, or a landlord?—With regard to cases against insurance companies, in one important case which I had, the jury struck off a very large sum from the claim. I don't think a jury would do injustice to a landlord.

13,943. Did you ever know a landlord to win?—Yes.

13,944. *Lord Barcaple.*—I suppose that if juries are properly constituted, they will contain a proportion of all these classes—not railway companies, of course, but persons connected with railway companies, and landlords and masters?—Yes. I think a jury is generally very conscientious.

13,945. *The Lord Justice-General.*—You have been engaged, I daresay, in a good many trials against railway companies, at the instance of persons injured by accidents on the line?—Yes, a great many.

13,946. Have you found many bad verdicts against the railway company in the course of your experience?—I have not. I have been in cases where the railway company got a verdict in their favour.

13,947. But have you found, in the course of your experience, any verdicts against railway companies in such cases, that ought not to have been returned?—I don't think I ever saw a case where they did not deserve it.

13,948. I suppose you have seen a great many cases in which the railway company thought they were bad verdicts?—Yes.

13,949. *Lord Barcaple.*—I suppose generally, when there was dissatisfaction with the verdict, it had reference rather to the amount of damages given than to the liability for damage?—Very often. And sometimes they might be technically wrong in the verdict; that is to say, on some subtle principle of law they might be wrong.

13,950. *The Lord Justice-General.*—In cases of that description, have you ever found the jury go wrong against the charge of the judge?—I have not.

13,951. *Mr. Harrison.*—Is not the amount of damages given by juries apparently a matter of haphazard?—That is a much more difficult question.

13,952. *Lord Barcaple.*—Is it not a very difficult and delicate problem for any man or set of men to determine the damages to be given by a railway company for an accident?—No man can do it accurately; it is just a guess.

13,953. Is there not in it an unusual element of difficulty from endeavouring to make the company recompense the pursuer for a matter that did not properly enter into the contract between them—either life or health?—Yes; and often the total uncertainty of how the accident is to result, in the case of a party injured.

13,954. *Mr. Shand.*—Can you charge your memory with any one case in which you can characterize the damages given in such cases in Scotland as being extravagant?—Not in any case that I have had; but I have read of cases in which large damages were given.

13,955. In Scotland, are you aware of any case in which you could characterize the damages as large?—No. The cases in which I have been, have been generally cases where a comparatively moderate amount of damages was given. I have read of cases where very large damages were given.

13,956. *Lord Barcaple.*—In cases of large damages, I presume the pursuer is usually in rather a superior rank?—Yes, very often.

13,957. Must it not necessarily be so?—I have seen comparatively large damages given where the man was likely during life to be subjected to great torture. I have had one or two cases of that kind, where it was clear from the nature of the injury that the man must always undergo great torture from a change of weather, or some cause of that sort.

13,958. What amount of damages was given there?—£1100.

13,959. In the cases where thousands have been given, I presume the pursuer was necessarily a person of a superior rank?—Not necessarily, but very often.

13,960. They were not persons in humble position?—No.

13,961. *Lord Justice-General.*—And therefore not so likely to enlist the sympathies of the jury?—The jury generally take the station of the pursuer into account in estimating the damages.

13,962. *Mr. Shand.* Is it your experience, with reference to jury trial, that jurymen as a rule are disposed to give great weight to any indication which the judge may give of his opinion?—Always.

13,963. *Mr. Harrison.*—That is to say, where the decisions of juries are satisfactory, it is generally because they have accepted the directions of the judge?—I would not say that. I have seen them give a very satisfactory judgment against the suggestion of the judge.

13,964. *Mr. Shand.*—Or where there has been no indication from the judge?—Or where there has been a contrary indication. In their opinions on the facts, the jury are very often right, and the judge wrong.

13,965. *Lord Justice-General.*—Supposing the judge to have great weight with the jury, don't you think the presence of the jury has great influence upon the judge in making up his mind upon the evidence?—Yes.

13,966. And that he will form a much better opinion upon the evidence because he has got the jury to charge?—No doubt of it. I have heard a great deal said against jury trial and against the verdicts of juries; but looking back on my own experience, whether the verdicts were for or against me, I cannot say that I can discover any cases justifying that opinion, except that very often those against whom the verdicts are given take a dislike to the jury. Self-willed judges are also apt to dislike juries.

13,967. *The Lord Justice-Clerk.*—Have you had experience in cases of right of way?—Yes.

13,968. Have you found satisfactory verdicts by juries in such cases?—Yes. Of course there is generally room for two opinions.

13,969. Is it not generally observed that the verdicts are in favour of the public, and against the proprietors?—The tendency is in that way, but there are verdicts both ways, and I cannot say that I could point to any case where they did so unjustly.

13,970. *Lord Barcaple.*—May that not be accounted for by the fact that in the majority of the cases the right judgment is in favour of the party seeking to establish the right of way?—Yes. He prepares his case, and understands the facts before bringing the action generally. There are cases, I daresay, where there was a failure owing to not taking into account some principle of law. For example, there was a clamant case before the First Division, from Elgin, where the jury had not noticed, or did not give effect to a sort of short

gap in the continuity of the possession or use of the road, and gave a verdict for the pursuer, where it ought to have been for the defender. The court set that right.

13,971. *The Lord Justice-General.*—The trial to which you are referring occurred in the Second Division?—Yes, I think so.

13,972. *Mr. Paterson.*—Did you never in any case get a verdict in your favour when you had made up your mind that you were to lose the case?—Yes, I think I have sometimes.

13,973. And I suppose you have lost several which you considered you were fully entitled to gain?—I have.

13,974. *Lord Barcaple.*—Did that never happen to you in cases that were not before a jury?—Very often it happens before the Lord Ordinary or the Division; but when you go before a jury, though you may have the opinion that you will gain or lose, the facts often come out quite differently from what you expected.

13,975. *Mr. Paterson.*—But I refer to the opinion you formed at the close of the case, when the jury retired?—Yes, that is what I meant.

13,976. *The Lord Justice-General.*—Has it ever occurred to you that your first impression of a verdict against you was that it was wrong, and afterwards, on reflection, you came to change your mind?—I very often thought they were right within half an hour after they had delivered their verdict, when I began to think of it. A counsel is necessarily biassed in regard to his case.

13,977. *The Chairman.*—What is your next suggestion?—There is one remark I wish to make in regard to proofs. It seems to be thought that only one counsel a side is to be allowed to speak after a proof is led, which would be a great injustice in many cases of difficult law. But I don't read the Act in that way. Only one counsel is allowed in summing up the evidence—if it is merely summing up the evidence. But suppose a case which has several branches, on one of which only is proof allowed: when that proof is led, and counsel come to address the court upon the case, I don't think the Act confines it to one counsel a side.

13,978. *Lord Barcaple.*—Nor to going on the same day?—I think not.

13,979. There are no doubt cases in which either upon a branch of the cause, or upon the whole of it, there is a question of fact that has been remitted to proof, and where there is summing up of the evidence and a judgment very much of the nature of a verdict on the evidence; and there it has been my practice generally to dispose of them on the spot; but that is a very rare instance indeed. The much more common case in our court is a case in which there are a certain number of disputed facts, but there are also a certain number of admitted facts, and there is a great deal of law, the whole going to make up one course; and it would be impossible to pronounce a separate verdict upon the facts; at least if it were done, it would only end in complication and additional procedure. Does it appear to you—if you agree with me that that is a common description of case—that it is desirable that it should be dealt with by calling on the counsel for an immediate argument by one counsel a side on the proof?—I don't think it is desirable. I don't think justice can be done to it in that way; and the delay caused by sending it to the ordinary roll would not be great. Or two counsel a side might be heard at once.

13,980. *Mr. Shand.*—Would not the expense be very much increased if the case were adjourned, by the fact that copies or prints of the evidence have to be sent to counsel, that counsel must be again instructed, and that the debate would occupy double the time?—I don't think it would occupy double the time, but it would be greater expense.

13,981. *Lord Barcaple.*—If a case is to go to the Inner House, the evidence has to be printed?—Yes.

13,982. And therefore there would be no written copies of it?—No.

13,983. In that case the difficulty would be got over?—There is almost never any written copy now, except the copy supplied by the shorthand writer.

13,984. Is there not a great risk of additional expense being created, if you create a risk of an unsatisfactory judgment by an unsatisfactory hearing?—No doubt.

13,985. You have said, to my surprise, that you think half the cases of final judgments are not taken to the Inner House; but if there is an unsatisfactory judgment, I presume it will go to the Inner House. If the judge is obliged to give a judgment on matters on which he has not heard counsel, it is apt to go to the Inner House?—No doubt. But I have known what I thought unsatisfactory judgments not reclaimed against.

13,986. Have you observed in your own experience that there have been very important matters which have not come out in argument in these summary debates at the end of proofs?—I have; and which probably don't occur to the mind of counsel till perhaps next day. But that is not very often.

13,987. The pursuer's counsel has spoken upon his impression of the case without having heard what the defender has to say?—At the same time I don't think that is at all necessary, because I think it is quite competent to hear two counsel on each side.

13,988. *Mr. Shand.*—Is there any reason why counsel should not prepare themselves before the proof, for the legal points that are to come out, just as they do in a jury trial for the law that is to come out there?—None. But counsel, like other men, are not perfect.

13,989. *Lord Barcaple.*—But at the jury trial the judge does not pronounce judgment on law. He disposes of all the questions necessary, in order to enable him to conduct the trial and advise the jury; but he does no more?—No.

13,990. At the end of the proof he pronounces a judgment on the cause?—Yes.

13,991. *The Lord Justice-General.*—In the trial of an issue which exhausts the cause, the whole case—both law and fact—is disposed of at the trial, and by verdict?—Yes.

13,992. *Mr. Shand.*—Would it meet any evil which you think exists at present, if it were understood that it is within the power of the judge to allow the counsel to be heard oftener than once, if he thinks it desirable, or to allow him to reply in special cases?—I think that would do away with the greater part of the evil. The system is working so well and so satisfactorily, that it would be a pity to disturb it much.

13,993. *Lord Barcaple.*—Can you explain why it should be less necessary to have an argument by four counsel in a cause in which, in addition to all the legal questions, there is also a question of disputed fact?—I never saw any reason for limiting it to two counsel. As I already mentioned, I consider the question of fact often much more difficult to discuss than the law.

13,994. *Mr. Shand.*—You would not propose that two counsel should speak on each side at the end of a jury trial, after the evidence has been led?—No.

13,995. *The Lord Justice-General.*—Nor before the Lord Ordinary on a question of fact?—I don't see any reason for a change.

13,996. Don't you think it might be left to the discretion of the Lord Ordinary?—Yes. I may refer to one very complicated case, *Forbes* v. *Grant*, tried before Lord Barcaple.

13,997. *Mr. Shand.*—Was not that exactly a case in which one speech on each side was sufficient?—I don't know that.

13,998. Was not the complication there entirely upon the facts?—Yes.

13,999. In such a case as that, you surely would not propose that there should be four speeches?—I think it would have conduced to the expiscation of the case if a reply had been got to the defender's counsel.

14,000. Why should you, in a case where the sole difficulty is on the facts, have two speeches on each side after the evidence before the judge, and only one before a jury?—I propose to leave it to the discretion of the judge. But I think a jury (though it is difficult to say why) arrive at the truth of a case much more easily than the judge.

14,001. *Mr. Clark.*—They are not so particular

Charles Scott.

about the road they go, so that they get home?—When you reduce it to its elements, it comes to what I said,—that the average mind is a much better judge of the facts than the highly cultivated mind.

14,002. *The Chairman.*—Do you think it desirable to continue the system of having issues prepared to be sent to the jury?—I think there may be cases when it is not necessary; but, in the majority of cases, it would very much confuse the jury if they got the record put before them. I never could suppose a case in which that should be done; for then they would be left to the counsel to tell them what the point was, and there would be constant interference by the judge as to the statements of counsel in regard to that matter.

14,003. *Lord Barcaple.*—Would there not be great difficulty in expressing their verdict also?—Yes, I think so. It would be very unsafe, without the judge interfering, to state the point to the jury.

14,004. *The Chairman.*—Can you make any suggestion with a view to diminish the expense of the preparation of issues?—The new Act allows that to be done at the same stage with the disposal of all points before proof. It is not a separate thing now.

14,005. And that works well?—It does.

14,006. *Lord Barcaple.*—There is a provision of the statute by which the pursuer is to lodge an issue in all cases; but that seems to be very much neglected?—I suppose that provision was introduced for the purpose of taking care that it should be adjusted, if necessary, at that time.

14,007. There are many cases in which there never will be an issue to adjust?—Yes; in divorce cases, for example. These cases never go to a jury; but still the issue is put in.

14,008. The issue is not put in now in the majority of cases?—I put it in in every case.

14,009. *Mr. Shand.*—Don't you think it is a regulation in many cases more honoured in the breach than in the observance?—I think so.

14,010. Owing to the great number of cases in which it is totally inapplicable?—If it were a case in which a pursuer had not thought an issue necessary, and had not put it in, I see no difficulty in preparing and adjusting an issue on the spot. But either the issue should be put in, or the party should be required to adjust it on the spot.

14,011. *The Chairman.*—You have said that you approve of the system of a decision by the Lord Ordinary in the first place, and a review by the court?—Yes. I think it is essential to have a review within Scotland.

14,012. The expense and delay of that are somewhat reduced by the late Act?—I think the time now occupied by it is extremely short. I don't think any one can complain now of the delay of the court in any of its departments.

14,013. Have you any suggestions to make on the subject of that review?—No.

14,014. As to review by the House of Lords, have you any suggestion to make?—I would be very sorry to see that done away with.

14,015. It has been suggested by some that an appeal should be allowed to the House of Lords direct from the Lord Ordinary. Would you approve of that?—No. It is so very expensive a review, that I think it is right that the remedies here should be exhausted.

14,016. *Mr. Gordon.*—Have you any suggestions to make for improving the proceeding after the closing of the record—I mean in the way of bringing parties as speedily as possible to adjust the issue if there is a question of fact to be inquired into, or to dispose of the question of law?—I think it should not be made compulsory to send the case to the summary debate roll. I think the purpose of that roll was to have everything disposed of before proof. There are many cases where parties are ready to go to proof at once, and there is no necessity for sending these to the summary debate roll. It only causes delay and expense.

14,017. *Mr. Shand.*—If parties are agreed at present to take an order for proof or for issues, it is not refused?—I never had it granted.

14,018. Have you ever asked for it, both parties consenting?—No; but the provision by which everything before proof is settled at once is a great improvement. I have seen, under the previous system, five or six separate discussions before proof was allowed.

14,019. *The Lord Justice-General.*—Previous to the late Act?—Yes.

14,020. *Mr. Gordon.*—There used to be frequently a discussion whether there was a question of fact material to be inquired into?—I have seen first a discussion on a question of title or a preliminary plea; then upon prescription; then came the question of relevancy; and the adjusting of issues generally took two separate discussions.

14,021. *Lord Barcaple.*—Do you find that counsel generally come prepared in the summary debate roll to discuss all these matters?—*I* do so.

14,022. But is there not a difficulty occasionally in getting the thing to go on quite so quickly as you are putting it now? Supposing there is a discussion on the title, and the Lord Ordinary announces that he is prepared to repel the objection to the title, do you find that generally the parties are quite ready to discuss all the other matters which precede proof?—I don't think counsel or agents have got completely accustomed to the system yet. They very often forget that everything is to be disposed of at that stage.

14,023. *The Lord Justice-General.*—But you think that the true theory of the statute is, that at the first discussion in the summary debate roll counsel should come prepared to discuss and dispose of everything that stands in the way either of proof, if there is to be proof, or of the judgment on the merits of the cause, if there is to be no proof?—I assume that to be the theory.

14,024. Including the adjustment of an issue, if necessary?—Yes.

14,025. *Lord Barcaple.*—Is there not a difficulty experienced at present in this way, that counsel for one party are not aware what line the counsel for the other party are going to take? They are not aware what branch of the case he is going to open fire upon; and when he is heard, the other side are apt to say, 'We were not prepared for this—we must be allowed to consider it,' and to ask the judge to continue the cause?—If I was the Lord Ordinary I would refuse to continue it.

14,026. The result might be that he would pronounce a decision which would not stand, and that after a great deal of procedure, probably, the Inner House would go back on it?—It might. The same difficulty occurs in a more serious form in appeals or in reclaiming notes. You can bring up all the previous points of the cause, and it is very difficult to know beforehand what your adversary is to do. But that disadvantage is more than counterbalanced by the great advantage of shortening the process and reducing the expense.

14,027. *The Lord Justice-General.*—Have you found in the case of reclaiming notes bringing up all the interlocutors in the cause, that the respondent in the reclaiming note is ever taken by surprise?—I never saw such a case; but I can suppose the difficulty to be greater there than before the Lord Ordinary in the summary debate roll. In appeals it must be very great, because the whole previous interlocutors come up, and counsel may attack any one of them.

14,028. Is it not the same as a reclaiming note? When a final judgment is pronounced on the merits, the reclaiming note brings up every judgment in the case?—Yes; but there may have been previously a reclaiming note. But the advantage of having, at the very utmost, just two debates and a proof, is very great.

14,029. *The Chairman.*—Have you any other suggestions to make?—In regard to the signet, I think that is really a useless form now.

14,030. *Mr. Baxter.*—You would abolish it?—Yes.

14,031. *The Chairman.*—Have you anything to say as to the taxation of costs in the inferior court?—I think the inferior court agent scarcely gets justice in regard to that. Costs are taxed on too abstract a principle. It is essential to make use of the inferior court agent in many matters where the auditor does not allow the

expenses: He proceeds on the principle that the litigant should come personally to the agent here, which is utterly impossible.

14,032. What would you suggest?—I am not well acquainted with the subject. It is more a matter for the agents to consider what would be best for their interests.

14,033. I suppose you say the same as to the privileges of agents?—Yes. I have an opinion on the subject, but it might not be welcome.

14,034. Can you make any suggestions as to simplifying, economizing, or expediting processes of accounting?—I think they have been very much simplified by the late Act.

14,035. Is there not great expense in accountants' fees?—Yes; I think there ought to be a taxing officer there.

14,036. It has been suggested that there might be an officer, or if necessary two paid officers, connected with the court, to whom such questions should be sent?—Yes; I think there is much need of something of the kind. The expenses there appear to be out of all proportion to what is done.

14,037. And there is no control over it?—No. But now that the accountant does not require to prepare elaborate states, but merely to give a general report without states, unless required, the expense is greatly lessened.

14,038. Do they still give the long narrative?—Yes; but that is not essential.

14,039. *Lord Barcaple.*—You don't mean that they give a long narrative of the procedure?—Very often they do. That would be taxed off if there was a taxing officer.

14,040. *The Chairman.*—In regard to the Court of Justiciary, have you any suggestion to make?—I have heard great complaints of the fees of court in suspensions: they seem to be very large; and the parties who come there are generally very poor.

14,041. *The Lord Justice-Clerk.*—That extends probably also to appeals to the circuit?—Yes.

14,042. *Mr. Adam.*—Judges on circuit, if a question of difficulty occurs, have the power of certifying it for the opinion of the High Court?—Yes.

14,043. The High Court may now sit with a single judge?—Yes. Supposing a case of difficulty occurs at a trial, the single judge would have to dispose of it without any appeal to the High Court?—Yes.

14,044. Does that suggest to you that there might be an appeal on matters of law in the High Court?—I think there ought to be the same remedy there as in a civil jury trial.

14,045. *The Lord Justice-General.*—But that is not confined to the High Court?—No.

14,046. The judge trying a cause upon circuit has no more power of referring a point of law to the full court than a judge sitting in the High Court has?—No.

14,047. But the question which has now been put to you involves very large considerations as to review in criminal trials?—Yes.

14,048. Have you considered that subject at all?—Yes, I have thought over it; but the difficulty about it is, that I have very seldom heard a supreme judge give a wrong direction in point of law in a criminal trial. In the inferior court that often occurs. I was told of one the other day that must have led to a conviction: it was a case of culpable homicide by furious driving tried in the Sheriff Court, and the Sheriff laid down to the jury that if one party drove furiously, and the other two persons who were beside him did not interfere to prevent him, they were equally guilty; and the whole three were convicted.

14,049. *The Chairman.*—Were they in the same carriage with him?—Yes.

14,050. Sitting beside him?—Yes. I understand so.

14,051. *Mr. Baxter.*—There were conflicting judgments at circuit on the subject of a former conviction of theft, and it was at last settled by three judges in the High Court. How are these points now to be determined without a review?—They can easily arrange for more than one judge sitting.

14,052. But it is not known beforehand that the point is to arise?—They could decide it on a bill of exceptions.

14,053. *The Lord Justice-General.*—Would you propose to have a bill of exceptions?—Yes, for a case like that.

14,054. *Mr. Gordon.*—You are aware that in the High Court there is a power to call in other judges when the case is likely to give rise to any question of difficulty?—Yes; but I seldom remember in my own experience of hearing in the Court of Justiciary, in a criminal case, what I could say was a manifestly wrong direction in point of law.

14,055. It might give rise to considerable delay in the administration of criminal justice if an exception were admitted?—Yes.

14,056. *The Chairman.*—Have you any suggestion to make as to the review in the Court of Justiciary?—I think there is a great deficiency at present in the means of getting justice afforded to parties tried for the first time for disgraceful offences,—crimes such as theft. I would not include assault, because it does not affect character so much; but I mean offences that affect the status and whole life of the party. I think it is quite wrong that a party should be convicted without the means of redress on the facts.

14,057. *The Lord Justice-General.*—You mean by an inferior court, without review?—Yes; I think it is a very anomalous state of matters that you have redress on a £25 account, and not in regard to the sacrifice of your whole life.

14,058. *Mr. Shand.*—Do you mean your observation to apply to cases tried before the Sheriff and a jury?—No.

14,059. *Mr. Clark.*—Police cases?—Yes.

14,060. *The Lord Justice-General.*—And summary trials before the Sheriff?—Yes.

14,061. *The Chairman.*—In Police cases would you keep a record of the evidence taken in the Police Court?—Yes, I would have a shorthand writer.

14,062. In the Police Court?—Yes.

14,063. *The Lord Justice-General.*—Who is to pay for him?—I have no doubt that injustice is very often done there, especially to young persons alleged to be criminal, and which ends in their destruction.

14,064. How would you provide for the expense of it?—I would leave it to the party.

14,065. To provide the shorthand writer?—Yes.

14,066. Would you leave it to the accused?—Yes; and I never saw any case, where there was a substantial case, where the party could not get pecuniary assistance for the trial.

14,067. *The Chairman.*—You mean that in the Police Court a party brought up for theft should be allowed an opportunity of employing a shorthand writer?—Of asking the court to employ one. I would not allow him to employ the shorthand writer.

14,068. To ask the court to employ one at the expense of the party making the request?—Yes.

14,069. *Mr. Gordon.*—That is in the case of a first offence?—In the case of a first offence only. Another way might be for the magistrate to take notes. Properly speaking, I think there should be an official shorthand writer attached to all courts.

14,070. *Mr. Shand.*—Don't you think a great deal of care is generally taken by the magistrate in such a case, not to convict if it can possibly be avoided?—The magistrate acts to the best of his ability, but the proceedings are not always satisfactory, nor the result safe.

14,071. Was that where a stipendiary magistrate was sitting?—In both cases. They have a way of knocking through a case.

14,072. What class of judges do you refer to? That would not be so before a Sheriff?—It might. In the Edinburgh Police Court, I have sometimes seen highly experienced bailies, who were in no way inferior to the Sheriffs in handling such cases. There was one very noted case that perhaps may be in the recollection of some here as appearing in the newspapers, where an inspector of markets in Edinburgh was charged with

Charles Scott.

an indecent assault upon a woman whose husband he had brought up for selling unclean salmon. He was convicted, and the evidence appeared to be unsatisfactory as it appeared in the newspapers, although what it really was I don't know. That man was dismissed from his employment at once by the Town Council, who could not help themselves after the conviction; thus utterly destroying his whole future life on the mere judgment of a Sheriff-substitute. The conviction may have been quite right, but it was wrong that it should have been final.

14,073. *The Chairman.*—Was he tried without a jury?—Yes; in the Police Court.

14,074. *Mr. Clark.*—In England there is a sort of remedy in these cases, by allowing the party to indict for perjury?—That might or might not have done in that case. I do not know on which side the truth lay.

14,075. *The Lord Justice-General.*—Don't you think the great error in the case you have been describing to us was in sending such a case to be tried without a jury?—I don't think it should have been tried without a jury; it was too serious a case.

14,076. *Mr. Clark.*—Was it libelled as assault with intent?—I am not sure.

14,077. *The Chairman.*—And it was dealt with by the Police without being remitted to the Sheriff?—It was dealt with by a Sheriff-substitute on the Police bench.

14,078. It had not been remitted to the Sheriff as a serious case?—No. There was another case the other day, where a policeman was convicted of assaulting a man in the Grassmarket, and dismissed from the force, and the detective who was with him was also dismissed. These men will never get employment again; and it appears to be a very anomalous thing that there should be no appeal in such cases. I have known great numbers of cases of the kind.

14,079.—You suggest review where a party can afford the expense of a shorthand writer?—Yes.

14,080. That could not be reached by a poor party who could not afford a shorthand writer?—I have seen a large number of suspensions, and there never is a case where there is any substance in favour of the party alleged to be criminal, where friends or sympathisers do not come forward to supply the funds. But as I already said, there ought to be an official shorthand writer. Or the judge might take notes.

14,081. Have you any other suggestion as to criminal procedure?—No; except that in serious offences under the Licensing Acts, the Game Acts, Master and Servant Acts, or the like, there should also be an appeal. A judge with social crotchets or prejudices is often a mere oppressor, to whom it is vain to address argument. Farther, the suggestion as to a special case to be stated by the judge applies to these courts as well as to civil courts, if the judge feels a difficulty on a point of law.

14,082. *The Lord Justice-Clerk.*—Or power to reserve for consideration?—Yes; that would be a still better plan.

14,083. *Mr. Shand.*—If questions of difficulty arise in the High Court of Justiciary, where one judge is sitting alone, do you think it an advantage that he should have the power of reserving points for review?—I think it would do away very much with the difficulty which I have stated.

14,084.—Suppose he had given a decision, and reserved leave to have it reviewed, would you give a new trial in case of his decision being reversed?—I think that should be left to the court. There is only one thing that I have omitted to say with reference to a shorthand writer. I think if the system extends much, or even as it stands at present, it will be essential that a shorthand writer should be appointed by the court, as a functionary of the court. I think there will be gross abuses immediately, connected with the system of allowing the shorthand writer to be employed by the parties. He is too important a functionary to allow him to be employed by the party.

14,085. *The Lord Justice-Clerk.*—Is the shorthand writer not named by some of the judges at present?—No; he is generally employed by the pursuer.

14,086. Without the authority of the judge?—Yes; and I am afraid a system will be introduced of competition and underbidding, whereby incompetent men will come to act as shorthand writers. Respectable shorthand writers will then withdraw. The shorthand writer should be an official paid by salary.

14,087. *The Chairman.*—I think you said you did not desire to give any opinions on Teind matters?—No.

14,088. Are there any other points on the civil or criminal matters that you desire to state to the Commission?—I don't think so. I had prepared a number of suggestions upon special kinds of actions, such as rankings and sales; and special actions that don't go according to the ordinary modes of process,—with a view to simplifying them.

14,089. You can hand these in.—Yes, I will do so.

14,090. *The Lord Justice-General.*—Do you embrace multiplepoindings?—Yes; and poindings of the ground.

14,091. *Lord Barcaple.*—You have stated that where divorces are defended they are very earnestly defended, and that if they commenced in the inferior court, they would, as a matter of course, come to the Court of Session; and for that and other reasons, you think it expedient that they should commence in the Court of Session?—Yes.

14,092. I suppose you are aware that in a very large proportion of divorces there is no defence at all?—Yes; I should say in about one-half.

14,093. But there is a proof?—Yes; and the defender often appears at it, though no defences have been lodged.

14,094. A large number of the divorces are brought at the instance of poor people?—Yes.

14,095. Does it occur to you that there is a hardship to that class of persons in being precluded from bringing their divorce in the inferior court, where there is no defence? They cannot be at the expense—especially persons at a distance—of bringing a divorce in the Court of Session, and sending witnesses from a distant county; and therefore they submit to all the consequences, moral and otherwise, of being without a divorce?—I have heard a great deal said about such cases. I never met with any, and I doubt their existing in any number.

14,096. Does it occur to you that it might be proper to allow the divorce to be brought in the inferior court, but leave it in the power of either party to move it into the Court of Session?—That depends very much upon the relative expense. As matters at present stand, a divorce in the Court of Session, where there is no defence, is a very inexpensive process.

14,097. I am putting to you the element of distance. There are divorces at the instance of poor people living in Edinburgh, and there are some also from Glasgow; otherwise, I don't think there are any at all. But suppose the parties live in Caithness, it would be a very inexpensive proceeding, if the existence of the adultery is clear, to prove the facts and get a decree in the Sheriff Court there; but to bring the witnesses to Edinburgh is very expensive?—There would be the difference of the railway fares.

14,098. And payment of witnesses and subsistence?—Generally that is the same in the country.

14,099. *Mr. Baxter.*—Are you not aware that it does operate as a bar?—I never saw it; and I have acted as counsel for many poor people in the Court of Session. I have principally heard it spoken of by parties interested in nursing the Sheriff Courts. I never heard it spoken of by workmen.

14,100. *Mr. Shand.*—Have you not very frequently heard the expense made the subject of complaint?—No. I should like to know the relative cost of the action in the Sheriff Court and in the Court of Session. I don't think the difference is very great. But it is not merely a matter of cost, because you have to take into consideration the judge who is to test the proof.

14,101. *The Lord Justice-General.*—An undefended divorce cause is a cause in which there may be apprehension of collusion?—Yes.

14,102. It is therefore a very delicate judicial proceeding, to pronounce a decree of divorce in an unde-

fended cause?—I think it is a more delicate task for the judge than where it is defended.

14,103. *Lord Barcaple.*—Have you generally found it to be a delicate case at all when you came to the end of the proof?—I have had cases where the judge, after reading the proof, assoilzied the defender.

14,104. *The Chairman.*—Have you considered the matter of the constitution of the Sheriff Court, as consisting of the Sheriff and his substitutes?—I have thought a good deal over that.

14,105. What view do you take of it?—When I came to the bar, or up to a very late period, the Sheriff-principal was essential. Where an advocation lasted for two or three years, and caution required to be found, it was essential to have an appeal within the Sheriff Court. It is not so necessary now; but still there may be a great many little appeals within the Sheriff Court.

14,106. Do you think it expedient that there should be a power in that way of correcting the errors of the Sheriff-substitute, if he commits any, at a small expense?—If the Sheriff-substitute was a man of much higher position, with a very large income—a man of eminence in his profession—it might not be so necessary. But the office of Sheriff is a very old institution, and I would not be disposed to interfere with it. At the same time the court ought not to discourage appellants passing over the Sheriffs. That would prevent bad appointments, and greatly sharpen up the Sheriffs.

14,107. *Mr. Baxter.*—Suppose you had to re-organize it, or to institute it for the first time, would you have a double judge?—Not since the late Act.

14,108. *The Lord Justice-General.*—You mean the late Court of Session Act?—Yes. It is a matter of fact now that an appeal to the Sheriff may delay a cause more than an appeal to the Court of Session. The one may be more quickly decided than the other.

14,109. *The Chairman.*—Do you think the appeal to the Sheriff would admit of acceleration?—I think it would.

14,110. *Mr. Baxter.*—If you are correct in your estimate of the expense of £8 a side, you would rather have an appeal to the Court of Session?—That might depend on the matter to be appealed. I was much struck by reading the evidence of Mr. Bell as to the immense number of small appeals that came before him. It would be impracticable for the Court of Session, in its present condition, to dispose of these appeals. I think he said there were about 1100 in a year.

Charles Scott.

14,111. *The Chairman.*—Do you think that an advocate resident in Edinburgh, and attending the courts, keeps up his law better than one who goes to the country and resides there?—That must be the case generally, but there may be exceptions. It depends very much on his practice. I don't think an advocate without practice keeps up his law very much.

14,112. *Mr. Baxter.*—And there are a number of the Sheriffs who have not an extensive practice?—A few of them. But speaking generally, the Sheriffs as a class are superior to the Sheriff-substitutes. There may be individual exceptions. There is one thing which I would add with reference to the appeal in the Sheriff Courts, if it is to be retained: I think it is in the best possible form. Any suggestion I have heard as to altering it, would make a much worse system than the present one.

14,113. *Mr. Clark.*—You mean from the Sheriff-substitute to the Sheriff?—Yes. A court of three Sheriffs would make a very bad court. A court of three Sheriff-substitutes would make a still worse court. Such a petty court, aping a little Court of Session, would command no respect in the country, and would probably not command itself. I would add that the institution of the Sheriffs, though a valuable one, did great injury to the Supreme Court, which was often purposely crippled in order to maintain them; and the wholesome development of the law was thus much retarded, and we had frequently to go to England for our best principles. If the Sheriffs-principal are in the future to injure the Supreme Court and to become aggressive on it, I consider that they ought to be abolished. I cannot overrate the value to the country, and to the development and consolidation of the law, of a powerful Supreme Court superintending and directing all inferior courts. I do not know any Supreme Court more calculated by its present constitution to become popular than the Court of Session; and the outcry raised against it has generally arisen from interested parties.

SATURDAY, 22D MAY 1869.

Members Present:—

LORD COLONSAY.
THE LORD JUSTICE-GENERAL.
LORD BARCAPLE.
EDWARD GORDON, Esq., Q.C.
JAMES CAMPBELL, Esq.
DR. BARCLAY.
JAMES ADAM, Esq.
A. B. SHAND, Esq.
GEORGE HARRISON, Esq.
T. G. MURRAY, Esq.
J. B. BAXTER, Esq.
ADAM PATERSON, Esq.

THE RIGHT HON. LORD COLONSAY IN THE CHAIR.

GEORGE MONRO, Esq., examined.

George Monro.

14,114. *The Chairman.*—You are a practising advocate at the Scotch bar?—Yes.

14,115. How long have you been so?—Upwards of forty years.

14,116. You have had occasion to consider the system of procedure in the court?—I have.

14,117. Would you state your views on the note of points furnished to you, as to which the Commission are desirous to obtain information?—I am very well satisfied with the constitution of the court, and the distribution of the business thereof between the Outer House and the Inner House. With regard to the new court of the Lords Ordinary, we have not had much experience of it.

14,118. That is the temporary court formed by four Lords Ordinary?—Yes. It produced a good deal of delay in the Outer House procedure; but I think it is a valuable institution to be resorted to in case of need. With regard to Teind causes, I think there is very much need of considerable alteration on the whole procedure of the Teind Court, and in the keeping of its records; but probably this Commission will have information upon that subject from persons who have had more experience in that court than I have had. I have devoted some attention to it, and have notes partly proceeding upon conversations which I had last year and this year with a friend of mine who is very well conversant with it, and who has formed a scheme for improving the Teind Court; but probably this Commission had better get his ideas directly from himself.

George Monro.

14,119. *Dr. Barclay.*—Would you give us his name?—Mr. M'Gillivray, 16 St. Andrew Square.—With regard to the constitution of the court, I am of opinion that the salaries of the judges ought to be raised. The present salaries were fixed at a time when the expense of living was smaller than it is, and they are not sufficient to attract the ablest men at the bar. I think the efficiency of the court would be greatly promoted by an increase of the salaries. I am inclined to think that the additional duties thrown upon the judges by the legislation of last year and previous years must become too onerous, and it may be necessary soon to increase the number of judges; but I state that with great diffidence.

14,120. *The Chairman.*—Do you approve of the constitution of the court, as consisting of Lords Ordinary and two Divisions?—Decidedly.—The next point is the jurisdiction of the court—privative jurisdiction. I much incline to think that the Sheriff Courts ought to have a co-ordinate jurisdiction in questions of heritable right, and in reductions where the value of the cause is of small amount — perhaps not exceeding £200.

14,121. *Dr. Barclay.*—Annual value?—No, total value. I don't think the Sheriff Courts are at all so well fitted for that jurisdiction as the Supreme Court; but it is very desirable to encourage people in moderate circumstances to have heritable property, and to have the means of protecting and vindicating their rights at a cost that is suited to their means. That is my only motive for thinking so. Sheriffs have occasional difficulty in questions which are in a great degree questions of possession, yet where points arise as to which there is doubt whether the jurisdiction of the Court of Session may not be privative.

14,122. How would you find the value?—With reference to the ascertainment of the value, I think a sort of precedent may be found in the Judicature Act, 6 Geo. IV. c. 120, sec. 40, where advocation, with a view to jury trial, is made competent in causes over the value of £40; and there was an Act of Sederunt passed for ascertaining the value where the cause was not simply pecuniary. I don't think there could be much practical difficulty there; and I think the judgment of the Sheriff upon that point, subject to the review of the Sheriff-principal, should be conclusive, because a judgment on the merits can always be carried to the Court of Session by appeal.

14,123. *Mr. Baxter.*—You say you think the inferior courts are not so well fitted for disposing of questions of heritage. Would you give your reasons for thinking so?—The system of land rights, necessarily from its very nature, is more complex a great deal than questions of personal right or questions of obligation.

14,124. *Dr. Barclay.*—Is it not much less complex than it was when you went to the bar?—The procedure for making up titles is much simpler; but when questions arise, I don't know that they are any simpler. Perhaps they are more complex, because, as we have always to go back forty years for a prescriptive title, we have three or four successive systems to deal with.

14,125. *Mr. Baxter.*—Don't you think we in the country should be a little up to titles, seeing that we have to frame them?—No doubt you should, and I hope that the Procurators Act, and improved education, will have an effect, but still a great deal of the conveyancing of Scotland, of the highest kind, is concentrated in Edinburgh; and, speaking from my own experience and observation as a Sheriff, and of the way that the procurators deal with questions of heritable right, I would say that Sheriff Courts are not so well fitted for the disposal of such questions. The procurators have not the same extent of business, and I think questions of heritable right, where the amount was great, would always come to the Court of Session. I have the highest respect for the Sheriff Court procurators, but all men get rusty in law that are not every day practising.—I also very much incline to think that it would be well that the Sheriffs had some power of appointing judicial factors upon small estates,—perhaps to the maximum of £200, and subject to the jurisdiction of the Accountant of Court. I think that would be beneficial to many people in moderate circumstances.—Then, so far as regards appeals from the Sheriff Courts, I have considerable doubts whether it was advisable, as was done in the Act of last session, to allow appeals from the Sheriff Court entirely without caution. I have not been able to ascertain that as yet any evil has arisen from that, but I have seen great injustice arise in regard to appeals to the House of Lords from the power that poor parties have of menacing their successful antagonists with an appeal to the House of Lords, which can easily be taken without any security at all; and I have little doubt that the same thing will occur in appeals from Sheriffs. Whether the right of appealing without caution might be limited to the case of a difference of opinion between the Sheriff-substitute and the Sheriff-principal, may be worth considering.

14,126. *The Chairman.*—You mean that the question of whether caution should be found might be made to depend upon that?—Yes; if the Sheriff-substitute and the Sheriff agreed in opinion, that then the party should not be entitled to appeal without finding caution. I think it would be worth consideration also, particularly if the rule as to not finding caution continues, whether the respondent might not be entitled to allow the case to go *ex parte*, as is done in the House of Lords. For example, where a case is brought up to the Court of Session on judgments on a proof, or what we call a concluded cause, where the whole elements for decision are present, if a party felt very confident that his cause was just, and was not well able to afford the expense of litigation, he might allow the other party to plead the case, and the court to decide it; and if the court should pronounce any judgment requiring a further proof, or requiring further attention on the part of the respondent, there might be an order to give notice to him. With reference also to appeals, the Act of last year limited the power of review by appeal to six months; but, so far as I have observed, there is no limitation of the power of appeal by reductions on the head of iniquity. That is a competent process, and I don't see why there might not be some limitation of the review of Sheriffs' judgments in that form. Probably the same limitation as has been applied to appeals should also be applied to reductions on the head of iniquity. Of course there may be other grounds of reduction which it might not be proper to limit; but reductions of the nature of appeal ——

14,127. Reductions for review?—Yes; that is probably the proper expression; these might be so limited. With reference to writs, pleadings, and procedure, there are various processes—some of them by petition, and some by summons of adjudication, and the like—for making up titles to land, and in these it is necessary to call the heirs of parties deceased; and I have found, particularly since emigration became so common, that it is often difficult to know who the heir of a party is, or whether he had any heirs of his body, or any heirs at all, and in that way sometimes you really cannot get a summons raised. I have heard of parties raising summonses directed against persons whom they knew to be alive thirty years before, as the nearest approximation they could make to it. But why should there not be a power, subject to restriction and with leave of the judge, to cite the heirs of the party deceased, in general terms, simply as the heirs of such and such a person? I think that would be convenient.

14,128. *Dr. Barclay.*—Edictally?—Of course it must be.

14,129. *Lord Barcaple.*—After an incidental application to the court for authority to do so, do you mean?—I have not considered the form in which it might be done. But the citation might be given, and the sanction of the judge applied to it after it came into court. It is desirable to make it as simple and cheap as possible.

14,130. *Mr. Paterson.*—Would you have newspaper publication as a condition of that?—I think these edictal citations are published somewhere.

14,131. *Dr. Barclay.*—They are published to the profession?—But I think some publication in news-

papers or gazettes would be very proper,—whatever would tend to make it sufficiently public without too much expense. I have known great expense incurred by publishing in papers here and there.—I should say the form of summons of reduction, which is a very old and cumbrous form, should be simplified, and that there should be more power to hold a summons of reduction or declarator as repeated in any case where that is necessary to explicate the cause, and where all the parties are already in court.—With regard to the Act of last session, perhaps the phraseology of section 27 in regard to the summary debate roll is rather too stringent—that it is necessary to send every case to the summary debate roll, where parties don't renounce probation. There are a good many cases where it can be seen at once at the closing of the record that there must be probation. I don't say the Act does not admit of that, but I believe there are different constructions upon the subject; and I think, as the counsel and agents have the nature of the case fully in view when they are closing the record and stating whether they can renounce probation or no, that in many cases it could at once be held without going to the summary debate roll, that probation is necessary, and how it should be taken. I would give a little more power to the Lord Ordinary, or make it clear that he has the power. Perhaps at that stage he might have the power to order issues, looking to the nature of the case; because I rather think that in the same section the rule as to parties lodging issues before the case comes on for debate in the summary debate roll, is rather stringent, and in a great many cases we prepare issues without knowing very well whether they are to be of use or no, and there is a good deal of trouble connected with that.

14,132. *Lord Barcaple.*—Don't you often prepare them when you are confident there never will be issues?—I prepared a very troublesome issue no longer ago than yesterday, in that very position. I think something should be done to prevent that. I understand that of the issues actually lodged, very few come to be adjusted as issues.

14,133. And in a large number of cases, are there no issues lodged?—I believe in a great many they are not lodged.—With reference to the same section, perhaps it would be as well to give the Lord Ordinary power to allow a general answer by the pursuer to the defender's statement to be added upon the record, and any adjustment either of the condescendence or defences that he might think fit, without a revisal.—I also think the rule as to having the debate on a proof immediately after it is concluded is a little too stringent, because it often happens that questions of law depending upon the facts that may be ascertained in the course of the proof have to be argued, and counsel have not sufficient opportunity of considering the case, examining the authorities, and giving all the assistance in their power to the judge, without some short interval for that purpose. I think the judge might have a little more power and discretion given to him in regard to that.—I am also inclined to think that in debates on reclaiming notes in the Inner House, the senior counsel ought to open instead of the junior. The practice that at present exists seems to have sprung out of, although it is not exactly in accordance with, a communication that was made by the court to the Faculty, and which is printed at p. 839 of the 4th vol. of Shaw and Dunlop. This was immediately following the Judicature Act of 1825. It is not satisfactory when the court, after hearing merely the junior counsel for the party, refuse the reclaiming note. Parties are very apt to think that their case has not been fully stated; and such a result is not at all in accordance with the communication by the court in 1826, which is to this effect, that the junior counsel was only to state the facts and explain their bearing on the pleas in law, but that the discussion of the law and the application of the law to the pleas raised by the parties were to be left entirely in the hands of the senior counsel.

14,134. *Dr. Barclay.*—How if the senior counsel is not there?—That is a different thing. You must take the counsel that is there.

14,135. *Mr. Gordon.*—Could that be well carried out unless you made the arrangement that the two counsel for the reclaimer should be heard?—The consequence would be, that we must adopt the practice that prevails in the House of Lords in appeals; and I am now speaking entirely of the appellate jurisdiction of the Inner House. *George Monro.*

14,136. That would involve two speeches for the reclaimer, two speeches for the respondent, and a fifth speech in reply for the reclaimer?—Yes. I don't know that that would be found much longer; but at any rate it would enable the court, I think, more satisfactorily, where they thought that the proper course, to refuse the reclaiming note on the statement of the reclaimer, without calling upon counsel on the other side.—By the Act of last session, the prayer of reclaiming notes was abolished. I think it was quite right to take away the stringency attached to the prayer, but it strikes me that there should be some mode of the party indicating what he wants. I think that would be fair to the court and to the other party, because, although in some cases it is obvious that the party wants the judgment against himself to be altered, there are many reclaiming notes where he wants it altered in part, or to a certain effect. I think it would be well that the court knew what he wanted before they proceed to look into the case at home. Some judges like to read the case at home, but it is very unsatisfactory to read a whole case, and then it turns out that it is a mere minor matter upon which the alteration is wanted. The reclaiming note comes a good deal into the same predicament as an appeal in the Sheriff Court, which is in a few words: 'I appeal against the above interlocutor.' I have felt the same inconvenience there; I did not know what the party wanted. At all events, it should be made not informal that the party should have some mode of explaining what he wants.

14,137. *Dr. Barclay.*—Do you think it would be objectionable, under the Act, in an appeal from the Sheriff Court, to say, 'I appeal against the above interlocutor, so far as it finds me not entitled to expenses?'—The Act gives a certain form of words, as if they were *verba solennia*.

14,138. Was that not to do away with a long advocation?—Probably it was, and I don't know that there would be any objection to that; but I believe, in consequence of the way in which the Act is worded, it is very seldom that anything else is said. I think it should be made clear, that the party may state what he wants; and if in the course of a discussion on the reclaiming note new points are started, that may give rise to questions of expenses.

14,139. *The Chairman.*—Your view is, that if the party does not mean to reclaim against the whole interlocutor, he should give an indication of what part it is that he does reclaim against?—Just so. Then with reference to appeals to the House of Lords, I think the time within which such appeals are competent should be very much limited. I think too long a time is now allowed for appealing. Probably six months would be sufficient—six months from the date of the judgment, without regard to whether Parliament is sitting or no.

14,140. *Dr. Barclay.*—Would that not be rather severe in the case of a party who was abroad in Australia?—One may say the same thing in regard to the reclaiming note in the Court of Session. Whether a party is in the country or not, it must be lodged within twenty-one days, or within a shorter period in certain cases. I don't press six months, but I think the time should be considerably limited within what it is at present. The present term was adopted under a very different state of circumstances from that which now exists.—These are all the matters in the paper which I have to mention.

14,141. *The Chairman.*—Have you considered whether it would or would not be expedient to distribute among the Lords Ordinary indiscriminately all kinds of business, without limiting certain classes of cases to individual Lords Ordinary? For example, teinds are now assigned to one Lord Ordinary, and the Bill Chamber

George Monro.

work to the junior Lord Ordinary. Have you considered whether it would be desirable to allow these cases to go to any Lord Ordinary that the parties might prefer?—I have considered it, but I have not heard much complaint as to the present system. My own impression is, that the matter is better as it stands.

14,142. *Mr. Gordon.*—Do you think that the giving to the pursuer the choice of his judge is a good rule, or ought it to be altered?—The rule that prevailed when I came to the bar was altered, I think, very much for the worse; and that rule, again, has been modified by the power of distribution given to the head of the court. I think that power of distribution was a great improvement. There used to be a Lord Ordinary for the week; and if you enrolled your case for that week, it went to that Lord Ordinary and to a particular Division; but if you did not like that Lord Ordinary and that Division, you had to wait for the Lord Ordinary you wanted. You could not wait beyond a certain time, because the other party could put up protestation against you. I would be very sorry to deprive the public altogether of the power of selecting their judge, because I believe there are some judges, such as the late Lord Curriehill, who have special qualifications for particular branches of law and practice, as he had in feudal cases.

14,143. *Dr. Barclay.*—But the selection is always on one side. The defender has no power of selection?—That cannot be helped.

14,144. *The Chairman.*—The pursuer selects not only his own judge, but his opponent's judge?—That is true; but still I think, in the general case, the pursuer believes that he is wronged, and therefore selects a judge in *bona fide*.

14,145. And he also looks for expedition?—Yes.

14,146. But you think that the power of distribution has remedied the evils that existed from the crowding of the rolls of one judge, while another had not enough of cases to occupy him?—A good deal.

14,147. *Dr. Barclay.*—Have you heard it proposed that the Bill Chamber should cease as an independent branch, and that applications of the character now made in the Bill Chamber should be made to any Lord Ordinary, the clerk of each acting in these cases?—I have heard that proposed, but it is rather a recent idea.

14,148. *Lord Barcaple.*—You have had a good deal of experience in Bill Chamber causes?—Yes.

14,149. Have you found that department of the work of the Court of Session to be at any disadvantage in regard to the office of the clerks, or the mode in which it is dealt with?—No, I am not aware of that.

14,150. *The Chairman.*—Has anything occurred to you as to criminal procedure in the public court?—No. I am not aware that there is anything requiring a remedy at present.

14,151. *Mr. Campbell.*—It has been suggested that the Sheriff should have the power of sentencing to penal servitude in cases in which there are repeated convictions: have you considered that?—Yes; and I am against extending the power of the Sheriffs to pronouncing sentences of penal servitude. I think it stands very well as it is.

14,152. *The Chairman.*—Do you see any objection to the Sheriff having the power of disposing of questions of robbery, when such cases were remitted to him by the Lord Advocate, that being an indication that penal servitude was an excessive punishment for such a case?—It is sometimes doubtful whether an offence is theft or robbery; and I have seen that question very nicely raised,—a man snatching a watch from another's pocket,—whether he jostled him in doing it.

14,153. Do you think it would be safe to give the Sheriff the power of going on with the case, although it should so turn out?—I think it would be quite safe, because it is subject to the control of the Lord Advocate and his deputes.

14,154. *Mr. Paterson.*—With reference to the constitution of the Supreme Court, I should like to have your opinion as to some theories which have been put forward. Allowing for all the improvements of the recent Act, it is said in some quarters that the efficiency of the court in regard to economy and despatch might even yet be increased. What is your view with reference to that?—I think the Act of last year did a great deal to accomplish that.

14,155. But there are people who still maintain that it might be more improved in matters of economy and despatch?—I am not aware of any improvement that could be made. If any particular suggestion were made, I could state my opinion on it.

14,156. Do you think it would be practicable or necessary that the sittings of the judges should be further prolonged than they are under the recent Act?—I have some idea of the fatigue incurred by the judges from long sittings, and it strikes me that they are quite sufficiently long already. My impression is, that the judges of the Court of Session are the hardest worked elderly gentlemen in the country.

14,157. You think it would hardly be fair to the judges, looking to the extent and importance of their duties, to lay a greater burden upon them?—I think not. I indicated already that it might be necessary to increase their number.

14,158. Would it be possible so to organize the court, with the present number of judges, or if required, by enlarging their numbers, so as to give continuous sittings of a Division over the twelve months?—I don't see that that is necessary. Wherever there is any wrong requiring a sudden remedy, it is given in the Bill Chamber.

14,159. Have you heard it complained by parties or agents that the remedy got in the Bill Chamber, especially in the long vacation, is generally of an interim character; and that after a suspension or interdict gets to a certain stage, it stops until the court resumes?—I have not seen any practical evil from that, and I think by the late Act the Bill Chamber has the power of ordering things to be done; it is not confined to mere prohibitions or interdicts.

14,160. *Mr. Gordon.*—The process of going through the rolls of court has also been abolished?—Yes. I should think it would be very difficult to produce many instances of any grievance of the kind referred to.

14,161. *Mr. Paterson.*—Supposing an interdict refused in the Bill Chamber, and you have to wait for perhaps three months till the court meets, in order to present a reclaiming note, may the party not be aggrieved by that delay?—I think, wherever there is an appearance of serious question, the Lord Ordinary either grants the interdict, or only refuses it upon some condition which effectually protects the complainer against damage. It will be found that that is more a speculative complaint than a real one.

14,162. Supposing it is either granted or refused, may it not be a hardship on one of the parties to have to wait two or three months?—Sometimes it is granted on condition of finding caution for wrongous interdicting.

14,163. *Mr. Harrison.*—I suppose you mean us to understand that the popular belief that there is unnecessary delay and expense in the procedure of the Supreme Court applies rather to the past than to the present working of the court?—I think there was a good deal more made of it than was just, even under the former state of things, because, whenever there was what is called a summary case, it was always heard with despatch. At the same time I think the arrears of cases in the long rolls of the Inner House, and even of debates before some of the Lords Ordinary, were too great to be satisfactory; but there has been a very great clearance of these rolls since the late Act, and I have every hope that the Act will be effectual in preventing any such arrears for the future.

14,164. *Mr. Gordon.*—Even before the Act passed, I believe there was a reduction of the arrears, through the anxious desire of the judges to get rid of these arrears?—Yes; they were gradually being reduced by the power given to the court of prolonging the sittings.

14,165. *Lord Barcaple.*—Which has been regularly exercised by the Inner House for a considerable period?—Yes. I think the Act of last session a very excel-

lent one, and I have hopes that it will prevent the recurrence of these and many other evils.

14,166. *The Lord Justice-General.*—Has not the amount of arrears in particular rolls been also very much diminished by the power of distributing the business under the Act of 1856?—No doubt of it; very greatly.

14,167. *Dr. Barclay.*—Might there not be a division of counsel between the Outer House and the Inner House, and perhaps a subdivision of them between the First and Second Divisions, so that parties might always be secure of having their counsel present? I suppose you are aware that many fees are paid, and all the benefit got for them is having counsel's name printed on the paper?—I have often thought of making such a division.

14,168. Is it not done in England? Do not counsel attach themselves to particular courts there?—Not by law. They choose to do so. I have often thought it would be an advisable thing, for it is very unsatisfactory for the parties to have counsel employed, and not to have the benefit of their assistance at the debate.

14,169. And equally unsatisfactory to the court to have only the junior counsel present, when the Act of Sederunt says that the senior shall expound the law of the case?—I should think that must be unsatisfactory to the court.

14,170. *The Chairman.*—Do you think that the business of one Division would be such as to attract to it any considerable number of counsel of standing, or would it help to raise the standard of the bar to make such a subdivision?—Perhaps the result would not be different from what it is at present in regard to that,—that a few men might have all the business almost in one Division, and a few all the business of the other Division. At the same time it might be dangerous to make such a division by law. If the bar itself were to think seriously of it and do it, I don't know that it would be to the detriment of the public.

14,171. In that case, do you think there would be introduced the system which prevails in another place, that when a particular counsel was taken from his own Division to the other, he must get a special retainer,—a large fee of 50 or a 100 guineas?—I have heard that that prevails in England, though I don't know to what extent; but it certainly might lead to that evil.

ADAM GIFFORD, Esq., examined.

14,172. *The Chairman.*—You are a practising member of the Scotch bar?—Yes.

14,173. How long have you been so?—For twenty years, within a few months, and during the last half of that period I have had pretty full experience, chiefly in the civil practice of the Court of Session, although not exclusively.

14,174. You have had occasion to consider the efficiency of the system on which the business of the court is carried on?—I have; and in general I may say that so far as the constitution and arrangement of the court is concerned, I do not for my own part desire any sweeping or radical alteration.

14,175. You do not desire any organic change?—No. I think that, as a whole, and if well wrought, the arrangement of the court in regard to the Outer House, with the general system of review by the Inner House, is a beneficial and expedient arrangement.

14,176. Does it occur to you that any improvement could be made upon the procedure by the distribution of business or otherwise?—I cannot say that there should be any serious or fundamental change in that respect. It has been suggested that the Bill Chamber as a separate institution might perhaps be beneficially merged in the general machinery of the court,—that an application for interdict might be presented to any of the Lords Ordinary in the same way as any ordinary application, subject to the same final review on the merits, and subject to instant review so far as possession is concerned. That, however, is rather a matter of detail than of fundamental change in the business. I don't think there is any call for a permanent Third Division.

Adam Gifford.

14,177. *Lord Barcaple.*—Before you go to that, you say that a change in the Bill Chamber has been suggested. Do we understand that you concur in thinking it a desirable change?—In some respects I think it might be desirable.

14,178. Would you state the ground on which you would expect advantage to result from it?—I do not think that there is any great advantage in having what may be called the summary jurisdiction of the court confined to one judge. The jurisdiction of all the judges in the Outer House, considering them as primary judges, may be fairly put on the same footing; and it does not occur to me that there are advantages to counterbalance the separate machinery which the Bill Chamber involves.

14,179. Including the office of the Bill Chamber as a separate establishment?—Including the office of the Bill Chamber as a separate establishment.

14,180. *Mr. Gordon.*—Is there not an advantage in having one judge on whose presence in Edinburgh you can rely, instead of leaving it uncertain whether a judge can be got?—I understand that there would always be a judge on whose presence you could rely, for I would not abolish the existing practice of there being a constant permanent single judge, at all events, sitting during vacation.

14,181. *The Chairman.*—But the question alluded more to having a particular chamber open, with a clerk in attendance on it, where all people could go for Bill Chamber work, whoever might be the judge?—But that advantage does not seem to me to be any greater than would exist when all the other offices are open so many hours a day, and when, apart from office hours, a party may seek out the clerk or the judge.

14,182. *Dr. Barclay.*—You would require to put up a caveat in all the offices?—Yes; and that is an objection, no doubt.

14,183. *Mr. Adam.*—Have you felt any practical grievance from the present system?—I don't think we have; it is a little more expensive, probably.

14,184. *Mr. Campbell.*—A very little ingenuity would devise a particular locality where all caveats might be intimated?—Yes.

14,185. *Lord Barcaple.*—Would it be easy in that case for five clerks to get notice of the caveat?—It might enter the rolls of court in some way.

14,186. *The Lord Justice-General.*—It could only be published in the rolls of court once in twenty-four hours?—It would.

14,187. Would that be enough?—It might not. That is a practical difficulty.

14,188. The Bill Chamber judge at present is accessible for twenty-four hours a day. Is it desirable to subject all the Outer House judges to the same infliction?—I don't know that the Bill Chamber judge is more tied than any of the other judges. However, I don't attach much importance to that.

14,189. *The Chairman.*—Does it appear to you that the Act of last session has tended much to acceleration and economy?—I think it has, so far as it has gone. In part I think it is yet on its trial, but in many respects it has undoubtedly tended to acceleration in the decision of causes; and in reference to the making up of records, and in various other particulars, I think it is working very well.

14,190. Have you any suggestion to make in the way of accelerating and economizing causes?—I approve entirely of the general principle of records as they are at present made up, consisting of a simple statement in untechnical language of the facts which each party alleges, and a note of pleas in law deduced therefrom. I think that is a very philosophical as well as convenient arrangement.

14,191. *Lord Barcaple.*—There is another element in the present record—an answer by the defender to the pursuer's statement?—I don't attach so much

Adam Gifford.

importance to that as to the untechnical statement by each party of his case, and the deduction of his legal rights therefrom.

14,192. Then you do not, I presume, attach any importance to the absence of an answer by the pursuer to the defender's statement?—Practically I do not.

14,193. *Mr. Gordon.*—But do these answers produce any evil?—I don't know that they do, excepting delay.

14,194. But I mean answers to the pursuer's statement?—The present form is an answer to the pursuer's statement, and a separate statement if required. Lord Barcaple's question referred rather to the duply.

14,195. *Lord Barcaple.*—What I meant is this: At present we have an answer by the defender to every article of the pursuer's statement; we have not, unless there be a revisal, an answer by the pursuer to the articles of the defender's statement. Now the answers may be important or not important; but I presume, if they are important on the one side, they will be important on the other; and I wanted your opinion—and I understand I have got it—that you think they are really of comparatively little importance on either side?—I attach so little importance to it, that I think it not worth while to order a revisal for the purpose of getting them. Of course an admission cannot be implied where there has been no opportunity of answering.

14,196. The only use of an answer would be ——?—To narrow to some extent the subsequent inquiry.

14,197. In practice you think that is not material?—I think not. I was going to add that I think the present form of the record an advantage on account of its popular form. In a legal question, I think it is of some importance that the dispute in the pleadings should not be wrapped up in technical language, but should be such as can be understood by unprofessional persons; and that is an advantage so great, that I would be prepared to sacrifice the precision which might arise from a technical rule of pleading, rather than lose that popularization of the statement.

14,198. Do you attach importance to the pleas in law?—I think pleas in law are important, not by any means as narrowing the questions, but as indicating the points to which the parties think their case comes.

14,199. Then I suppose you would wish to maintain the pleas in law, but on the footing that additions to them should be very readily allowed?—Very easily allowed. And in reference to the new Act, which allows additions and alterations to a very large extent, I think that is a very great improvement on the old system.

14,200. Is there not often an error in practice in the counsel stating a great accumulation of pleas?—Perhaps there may; and I am not quite sure but that error, as well as the error of a great detail of facts, has arisen from the old rule that everything should be stated on record, and from a terror—perhaps an unfounded terror, but still a terror, that practically operated in lengthening the pleadings—that perhaps they might omit something, and a desire to put it in all shapes, so that they might have everything on record. As the operation of the new Act extends, I should expect that evil of the unnecessary length of the pleas would be obviated.

14,201. *Mr. Gordon.*—Have pleas in law not a beneficial effect on the mind of the party preparing them?—I think they have.

14,202. By directing his attention to the points that will fall to be argued, and thereby leading him to make the statement more concise and relevant?—I think so. In short, it is an anticipation of the pleading which he must come to, sooner or later.

14,203. And the adding of the pleas in law costs nothing additional?—Nothing.

14,204. *The Lord Justice-General.*—That depends, I should apprehend, on whether you would diminish the fees for preparing the condescendence, if there were no pleas in law?—Probably it does; but I should not contemplate any such diminution.

14,205. *Mr. Baxter.*—Suppose an important plea in law is omitted?—Then under the existing Act, of which I entirely approve, it might be supplied; and if expense has been occasioned by its omission, an award of expenses is the remedy. The working of the existing Act might be extended, perhaps. The court is appointed to do substantial justice between the parties, admitting every real question that arises; but there are restraints as to the amount concluded for. I would even take away these. If you have the parties before you, and it comes out in the course of the investigation that a particular right arises, I would not even fetter the court by the limit of the conclusions of the action.

14,206. *The Lord Justice-General.*—You would not extend the conclusions of the action except of consent, would you?—I think so. If it appears, when the real dispute is disclosed, that justice cannot be done without a supplementary summons, I would dispense with the necessity for that.

14,207. *Lord Barcaple.*—There is another purpose for which a supplementary summons is at present frequently used—viz. calling new parties. Should a similar facility be given there?—I think there might be; a new party might be called by an order of court; but I have not considered the details of how that might be applied. I think it might be done without the formality of a new summons.

14,208. *The Lord Justice-General.*—In approving of the use of popular and not technical language in statements of fact, do you extend it to the framing of pleas in law?—No; I think the pleas in law are contrasted with the statements, and there the technical rule of law ought to be expressed in technical language.

14,209. You would rather encourage the use of technical language in pleas?—Certainly; because there it is the precise canon of law that is to be applied that should be announced.

14,210. *Mr. Shand.*—If that can be expressed in plain language, should it not be so?—Perhaps so; but in law, as in other sciences, technical language will be more precise than ordinary language.

14,211. *The Lord Justice-General.*—Don't you find that some of the most superfluous and utterly useless pleas in law which appear on record are those expressed in popular language?—Very often.

14,212. *The Chairman.*—You said you thought the recent Act, so far as it goes, is working beneficially. Have you any suggestion to make as to any parts of it that don't work beneficially?—The appointment of a Third Division for the despatch of business was found to be very inconvenient.

14,213. You mean the occasional Court of Lords Ordinary?—Yes, the occasional abstraction of the Lords Ordinary from the Outer House. That was very inconvenient; and if hereafter it should be found necessary, from the accumulation of business, that an occasional Third Division should be appointed, I think it would be better, even at the expense of weakening the Inner House, that a judge should be taken from each Division, and one from the Outer House, instead of taking four of the Lords Ordinary from their work.

14,214. If that could not be done, you think that the sittings of the Lords Ordinary should not be of the length to which they were extended last session?—I hope it will not be necessary to have recourse to that arrangement again.

14,215. If it were not necessary that they should sit above a few days, the inconvenience would be comparatively small?—It would. The next point in regard to the working of the new Act, besides the records—which I have no more to add about—is the procedure thereafter. There has been a little practical inconvenience felt in the course of the procedure which takes place when parties close the record, and do not renounce probation. The case then, according to the existing Act, goes to the summary debate roll, and parties have to lodge issues. Practically, that has created considerable obstruction in the Outer House; but I should expect that the inconvenience of it would diminish as the working of the Act goes on, and that the summary debate roll will not be such an obstruction to the ordinary debate roll as it has hitherto proved.

14,216. *Lord Barcaple.*—Has it not rather swallowed up the ordinary debate roll?—Perhaps it has; but the

ordinary debate roll of some of the Lords Ordinary was in abeyance for a considerable period. I should expect the present inconvenience to diminish gradually, and I don't disapprove of the plan of the Act.

14,217. *Mr. Gordon.*—Was the choking up of the ordinary debate roll caused by the Lords Ordinary Court?—To some extent it was.

14,218. *Mr. Shand.*—You approve of that as the stage at which parties should endeavour by admissions, if they can, to bring out the points of law in controversy between them?—I think so.

14,219. And you think that should be the stage for doing so, rather than in the earlier stage of the pleadings?—I think that is the proper stage for the adjusting of issues or renouncing probation.

14,220. *Lord Barcaple.*—Have you seen the procedure in that roll to have any effect in procuring or encouraging admissions?—I don't know that it has.

14,221. Has there more or less ultimate controversy about point of fact arisen?—The practical working of that roll is, that when parties come up to debate in the summary debate roll, they have issues in. That is one of the prerequisites. Issues ought to be in by that time: if probation is not renounced, issues must be prepared. That narrows the case in the view of the parties; and they ought to be then ready for either taking an issue or order for proof, or a judgment upon the law; and I think, that practically, if the Act gets fair play in working,—and all Acts must get fair play in working, as one of the conditions of their success,—that will be found to be the working of the summary debate roll, which will be found to be beneficial.

14,222. *Mr. Gordon.*—The object is to make the debate available either for the adjustment of issues if further proof is required, or for the determination of the case if no further proof is required?—Yes.

14,223. It brings the parties to issue on point of fact?—The summary debate roll ought always to issue in one of three things,—an issue adjusted, an order for proof before the Lord Ordinary, or a judgment, if it be found that what the case requires is a judgment in point of law.

14,224. *Lord Barcaple.*—Do you mean necessarily a final judgment?—Not necessarily so; a judgment to some extent disposing of the merits of the cause.

14,225. But a judgment which may possibly be the precursor of proof or further procedure in various ways?—It might lead to that. For example, a plea of prescription would or might be disposed of in the summary debate roll.

14,226. Are there not a large portion of the causes in the summary debate roll which result in a debate which may not dispose of the cause, but which is nevertheless a long and anxious debate, necessarily involving careful consideration of the cause by the judge at home?—No doubt; but I am endeavouring to classify the results to which that debate would come.

14,227. But I wanted to see whether that case fell under your last remark?—Yes, I think so.

14,228. There is a misapprehension about that; and, do as we will, there are a great number of causes requiring law to be settled at that stage, and that cannot be settled summarily?—That is the third class to which I was bringing the actions—namely, issues, order for proof, or judgment on some point of law.

14,229. *The Chairman.*—You don't mean a judgment pronounced on the spot?—Not necessarily; but judgment as the result of the debate.

14,230. The judge might make avizandum?—Yes.

14,231. *Mr. Shand.*—And that might dispose of the case, or of some point of law preliminary to the merits?—Yes. Proof is perhaps the next point, when dispute arises in point of fact, and I think that is one of the matters on which perhaps the new Act is on its trial as yet. I cannot say that the new mode of taking proofs before the Lord Ordinary with a shorthand writer has been sufficiently tried, to enable me to say either that it has failed or that it has succeeded. It has been found to be very expensive in many cases; and when review comes to be asked, the print is generally long, and the cost considerable. I fear that that cannot be avoided, and that, large as the expense is, it would be less than a jury trial. I think that a jury trial, besides the other objections to it, would not be cheaper than the mode adopted under the present Act, of taking the evidence by a shorthand writer before the Lord Ordinary. Then I think I may say, speaking not as a litigant, but as a counsel, that the judgment of the Lord Ordinary is always more satisfactory than the verdict of the jury. I think most of us feel that the judgment of the Lord Ordinary upon evidence led before himself, is more satisfactory than the verdict of a jury would be upon the same point.

14,232. *The Lord Justice-General.*—In regard to the matter of expense, have you ever compared the expense of two similar causes,—one tried before the Lord Ordinary without a jury, and then carried to review in the Inner House, and another tried before a jury, and coming to end with the verdict?—I cannot say that I ever have, in figures; I only speak generally. It is not my part of the profession to see the accounts of the expenses, and I can only speak very generally; but I have heard complaints from agents as to the expense of proofs, from the detail and the printing which they involve. But no doubt, if there was to be the same inquiry before a jury, there would be the same expense, and a less satisfactory result. As to the machinery for taking the proof, a shorthand writer is of recent introduction, and it is certainly a great saving of judicial time. It involves a little reading when the proof comes to be printed; but it saves time when the proof is taken, and, upon the whole, it is the quickest mode of taking the proof. It does occur to me that as the shorthand writer is now a part of the court, there should be an approval of him by the court as the shorthand writer. No abuse that I know of has yet been found, but I can easily see that if the parties are to have the appointment of the shorthand writer, and not the judge, there may possibly be abuses; and I wish to forestall the possibility of that by recognising a body of gentlemen as shorthand writers, and admitting them as such on proof of their qualifications, or otherwise.

14,233. *The Lord Justice-General.*—Are you quite confident in your opinion that the taking of the evidence by a shorthand writer, instead of the judge making a note of it, saves much judicial time?—I think it does, upon the whole.

14,234. I suppose you don't think the difference is very great?—Not very great.

14,235. It depends a good deal upon the rapidity of the judge's writing?—It does; and upon the style of notes which a judge takes. One judge will take much more full notes than another; but in the case of a judge who takes short notes, that is almost always objected to by one or other of the parties. All complaint of that kind is obviated when the witness's whole words are taken down.

14,236. *Lord Barcaple.*—Do you say that the judge's notes are objected to?—They may be objected to.

14,237. According to your experience, have you found, when causes have come up after a jury trial on a bill of exceptions, or a motion for a new trial, that on either side the counsel for the parties felt any serious grievance of that kind?—I have not practically heard of it.

14,238. In taking the evidence by a shorthand writer, you think that there is greater rapidity in the writing of it?—Yes; I think so, on the whole.

14,239. On the other hand, is there not a difficulty, costing time, when the judge wishes to refer to some particular point in the evidence already taken, which he cannot easily do in the shorthand writer's notes?—I don't think there is practically very much difficulty there, because the shorthand writer can easily refer back to his notes.

14,240. *The Lord Justice-General.*—Do you contemplate in what you have been saying, that the shorthand writer is to take down the evidence in the narrative form, and not question and answer?—I understand that the shorthand writer at present takes the words down question and answer, but in extending them he puts it into the form of a narrative.

Adam Gifford.

14,241. Do you expect that all shorthand writers who may be employed, if this system is extended, would be sufficiently skilled to be trusted with that manipulation?—Subject to the check of the judge or of the parties, I think they might.

14,242. What check?—In my practice I have often seen the shorthand writer called, in the case of an examination, to take the evidence question and answer, and the judge has the same check.

14,243. *Mr. Gordon.*—If the shorthand writer takes it down question and answer, and it is thought that he has committed any error in extending it, he can refer back to his notes?—Yes.

14,244. *Lord Barcaple.*—At what stage is that to happen?—The notes are written out afterwards and certified by the judge, who, I suppose, reads them or glances over them. That is the stage at which it might be done.

14,245. The proof comes to the judge, consisting very often of several hundred pages, and under the Act of Parliament he reads it over; but do you think he is likely to discover any error in it?—I rather pointed to the check arising at the time the evidence is given.

14,246. Does it occur to you, who have been present at many of these proofs, that it is possible for the judge, in any honest sense of the word, to certify the correctness of the notes?—I think a perusal of them by the judge may entitle him to say that it is a fair report of the evidence.

14,247. *The Lord Justice-General.*—What is the certificate that the judge gives?—'I certify that this is a true report.'

14,248. If he certifies the report of the evidence as correct, that ought to be the result of a comparison of the report with his own recollection of the depositions of the witnesses?—I suppose so.

14,249. Do you think that in practice it is possible for a judge conscientiously to grant such a certificate?—I scarcely think it. He can have nothing more than the most general recollection of the evidence.

14,250. *Lord Barcaple.*—You are aware that the shorthand writer is sworn for the particular service?—Yes.

14,251. *Mr. Adam.*—Supposing there is an error made in the taking down of the notes after they have been certified by the judge, there is at present no means of getting it put right?—I am not aware that there is, further than by the judge getting the shorthand writer to read the notes, coupled with his own recollection of what the witness said.

14,252. *The Lord Justice-General.*—Do you think the judges generally have so much reliance on their own memory, that they would set it up in competition with what was taken down at the time by a skilful shorthand writer?—I can understand cases where they might do so: for example, where a witness deponed negative, and a shorthand writer omitted the 'not.'

14,253. Only in such cases?—Only.

14,254. *Lord Barcaple.*—Suppose the judge sends for the shorthand writer, and the shorthand writer tells him he is quite sure that the 'not' was not said, how would you settle it?—If I were the judge, and had a distinct recollection of the negative being given by the witness, I would trust my memory.

14,255. Has the judge any authority to alter the shorthand writer's notes?—I have great doubts about that. But these difficulties to some extent arise in whatever form the evidence is taken. The same mistake may occur in the longhand notes of the judge.

14,256. *Dr. Barclay.*—Have the agents no opportunity of looking at the notes before they go to the judge?—No; the notes are extended by the shorthand writer, and transmitted to the judge without being communicated to the parties.

14,257. *Mr. Shand.*—Having seen a great many proofs, I suppose you can say that, practically, none of the inconveniences which have been suggested have been felt?—Not to any sensible degree.

14,258. The proof is furnished by the shorthand writer in the narrative form, except in its very important passages, or at the critical point of the case, or where the shorthand writer is specially requested to give it question and answer?—Yes; and we have been very fortunate with our shorthand writers hitherto.

14,259. *Mr. Paterson.*—Have you ever known any question to arise as to inaccuracies in the proofs?—I have not known any case in my own experience, but I have heard of a case in which there was a very important statement said to have been erroneously taken down.

14,260. And what was the result?—I believe it is still open at this moment.

14,261. *Lord Barcaple.*—Formerly evidence was taken in the Court of Session, either in the form of jury trial, or of commission. Now it is taken either by jury trial, or by a proof before the Lord Ordinary. Does it appear to you that at present we have a larger amount of evidence taken, and evidence taken in a greater proportion of cases, than we used to have formerly?—I rather think we have.

14,262. Can you explain that?—I think there are more proofs taken now than formerly, but I don't know what the exact explanation of that may be. One explanation arises from this, that parties are asked to renounce probation, and there is always a shrinking from that, in case there be some point not admitted, which may afterwards turn out to be important. When there is an enforcement of the rule to renounce probation, there will be a good many proofs led unnecessarily, because parties will lead them, as a precautionary measure, in case there be any fact which may ultimately turn out to be important: that may have had a tendency to increase the number of proofs. Another thing which may account in some degree for it, is the desire which has prevailed lately to have the facts ascertained before dealing finally with the law,—to have the whole cause before the court, and not what may in some aspects be called a tentative judgment on points of law, which may be superseded on the facts being ascertained.

14,263. I think there were some observations made at one period in the House of Lords, which were supposed to have led the court to be cautious about not exhausting inquiry into the facts?—Yes, and that may have tended in that direction; but perhaps we are now going to the opposite extreme.

14,264. The Outer House were more apt to go wrong in that way, and to decide the case without exhausting the facts?—Perhaps so; I can hardly say that. Sometimes an Outer House judge, pressed by the parties that to decide a certain point of law would settle the case, was good-natured enough to do it; but in the Inner House the judges were not so pliant.

14,265. And the result was, that a proof was allowed before answer?—Yes; it is proofs before answer that have increased.

14,266. Have there not been very many instances in which, however accurate and artistic a mode that may be for dealing with a case, it arrived at the same result, which was the obvious result upon the case as it stood before the proof?—Sometimes; I have not the least doubt of that. Sometimes the proof before answer was found not materially to have shifted the case.

14,267. Is not the taking of evidence always a very expensive portion of a litigation?—It is.

14,268. In whatever mode it is taken?—Yes.

14,269. It is impossible to take it cheaply in any way at present recognised by the law of Scotland?—It is.

14,270. It is also, I suppose, a very remunerative branch of litigation to the persons employed in it, in all branches of the profession?—I suppose it is.

14,271. Possibly it does not make so much difference in the remuneration of counsel?—I don't think it does make very much difference.

14,272. But, one way or another, the preparation for these cases is very remunerative to the other branch of the profession?—I should think so; but I have not the means of knowing that.

14,273. Have you ever thought whether there is

any way in which the necessity for proof, assuming that it must be taken, could be mitigated? Have you considered the working of the English system of affidavits?—I have not. My own impression is, that the system of taking proofs is in general a better system than the system of affidavits.

14,274. If you want to test very absolutely the truth of the matter. But may there not be very many cases in which the one party would be satisfied of what is the obvious result of an investigation, upon seeing the affidavits of his opponent?—I can quite conceive that there may be a great many cases of that kind.

14,275. Does it not frequently happen that, upon the eve of a jury trial, or sometimes at the very commencement of a jury trial, the parties arrange their dispute?—A compromise before a jury trial has not been an unusual occurrence.

14,276. Does it occur to you that that has been brought about in many cases by the parties having by precognition ascertained truly what the case which they can present is?—I could not say that. I think it has arisen very much from the uncertainty of the result of the pending trial, both parties being afraid to some extent of the tribunal. I don't say that is always so, but very frequently it has not arisen so much from one of the parties being satisfied upon precognition that they were in the wrong, as from both parties feeling that there was a great risk, and that they had better settle.

14,277. They may not feel satisfied that they are in the wrong, and yet they may be advised that on the face of their precognitions they have not got a strong case. Do you think they are as likely to get that advice before the precognitions are fully taken and laid before counsel?—It would be better, if in every case the full precognition could be got at the beginning of a case, but you cannot have that; and I should say, the compromises before a jury trial generally arise from the uncertainty of the tribunal. I believe that even the party who is advised that he has a strong case to go to a jury with, will yet make a considerable sacrifice to get a settlement without going to a jury; and therefore the compromises of such cases are perhaps compromises in which the weak party has got a better settlement than he would otherwise have got, just by pressing the other party to the eve of a jury trial.

14,278. *The Lord Justice-General.*—In proofs, according to your experience, are there a good many facts established by the evidence, about which there is no very serious dispute between the parties?—Very often; and that lengthens the proof a good deal.

14,279. And cumbers the proof with matter about which the parties are not thereafter to have any controversy?—Yes.

14,280. Don't you think that if the pursuer, at the stage at which the cause comes into the summary debate roll, we shall say, lodged affidavits in process, demonstrating to his opponent that he is in a condition to prove all these facts, it would cheapen very much the proof afterwards, and in some cases perhaps even prevent the necessity for a proof at all, particularly if the facts which he so proves are facts that cannot be within his opponent's knowledge, but are within his own?—It might have a tendency to do that. I scarcely understand your Lordship's question, however. Does it point to a voluntary act?

14,281. Yes; affidavits taken before a magistrate?—At the choice of the party?

14,282. Yes; either the party himself, or his witnesses; but with liberty afterwards to the opposite party, if he thinks it right, to ask for a cross-examination of the witness in court, in presence of the judge?—Does your Lordship point to that as a separate proceeding from the ultimate proof that is to be allowed?

14,283. It may or may not, according to what is most convenient in the conduct of the cause. If there is to be a proof, or a trial afterwards, probably that would be the best time at which to cross-examine the witness who has already deponed on affidavit. If a proof is not necessary, then there would be a separate proceeding before the judge?—If I understand your Lordship's question, it points to a mixed system in which affidavits might be tendered, though they could not be called for or compelled.

14,284. Yes?—I think that might lead to settlement in some cases; but only in those cases where the parties were thoroughly reasonable and willing to meet each other; and in such cases probably that machinery might not be necessary.

14,285. But the case to which I wanted to ask your attention, is a case in which there may be a serious controversy about some matter of fact, but a non-admission of a great many other facts, without any very serious controversy about them. Don't you think that the lodging affidavits in the way I have suggested would tend, in such a case, very much to limit the extent of the proof?—It might, certainly.

14,286. And to a great extent also to diminish the expense of it?—It might. But that might also be accomplished by the party calling for an admission of a fact within his own knowledge, and to which he would be quite ready to make affidavit. That would be practically the same thing.

14,287. *The Chairman.*—An affidavit emitted under the knowledge that the party may be called into court and cross-examined upon it, would probably have greater weight than the course you suggest?—Probably it might.

14,288. *Lord Barcaple.*—Are there not a great many proofs, a large portion of which consists in each party vouching his facts, as it were, by producing the evidence for them, the opposite party having no evidence to produce on the subject?—There are a good many such cases.

14,289. *Mr. Shand.*—Don't you think it would save expense in many cases where the witnesses are at a great distance, if the Lord Ordinary, after seeing the nature of the case, and hearing the parties in the debate roll, had power to allow a proof by affidavit, subject to cross-examination, so that each party would put in affidavits so as to form the proof?—I have not considered the subject of affidavits sufficiently to give a precise answer to that question.

14,290. *Lord Barcaple.*—Does it strike you that there would be any bad result from either party being entitled to apply to the Lord Ordinary to have the opposite party appointed to answer certain interrogatories upon oath?—I think that might be a very expedient power. A power of that kind used to be inherent in courts. The oath of calumny originally was part of that system of testing the party.

14,291. *Dr. Barclay.*—But that was a general oath?—Yes.

14,292. *The Chairman.*—A judicial examination?—Yes; which used to be more common than it is now. I think a power of that kind might be very beneficial and very useful.

14,293. *Mr. Shand.*—You had a great deal of experience in proofs by commission?—I cannot say that I had.

14,294. Have you any hesitation in saying that the present system is much better than that?—It is much better; and, dear as it is, it is cheaper than the interminable proofs before Commissioners, which went on, a witness and a half at a time, and then an adjournment.

14,295. *Dr. Barclay.*—And numerous objections?—Constant objections.

14,296. *The Chairman.*—I think you have indicated that you think there is an indisposition to jury trial?—I have felt that in my own experience. I think that nowadays really important patrimonial cases very seldom go to a jury, if both parties seriously wish to try them. We find them better tried before the judges, with the review of the Inner House if necessary, than by taking the chance of a jury trial. Hence jury trials are practically confined to cases of slander, and one or two other categories of cases.

14,297. Actions of damages?—Yes.

14,298. Does it appear to you that the number of jury trials in the court, including those before Lords Ordinary, has, upon the whole, increased lately?—I can only speak for the last ten years. I rather think

Adam Gifford.

that the jury trials have increased during the last ten years.

14,299. *Lord Barcaple.*—They have been diminished since the last Act?—Yes; but in the last ten years I think they have rather increased.

14,300. *The Chairman.*—You think that more cases on the whole have gone to proof than used to do so?—A great many more.

14,301. And chiefly before the Lords Ordinary?—Yes.

14,302. If there have been more investigations of fact before juries, and more investigations of fact otherwise, does it appear to you that the number of causes has increased much, or is it that a larger proportion of them are questions of fact?—A larger number of them have involved an inquiry into fact—that is to say, have landed in a proof or in a jury trial—than formerly. I don't think there has been an increase in the number of causes; but that is matter of statistics.

14,303. But how did they get over the difficulties in fact formerly?—I was referring to that point in answer to a question by Lord Barcaple. The law was more readily reached.

14,304. In disregard of fact?—Not in disregard of fact, but without finding the necessity for full investigation into all the disputed facts.

14,305. *Lord Barcaple.*—The judges held, I suppose, that they had facts enough?—Yes.

14,306. *The Lord Justice-General.*—You are not partial to jury trial?—I am not.

14,307. Can you tell me, according to your experience, what is the percentage of bad verdicts?—I don't think it is very large.

14,308. How much would you suppose it to be?—I should say five out of every six, or six out of every seven, verdicts are undoubtedly right.

14,309. You think that one in seven is bad?—That is the merest guess.

14,310. Have you ever considered what is the percentage of bad judgments by a judge, especially upon questions of fact?—I don't perhaps exercise the same freedom of review as to these that I do in reference to the verdicts of juries.

14,311. But suppose you were to form your opinion, and deduce your percentage from the ultimate result of cases upon review, either in the Inner House or in the House of Lords, what would you say as to the percentage of bad judgments by Lords Ordinary on questions of fact?—I would say it is much less than that of juries. I think juries are much more apt to go wrong; but I confess my judgment on that point is hardly a judgment of figures; it rather goes on the *à priori* likelihood of the tribunal.

14,312. You think it is more likely, but you are not prepared to give an opinion on the matter of fact, as falling within your own experience?—I scarcely am.

14,313. *Mr. Campbell.*—You have had large experience in regard to Sheriff Court processes?—I have not very large experience in that respect. I have not more than a dozen appeals in the year.

14,314. But as a counsel?—Oh yes.

14,315. A large number of the cases there are substantially questions of fact, such as would be disposed of by a jury if they occurred in the Court of Session. What is your experience as to the judgment in the first instance by the judge there, with reference to the review both of the Sheriff, and when it has come to the Court of Session?—I think it is very generally correct in point of fact.

14,316. They rarely err, although they are the humblest members of the judicial body?—Very rarely.

14,317. *Mr. Shand.*—Are there not many cases in which you are of opinion that jury trial is the best mode of trial?—Except in cases of damages for slander, and cases of that kind, I would almost say that there is no other case for which jury trial is the best tribunal.

14,318. *The Lord Justice-General.*—Even mercantile contracts?—I find that juries are not good judges of mercantile contracts. Two days before the present session commenced we had a question of contract as to esparto: the question was, what was the contract, and it turned on a correspondence extending over sixty pages of print; we had to construe that correspondence, and we had to read it to the jury; the judge had it, but the jury were not allowed to look at it: and yet the question was the true mercantile meaning of that correspondence. That is the last jury trial I was in, and I felt the extreme unfitness of the jury as a tribunal for the disposal of it.

14,319. *The Lord Justice-General.*—Probably that was a case not very well adapted for trial by jury; and if the parties had been well advised, they would have taken the proof in some other way. Is that not so?—Well, it came naturally enough to trial by jury.

14,320. A case where the evidence is entirely, or almost entirely, documentary, as that was, is not well suited for a jury?—The contract was documentary, but there was a question of the fulfilment of the contract, and of the quality of the esparto. The true dispute on the documents was, whether it was a sale by a particular sample cargo, or a sale of a good quality generally; and one question which arose was the sufficiency of the esparto supplied.

14,321. But you said the real question of the difficulty was the construction of the correspondence?—Yes.

14,322. Was not that a case very ill adapted to jury trial?—Certainly.

14,323. And it ought not, in your opinion, to have been sent to a jury?—The pursuer demanding it, I am not sure that it could have been resisted.

14,324. The court has the power?—But there is an unwillingness sometimes.

14,325. *Mr. Shand.*—Are you satisfied that it should remain as at present, the court determining in each case what is the best mode of inquiring into the disputed facts?—I can see no better plan.

14,326. *Mr. Paterson.*—Of the cases set down to be tried by jury, I understand that there is a proportion that never go to trial?—About one half disappear at the date of trial.

14,327. By way of compromise?—Or arrangement, or a reference.

14,328. Can you tell us, from your observation, what you consider that owing to?—I have already said it is the distrust of the parties in the tribunal. That is the chief reason.

14,329. *Mr. Adam.*—Cases are not compromised in the same way on the eve of a proof before the Lord Ordinary?—They are not; nor on reclaiming note to the Inner House.

14,330. *Lord Barcaple.*—Have there not been a large number of cases set down for proof compromised?—There may have been; but in my own practice I am not aware that there have been so many settlements of cases on the eve of a proof as on the eve of a jury trial.

14,331. *Mr. Paterson.*—The cases I refer to are cases where all the expenses of preparing for trial have been incurred, and they are within a few days of being tried. Have you known such cases taken out of the Jury Court?—Very frequently.

14,332. Even after the expenses for the trial have been incurred?—After much of them has been incurred.

14,333. And that you attribute to uncertainty as to the result?—A distrust of the tribunal is one of the reasons.

14,334. *The Chairman.*—Accountings occupy a great deal of time, and cost a great deal of money?—They do.

14,335. Could you make any suggestion as to economizing time and money in regard to them?—I think that is another of the points on which the late Act is on its trial. There are provisions in that Act for calling on the accountant to sit beside the judge, and arrangements of that kind, which have not yet been fairly tried, but which I think are calculated to diminish expense in complicated accountings, as far as that can be done. I would be disposed to allow the Act a fair trial in these respects.

14,336. We have been told that the system, which used to exist to a large extent, of alternative tables annexed to the states as an appendix, and very long prefaces, extending sometimes to twenty or forty printed pages, are very much abridged?—Yes; we have had very short reports recently from many accountants, and that is always desirable. The details of the figures don't require in general to enter the formal report of the accountant.

14,337. It has been suggested that it might be expedient to have one or two official persons connected with the court,—salaried officers, to whom remits in cases of accounting should be made?—I have not considered that suggestion, and I am not prepared to say whether it is a good one. To some extent it might be; but I rather incline to think that the existing practice—there being a professional body of accountants to whom the court can always have recourse—is sufficient.

14,338. Accountants charge by time, and there is no check on it?—That is a practical difficulty which has long been felt with reference to accountants' fees. An accountant's fee is necessarily a very arbitrary thing.

14,339. *Mr. Paterson.*—And very large?—Yes.

14,340. *Lord Barcaple.*—Does it not happen that an accountant's work, in an accounting, involves a great deal of matter of importance to the parties, or one or other of them, independent of their merely obtaining a judgment in the cause?—Sometimes that is so; and in such a case as that it would be an abuse to get the services of a judicial officer.

14,341. *The Chairman.*—Have you anything to suggest with reference to multiplepoindings, beyond what the late Act provides?—I think not. The facilities given by the late Act as to joint cases are applicable to all cases, and have been found to work very beneficially. We have been able to make a joint case in a multiplepoinding in which there were fifty or sixty claimants, and get the principles announced; and then we go back to the Lord Ordinary, and decrees are given. We never would have been able to do that without a formal multiplepoinding; but the parties being brought into court by that action, saw that the whole questions depended on the construction of certain deeds, which were then settled by a joint case. I refer to the 'Rosetta' case, *Young* v *Young*, in the First Division.

14,342. *The Lord Justice-General.*—But in that case there must have been considerable expense incurred in the preparation of the record?—There was a mistake committed in regard to that. The record should not have been closed; but it was very difficult to prevent claims coming in in the ordinary course, and as there was hardly any revisal, the record was just the claims which had been lodged. It was a very long record, but that was unavoidable from the number of claimants.

14,343. *The Chairman.*—Have you any suggestion to make as to the order of hearing causes in the Inner House?—The only suggestion I have to make on that point has been already practically given effect to—namely, that the hearing should, as far as possible, be continuous; that when a case is called in the summar roll or the short roll, the hearing of it should be continued till its close, and not interrupted by any other case. But really that is now practically enforced; and we do not now find the inconvenience, which was at one time felt, of having each day a summar roll which went far on into the day, and a short roll case lasting an hour or two a day for a week.

14,344. *The Lord Justice-General.*—Any interruption to the hearing of causes arises generally from the engagement of counsel elsewhere?—Generally; and it is reduced almost to a minimum.

14,345. You cannot suggest any remedy for that?—That is very difficult. The remedy for that is with the agents and litigants, not with the court probably.

14,346. *Mr. Campbell.*—We have been informed here that of late there have occurred instances where leading counsel at the bar have declined to accept a position on the bench of the Supreme Court. Do you attribute that to any particular cause?—There are two causes probably: one cause is that the party who has made the declinature has preferred the prospect of public life, which the elevation to the bench would deprive him of. The other cause is—and it is quite right that it should be mentioned—that the emoluments of the bench are not equal to the emoluments which some of the leading members of the bar enjoy; and if it is for me to give an opinion, I should certainly say that there is room for a strong appeal that the salaries of the judges should be somewhat enlarged.

14,347. As a member of the bar, are you decidedly of opinion that the prospects of the bench are deteriorated by the smallness of the remuneration of the judges?—The salaries of the judges being what they are, is one of the circumstances which will always operate, as long as they remain so, to lead men, who would otherwise accept that honour, to decline it.

14,348. And in the interest of the public service, you think a change should be made in that respect?—I think, in fairness to the judges, the salaries should be somewhat raised. I understand that in England and Ireland the salaries are considerably larger, and I don't think there is any good reason for judicial salaries being smaller in Scotland than in other parts of the kingdom.

14,349. *Mr. Paterson.*—Do you consider that the court, on which great improvements have been made by the recent Act, is capable of being still further improved in regard to economy and despatch?—It is difficult to say that any limit has been attained,—everything is capable of improvement; but I have already said I would make no sweeping fundamental or radical change. The changes called for are changes in the direction of those which have been already enunciated, and intended to give them fair play.

14,350. With reference to a theory which we sometimes hear stated, do you consider that the sittings of the court could be further prolonged than they are at present?—I think they are long enough. The business will be accomplished during these sittings, I think; and if the avocations of judges and counsel, and the necessary work done in vacation be taken into account, it will be found that there is a very fair year's work done by our judges.

14,351. Measuring the year's work according to its present extent, do you think there would be continuous employment for the court, were it to sit every working day of the year?—In that case there could be no circuit, and all the Bill Chamber work done in vacation would be part of the general work. You might get more done in vacation, but I doubt if it would be better done.

14,352. *The Lord Justice-General.*—Are you aware of any human constitution that could stand that?—No.

14,353. *Mr. Paterson.*—I assume that you had an organization of the court which would admit of its sitting every working day, either by re-distributing the judges, or by adding to their number. If that were so, would there be an amount of business to keep the court at work every working day of the year?—If you mean that the existing 13 judges should sit six days a week for 52 weeks a year, I think it would be unjust to the judges, and it is unnecessary for the business of the country. It is unnecessary for the business that 13 judges of the Court of Session should sit six days of the week all the year through.

14,354. There would be no utility in that as compared with the present system?—None.

14,355. You are also satisfied that an organization of that kind would be very unfair towards the individual judges?—I think it would.

14,356. *Mr. Gordon.*—And pretty severe to gentlemen practising at the bar?—Yes.

14,357. *Mr. Paterson.*—In regard to the expense of litigation in the Supreme Court, have you considered how that expense might be lessened?—I don't think that the expense of litigation will ever be made what law reformers say is small. I think, as long as there are important interests at stake, parties will, by buying the best talent both behind the bar and at it, make

Adam Gifford.

litigation a matter of more or less expense. It is impossible to carry on litigation without expense.

14,358. Then you don't think the expense could be lessened?—I don't think it could be very materially lessened.

14,359. We have heard it said that there should be a scale of fees for counsel, compiled partly on the *ad valorem* principle, and partly with reference to the time occupied. Do you think that practicable?—I don't think so.

14,360. *Mr. Adam.*—Do you approve of the recent change in the constitution of the High Court of Justiciary by which one judge is a quorum?—I have not been in the High Court of Justiciary since the change took place; but I think the ordinary business may be transacted quite safely by one judge.

14,361. Then a single judge, without review, may be called on to decide an important point of law?—He may. In difficult cases there would probably be more than one.

14,362. A difficult point may arise in the course of a trial, and he may have to decide it at once?—I have not considered that.

14,363. *The Chairman.*—That was always the case on circuit?—Yes.

14,364. *Mr. Adam.*—But they could certify at circuit?—Yes.

14,365. *Mr. Murray.*—Have you considered whether there is not a class of cases before the court, in which it would be desirable that the court should have the power of compulsory arbitration?—I have not considered that. It is a very common thing in England. It is rather against our principles to compel arbitration, and I have not thought whether a compulsory power of that kind might be beneficially introduced. If it is a matter of practical skill, a remit to an arbiter is a kind of arbitration on that point; and beyond that, I don't think there is any call for change.

14,366. Are there not cases where the trial in the ordinary way would cause an expenditure of time and money disproportioned to the case, and which might be more conveniently settled by arbitration?—I don't think so.

14,367. *The Lord Justice-General.*—Is arbitration a rapid and economical way of conducting cases?—I have not found it so.

14,368. *Mr. Murray.*—I mean judicial arbitration?—Any kind of arbitration. It is just another law plea; and if it is a question of skill, a remit is the proper thing.

14,369. *The Lord Justice-General.*—And it is another law plea before a court that has no power to enforce its own order, and therefore the delay may be infinite?—Yes.

LETTER, Francis Russell, Esq., Sheriff-substitute, Jedburgh, to the Right Hon. Lord Colonsay, Chairman of the Law Courts Commission.

Jedburgh, *June* 30, 1869.

My Lord,—My attention having been called, at a late meeting of the Justices of the Peace of the county of Roxburgh, to certain passages in my evidence before the Law Courts Commissioners, which may convey an impression not altogether correct, and somewhat beyond my meaning, I have to ask the leave of the Commissioners to lay before them a more particular, and I believe a more accurate statement as to these matters.

The *first* relates to the amount of the fees paid to the Clerk of the Peace, and will be found at the foot of the second column of page 58 of the First Report. I am satisfied, by inquiries which I have made, that I had misunderstood my informant (who had paid the fees), and that the sums I have there named as the amount of the clerk's fees, sometimes paid in respect of the cases tried at *one* sitting of the court, ought to have been stated as the amount sometimes paid in respect of the cases tried at *two* sittings. I furnished to the Commissioners a copy of the table of fees now in force. Since my attention was specially called to the matter, I have seen a statement prepared by the Clerk of the Peace, and returns prepared by direction of the Commissioners, of the fees received by the clerks in each district of the county. These returns show that in a few instances the fees paid in respect of the cases tried at one sitting of the court reach the amount which my evidence, as now corrected, would indicate. But on this point I would simply refer the Commissioners to the returns now before them. I may be allowed to add, that in mentioning the matter to the Commissioners, I had no intention of expressing any opinion to the effect that the emoluments of the Clerk of the Peace ought to be diminished, but desired to call their attention to the costs chargeable against persons convicted of statutory offences, and to the considerable element in these costs, which consisted of the clerk's fees; my opinion being that the clerk ought to be paid not by fees, but by salary, and that the costs exigible from persons convicted of such offences (if the exaction of them be at all retained) ought to be materially reduced. In the Sheriff Court, I found the costs in prosecutions for offences under the Tweed Acts very frequently to amount to more than £2 in each case, and thus to exceed the *maximum* statutory penalty for the offence charged.

The *other* statement in my evidence which I desire to qualify, relates to the practice observed as regards the notice given to Justices when Courts of Petty Sessions are to be held, and will be found at the foot of the first column of page 59 of the Report.

In making that statement, I had especially in view the practice in the district of Jedburgh, which had come under my own observation. With respect to the other districts of the county, I am satisfied, by inquiries I have made, that in all cases each of the resident and acting Justices receives a notice of every diet fixed for the holding of a court in the district; so that to the practice in these districts my criticism is clearly inapplicable, and I regret that the language I used should have in any quarter caused a different impression.

As regards the district of Jedburgh, the statement of the Clerk of the Peace on this point is as follows:—'In the district of Jedburgh the same practice is followed' [that is, the practice of convening the Justices to courts by written circulars], 'except in cases of apprehension, which are disposed of at once (Jedburgh being the residence of the Procurator-fiscal, who holds that appointment for all the districts of the county), and when there is only one complaint to be disposed of; and in these cases only a few of the nearest Justices are asked to attend.' Accepting this statement as substantially correct, I am still of opinion that the practice which I had in view is, even to the limited extent to which it is admitted to prevail, objectionable; and I have reason to believe that the attention which has been directed to it in consequence of my evidence, will lead to its discontinuance.

I have only to add, that in speaking of 'poaching cases' I referred especially to cases of river poaching; which, from the complexity and stringency of the provisions of the Tweed Acts, and from other considerations, appear to me cases peculiarly requiring calm, judicial investigation, and careful sifting of evidence, and therefore to be among the very last of the classes of cases which may be safely dealt with by a court, the constitution of which is not entirely satisfactory.

I have the honour to be,

My Lord,

Your Lordship's obedient servant,

Francis Russell.

To Lord Colonsay,
etc., etc.

REPORT

OF THE

ROYAL COMMISSIONERS

FOR INQUIRING INTO THE

LAWS OF NATURALIZATION AND ALLEGIANCE:

TOGETHER WITH

AN APPENDIX

CONTAINING

An Account of British and Foreign Laws, and of the Diplomatic Correspondence which has passed on the subject, Reports from Foreign States, and other Papers.

Presented to both Houses of Parliament by Command of Her Majesty.

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1869.

CONTENTS.

	Page
COMMISSION	iii
REPORT	vi
APPENDIX	1
I. Memorandum by Mr. Abbott:	
1. British and Colonial Laws	5
2. Laws of the United States	16
3. Laws of other Countries	19
4. Correspondence between Great Britain and the United States	29
5. Correspondence between the United States and other Countries	52
6. Correspondence between Great Britain and other Countries	60
Addenda :—	
(A.) Attorney-General Cushing's Opinion on Expatriation	78
(B.) United States Naturalization Act, Oaths, and Certificate	85
(C.) Sir W. Scott's Judgment in the Case of the "Ann"	86
(D.) Judgment of Wissembourg Court in Zeiter's Case (French Conscription)	87
(E.) Attorney-General Bates' Opinion on Citizenship	87
(F.) Chief Baron Piggott's Ruling in Warren's Case (mixed Jury)	90
(G.) Memorandum on Prussian Laws	91
(H.) Report by Counsel to Vienna Embassy on Austrian Laws	92
(I.) British Naturalization Acts, 1844, 1847 (7 & 8 Vict. c. 66, 11 & 12 Vict. c. 83). Form of Certificates, Regulations respecting the Issue of Certificates	93
(K.) Foreign Office Circulars respecting the Grant of Passports and Protection to Naturalized British Subjects	96
(L.) Mr. Vernon Harcourt on British Nationality	97
(M.) Report of the Committee of Foreign Affairs of the House of Representatives	98
(N.) Nationality Statutes: 25 Edward III. stat. 2; 7 Anne, c. 5; 10 Anne, c. 5; 4 Geo. II. c. 21; 13 Geo. III. c. 21	107
Alphabetical Index	109
II. Disabilities of Aliens — Reports from Foreign States.—Austria. Baden. Bavaria. Belgium. Denmark. France. Greece. Hanse Towns. Italy. Netherlands. Portugal. Prussia. Russia. Saxony. Sweden. Switzerland. United States. Wurtemberg	113
III. Right of Aliens to hold Lands. Colonial and Indian Laws. Memorandum by Mr. Abbott	137
IV. Position of Aliens and Naturalized Aliens in England. Case of Mr. Brandauer. Letter from Professor Leone Levi	139
V. Nationality of Children born of Alien Parents. Reports from Foreign States.— Austria. Baden. Bavaria. Belgium. Denmark. France. Greece. Hanse Towns. Hesse Darmstadt. Italy. Netherlands. Portugal. Prussia. Russia. Saxony. Spain. Sweden. Switzerland. United States. Wurtemberg	141
VI. Naturalization Treaties between the United States and other Powers	149
VII. Statistics. British Subjects abroad. Aliens in England. Number and Nationality of Aliens Naturalized, 1845–1868	152
Registration of Births, Deaths, and Marriages at Embassies, Legations, and Consulates	155

COMMISSION.

Victoria, by the Grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith.

To Our right trusty and well-beloved Cousin and Councillor George William Frederick Earl of Clarendon, Knight of our Most Noble Order of the Garter, and Knight Grand Cross of our Most Honourable Order of the Bath, Our right trusty and well-beloved Councillor Edward Cardwell, Our right trusty and well-beloved Councillor Sir Robert Joseph Phillimore, Knight, Doctor of Civil Law, Judge of the High Court of Admiralty of England, Our trusty and well-beloved Sir George William Wilshere Bramwell, Knight, one of the Barons of Our Court of Exchequer, Our trusty and well-beloved Sir John Burgess Karslake, Knight, Our Attorney-General, Our trusty and well-beloved Sir Travers Twiss, Knight, Doctor of Civil Law, Our Advocate-General, Our trusty and well-beloved Sir Roundell Palmer, Knight, Our trusty and well-beloved William Edward Forster, Esquire, Our trusty and well-beloved William George Granville Venables Vernon Harcourt, Esquire, one of Our Council learned in the Law, and Our trusty and well-beloved Mountague Bernard, Esquire, greeting.

Whereas We have deemed it expedient that a Commission should forthwith issue to inquire into and consider the Legal Condition of our Natural-born Subjects who may depart from and reside beyond the Realm in Foreign Countries, and to report how, and in what manner, having regard to the Laws and Practice of other States, it may be expedient to alter and amend the Laws relating to such Natural-born Subjects, their Wives, Children, Descendants, or Relatives.

And, also, to inquire into and consider the Legal Condition of Persons, being aliens, entering into or residing within the Realm, and becoming Naturalized as Subjects of the Crown, and to report how far, and in what manner it may be expedient, having regard to the Laws and Practice of this Country, of Foreign States, or otherwise, to alter or amend the Laws relating to such Persons, or Persons claiming rights or privileges through or under them.

Now know ye, that We, reposing great trust and confidence in your knowledge and ability, have authorized and appointed, and do by these presents authorize and appoint you the said George William Frederick Earl of Clarendon, Edward Cardwell, Sir Robert Joseph Phillimore, Sir George William Wilshere Bramwell, Sir John Burgess Karslake, Sir Travers Twiss, Sir Roundell Palmer, William Edward Forster, William George Granville Venables Vernon Harcourt, and Mountague Bernard, to be Our Commissioners for the purposes aforesaid.

And for the better effecting the purposes of this Our Commission, We do by these presents give and grant unto you, or any five or more of you, full power and authority to call before you such persons as you shall judge likely to afford you any information upon the subject of this Our Commission, and also to call for, have access to, and examine all such books, documents, registers, and records, as may afford the fullest information on the subject, and to inquire of and concerning the premises by all other lawful ways and means whatsoever.

And We do by these presents will and ordain that this Our Commission shall continue in full force and virtue, and that you Our said Commissioners, or any five or more of you, may from time to time proceed in the execution thereof, and of every matter and thing therein contained, although the same be not continued from time to time by adjournment.

And We further ordain that you, or any five or more of you, may have liberty to report your proceedings under this Commission from time to time, if you shall judge it expedient so to do.

And Our further will and pleasure is that you do with as little delay as possible, report to Us, under your hands and seals, or under the hands and seals of any five or more of you, your opinion upon the several points herein submitted to your consideration.

And for your assistance in the due execution of this Our Commission, We have made choice of our trusty and well-beloved Charles Stuart Aubrey Abbott, Esquire, to be Secretary to this Our Commission, and to attend you, whose services and assistance We require you to use from time to time as occasion may require.

Given at Our Court at St. James's, the Twenty-first Day of May 1868, in the Thirty-first year of Our Reign.

By Her Majesty's command.

GATHORNE HARDY.

REPORT.

TO THE QUEEN'S MOST EXCELLENT MAJESTY.

We, Your Majesty's Commissioners appointed to inquire into the Laws of Naturalization and Allegiance, have to state that, in compliance with the terms of Your Majesty's Commission, we have inquired into the legal condition of natural-born British subjects who may depart from and reside beyond the realm in foreign countries, and have considered how and in what manner, having regard to the laws and practice of other States, it may be expedient to alter and amend the laws relating to such natural-born subjects, their wives, children, descendants, or relatives. We have also inquired into the legal condition of persons, being aliens, entering into or residing within the realm and becoming naturalized as subjects of the Crown, and have considered how far and in what manner it may be expedient, having regard to the laws and practice of this country, of Foreign States, or otherwise, to alter or amend the laws relating to such persons, or persons claiming rights or privileges through or under them.

We have found it necessary, in order to deal satisfactorily with the matters referred to us, to enter into some others bearing closely on them but not embraced within the express terms of Your Majesty's Commission; and on these latter, as well as on the former, we have thought it right to submit to Your Majesty the conclusions to which we have been led.

We now humbly lay before Your Majesty the following Report.

I.

There are two classes of persons who by our law are deemed to be natural-born British subjects:—

1. Those who are such from the fact of their having been born within the dominion of the British Crown;
2. Those who, though born out of the dominion of the British Crown, are by various general Acts of Parliament declared to be natural-born British subjects.

The allegiance of a natural-born British subject is regarded by the Common Law as indelible.

We are of opinion that this doctrine of the Common Law is neither reasonable nor convenient. It is at variance with those principles on which the rights and duties of a subject should be deemed to rest; it conflicts with that freedom of action which is now recognized as most conducive to the general good as well as to individual happiness and prosperity; and it is especially inconsistent with the practice of a State which allows to its subjects absolute freedom of emigration. It is inexpedient that British law should maintain in theory, or should by foreign nations be supposed to maintain in practice, any obligations which it cannot enforce and ought not to enforce if it could; and it is unfit that a country should remain subject to claims for protection on the part of persons who, so far as in them lies, have severed their connexion with it.

We accordingly submit to Your Majesty the following Recommendations for an amendment of the law in this respect.

1. Any British subject, who, being resident in a foreign country, shall be naturalized therein and shall undertake, according to its laws, the duty of allegiance to the Foreign State as a subject or citizen thereof, should, upon such naturalization, cease to be a British subject.

2. The principle of this rule should be applied to a woman who, being a British subject shall become by marriage with an alien the subject or citizen of a Foreign State.

3. The wife of a British subject who shall become naturalized abroad, and his children if under the age of 21 years at the date of his naturalization, should likewise cease to be British subjects from that date; but this rule should not include a wife or child who has not emigrated to the country of naturalization, nor should it operate unless, according to the local law, the naturalization of the husband or father has naturalized also the wife or child.

4. Naturalization in a foreign country, though operating from the time of its completion as an extinguishment of the original citizenship, should not carry with it discharge from responsibility for acts done before the new allegiance was acquired.

Provision should be made for applying the same principles to the case of British subjects who have become so by naturalization.

We have considered the question whether the acquisition of a foreign domicil, or a certain length of residence abroad, should divest a person of British nationality. We have not been able to satisfy ourselves that either continued residence or domicil could be practically adopted as a rule to determine the allegiance of the subject, having regard to the difficulties which attend the definition of domicil and proof of the fact, and also to the great diversity of circumstances under which men reside in foreign countries.

II.

It is expedient that the foregoing Recommendations should be applied to British subjects already naturalized in foreign countries, as well as to those who may hereafter become so. A certain period, however, not less than two years, should be allowed, within which any person already so naturalized (that is, before the proposed alteration of the law is made) might declare his desire to remain a British subject. The mode in which this should be done might be settled reciprocally by Treaty or otherwise with such foreign Governments as were willing to permit it to operate as an extinguishment of the acquired allegiance. In the absence of such an agreement, the naturalized person might make a formal Declaration of such his desire, if resident abroad, before a British Minister or Consul, or, if within Your Majesty's dominions, before a Justice of Peace, such Declaration to be registered or recorded in such manner as might be judged expedient, in the United Kingdom by the Secretary of State for the Home Department, in a Colony by the Governor or other chief officer of the Government. Any person thus electing within the prescribed period to remain a British subject should be deemed to retain his British nationality, and the benefit of this election should extend to his wife, and to his children if under age at the time; but the election should not (unless permitted by the State of his naturalization to extinguish his acquired allegiance) entitle him or them to claim any British privileges when within the territories of that State.

These provisions should be deemed to apply to women already naturalized abroad by marriage with an alien or by the foreign naturalization of their husbands, and to children already naturalized abroad by the foreign naturalization of their fathers. Such women, becoming or having become widows, and such children, attaining or having attained the age of 21 years, should be enabled to retain their British nationality by exercising a like option at any time before the expiration of the period to be limited as aforesaid.

Persons already naturalized abroad who might not exercise this option within the prescribed period would be able at any time afterwards to regain British nationality in the mode pointed out in a subsequent part of this Report.

III.

The above Recommendations, if carried into effect, would impose the condition of aliens upon many persons who have hitherto enjoyed the legal rights proper to British subjects. It was necessary, therefore, to consider what effect the deprivation of such rights would have upon those affected by the change. And here it was impossible to overlook the serious question raised by the existence of those disabilities which (subject to certain limitations) attach by law to aliens in respect to the holding and inheritance of real estate in the United Kingdom.

Those disabilities have hitherto only affected persons who had never been regarded by the law as natural-born British subjects, such persons alone coming within the legal definition of aliens. But when it is proposed to bring within the same category a new class of persons who, having been originally British subjects, are for the future to lose that character, different considerations arise. To deprive persons, already naturalized abroad, who now enjoy the right of holding and inheriting lands, of that right, might be thought harsh if not unjust. In the case of those who may become so naturalized hereafter, the same objection would not arise; but even here the penalty of exclusion from possible rights of inheritance appears to be an impolitic restriction on the liberty of emigration.

We have to choose, then, between two courses; one is, to maintain the existing disabilities, making special provision for the new class of cases to which our Recommen-

dations would give rise; the other, to abrogate the disabilities altogether in respect of all classes of aliens.

The first course, viz., that of making special provision for expatriated British subjects who will now become aliens, whilst it would break in upon the general principle, might in practice be productive of embarrassment and litigation. We have accordingly considered the other course. The question whether aliens ought any longer to be prohibited by our law from holding landed property within the realm has not, indeed, been expressly referred to us by the terms of Your Majesty's Commission; but we have found it impossible to deal with the position of those who, under the terms of our previous Recommendations, will cease to be British subjects, without forming an opinion as to the position of aliens generally in this respect.

We think it right to point out that not only can aliens hold real estate in France and many other European countries, but they are also enabled by Colonial enactments to hold real estate in the Dominion of Canada (except New Brunswick), British Columbia, Cape of Good Hope, Natal, Queensland, Victoria, South Australia, St. Kitts, and Hong Kong, while the regulations prohibiting aliens from possessing real estate have recently been repealed in Bengal, and are now under revision in Madras and Bombay.

By the Act of 1844 (7 & 8 Vict. c. 66), "every alien now residing in, or who shall "hereafter come to reside in, any part of the United Kingdom, and being the subject "of a friendly State, may, by grant, lease, demise, assignment, bequest, representation, "or otherwise, take and hold any lands, houses, or other tenements, for the purpose "of residence or of occupation by him or her, or his or her servants, or for the purpose "of any business, trade, or manufacture, for any term of years not exceeding twenty-"one years, as fully and effectually, to all intents and purposes, and with the same "rights, remedies, exemptions, and privileges, except the right to vote at elections for "members of Parliament, as if he were a natural-born subject of the United Kingdom."

This term of twenty-one years may, of course, be renewed.

We have arrived at the conclusion that the grounds formerly assigned for the rule are either untenable in themselves or have ceased to be applicable; and we are prepared therefore, instead of making any distinction between the two classes of aliens, to recommend that the present disabilities of alienage in respect of the holding and inheritance of land, should be abolished altogether.

It has been suggested that, in time of war, danger might occasionally arise from the possession of land by aliens. We think it sufficient to say that this is a danger against which, should it be deemed serious enough to demand special legislation, it would not be difficult to guard.

IV.

In considering whether the character of a natural-born British subject should be regarded as indelible, and, if not, how it should be lost, we have found it necessary to consider also whether any changes should be made in the laws which determine what classes of persons should be deemed to possess that character.

There are two classes with respect to whom this question may be raised. They are—

1. Persons of foreign parentage born within the dominions of the Crown;
2. Persons of British parentage born abroad.

All persons, of whatever parentage, born within the dominions and allegiance of the Crown, are by the Common Law natural-born British subjects. All persons, on the other hand, of whatever parentage, born beyond its dominions and out of its allegiance, were by the Common Law regarded as aliens.

By various Statutes it has been enacted as follows:

25 Edw. 3. stat. 2: "All children inheritors, which henceforth shall be born out of "the ligeance of the king, whose fathers and mothers at the time of their birth be and "shall be at the faith and ligeance of the king of England, shall have and enjoy the same "benefit and advantage, to have and bear inheritance within the same ligeance as the "other inheritors aforesaid in time to come: so always that the mothers of such children "passed the sea by the licence and will of their husbands."

7 Anne, c. 5: "The children of all natural-born subjects, born out of the ligeance of "Her Majesty, her heirs and successors, shall be deemed, adjudged, and taken to be "natural-born subjects of this kingdom, to all intents, constructions, and purposes "whatsoever."

4 Geo. 2, c. 21: "And whereas some doubts have arisen upon the construction of the "said recited clause in the said Act of the seventh year of Her late Majesty's reign: now "for the explaining the said recited clause in the said Act, relating to children of natural-

" born subjects, and to prevent any disputes touching the true intent and meaning thereof, " be it enacted, that all children born out of the ligeance of the Crown of England or of " Great Britain, or which shall hereafter be born out of such ligeance, whose fathers " were or shall be natural-born subjects of the Crown of England, or of Great Britain, at " the time of the birth of such children respectively, shall and may be adjudged and " taken to be natural-born subjects of the Crown of Great Britain, to all intents, con- " structions, and purposes whatsoever."

13 Geo. 3. cap. 21: " All persons born, or who hereafter shall be born, out of the " ligeance of the Crown of England or of Great Britain, whose fathers were or shall be, " by virtue of a statute made in the fourth year of King George the Second, to explain " a clause in an Act made in the seventh year of the reign of Her Majesty Queen Anne, " for naturalizing foreign Protestants, which relates to the natural-born subjects of the " Crown of England or of Great Britain, intitled to all the rights and privileges of " natural-born subjects of the Crown of England or of Great Britain, shall and may be " adjudged and taken to be, and are hereby declared and enacted to be, natural-born " subjects of the Crown of Great Britain, to all intents, constructions, and purposes " whatsoever, as if he and they had been and were born in this kingdom."

Without entering into any discussion on the construction of these Statutes, we think it right to state that, so far as we are aware, no attempt has ever been made on the part of the British Government, (unless in Eastern countries where special jurisdiction is conceded by Treaty), to enforce claims upon, or to assert rights in respect of, persons born abroad as against the country of their birth whilst they were resident therein, and when by its law they were invested with its nationality.

A rule corresponding to that of the English Common Law has been retained by the United States. Every person born within the limits and jurisdiction of the United States is an American citizen by American law. But it is also provided by an Act of Congress passed in 1855 that, " Persons heretofore born, or hereafter to be born, out of the limits " of the jurisdiction of the United States, whose fathers were or shall be at the time of " their birth citizens of the United States, shall be deemed and considered, and are hereby " declared to be citizens of the United States: provided, however, that the rights of " citizenship shall not descend to persons whose fathers never resided in the United States."

By the Code Napoléon (Art. 10), " Tout Français né d'un Français en pays étranger " est Français." As to children born in France, they were under the Code French if their fathers were French, aliens if their fathers were aliens, but with a right in the latter case to claim French citizenship on making a declaration and fixing their domicil in France. An exception has been introduced, however, by a law passed in 1851, by which, if the alien father were also born in France, the child is deemed French, but is at liberty to claim the status of an alien on attaining 21 years of age.

The Prussian law of 1842 declares that " Every legitimate child of a Prussian subject " is by birth a Prussian subject, even though born in a foreign country."

Of these two tests of nationality—the place of birth and the nationality of the father—neither is at present adopted without qualification by British, French, or American law. The laws of these countries exhibit, in fact, different combinations of the two, Great Britain and the United States laying chief stress on the place of birth, whilst in France the father's nationality determines, though not absolutely and in all cases, that of the child; and this latter theory has found acceptance among other European nations.

The rule which impresses on persons born within Your Majesty's dominions the character of British subjects is open to some theoretical and some practical objections, of the force of which we are aware. But it has, on the other hand, solid advantages. It selects as the test a fact readily proveable; and this, in questions of nationality and allegiance, is a point of material consequence. It prevents troublesome questions in cases, (numerous in some parts of the British empire,) where the father's nationality is uncertain; and it has the effect of obliterating speedily and effectually disabilities of race, the existence of which within any community is generally an evil, though to some extent a necessary evil. Lastly, we believe that of the children of foreign parents, born within the dominions of the Crown, a large majority would, if they were called upon to choose, elect British nationality. The balance of convenience, therefore, is in favour of treating them as British subjects unless they disclaim that character, rather than of treating them as aliens unless they claim it. The former course is, of the two, the less likely to inflict needless trouble and disappoint natural expectations.

We do not therefore recommend the abandonment of this rule of the common law, but we are clearly of opinion that it ought not to be, as it now is, absolute and unbending. In the case of children of foreign parentage, it should operate only where a foreign nationality has not been chosen. Where such a choice has been made, it should give way.

As to the second class,—persons of British parentage born abroad,—we think it expedient that the Statutes now in force should be repealed, in order to introduce some limitations and place the law on a clearer and more satisfactory basis. Birth abroad is often merely accidental, while of those British subjects who go to reside in foreign countries a great number certainly prize British nationality for themselves, and wish that it should be enjoyed by their children. The law, as it stands, concedes this benefit to their children born abroad; and we do not recommend that it should be withdrawn; but we think that the transmission of British nationality in families settled abroad should be limited to the first generation.

The following Recommendations embody the conclusions which we have formed on this branch of the subject:

1. As to persons born within the dominions of the Crown:

(*a.*) All persons born within the dominions of the Crown should be regarded by British law as British subjects by birth, except children born of alien fathers and registered as aliens.

(*b.*) Provision should be made for enabling children, born within the dominions of the Crown, of alien fathers, to be registered as aliens; and children so registered should be thenceforth regarded as aliens. The child, if not so registered on his birth or during his minority by his father or guardian, should be permitted to register himself as an alien at any time before he has exercised or claimed any right or privilege as a British subject.

(*c.*) If the father, being an alien when the child was born, becomes during the child's minority naturalized as a British subject, the child, though registered as an alien, should follow the condition of the father.

2. As to persons born out of the dominions of the Crown:

(*a.*) Every child born out of the dominions of the Crown whose father at the time of the birth was a British subject, should be regarded by British law as by birth a British subject, provided the father were born within the dominions of the Crown, but not otherwise.

(*b.*) Provided that any such person as aforesaid who according to the law of a foreign country is a subject or citizen of that country, and who has never exercised or claimed any right or privilege as a British subject, should in the administration of British criminal law be treated as a subject of the country in which he was born.

(*c.*) And if any such person, charged with a criminal offence for which an alien would not be liable to be tried, should successfully defend himself on the ground that he was not, in respect of the act alleged, amenable as a British subject to the criminal law of this country, he should be thenceforth to all intents and purposes an alien.

(*d.*) If before the child's birth the father had become naturalized in the foreign country he would, under our previous Recommendations, have ceased to be a British subject. If he should become so naturalized during the child's minority, the child born abroad should follow the condition of the father.

(*e.*) By the Statute 12 & 13 Vict. c. 68, provision is now made for the registration at British consulates abroad of marriages of British subjects celebrated abroad; and official copies of such registers are made evidence in the courts of this country. We think that a similar system of registry, with the like legal effect, should be adopted for the purpose of procuring evidence (as far as practicable) of births and deaths of British subjects abroad, due provision being made for securing the accuracy of such registration; and we further recommend that such registries should be established in all British legations as well as consulates.

The above Recommendations, in so far as they may be inconsistent with the present law or practice of this country, are not intended to apply to children born of British fathers within the dominions of the Ottoman Porte, China, Japan, or other countries with which Great Britain may have special Treaties for exclusive jurisdiction, nor any part of Asia or Africa not the possession of some civilized State. As to such children we contemplate no alteration in the existing law.

V.

We have considered the present practice of naturalization under the Act 7 & 8 Vict. c. 66. In dealing with this question we have desired to give effect to our opinion, that to be a British subject is a valuable privilege to be considerately imparted to those who desire its

advantages, and are willing to undertake its duties. If aliens are, as we recommend, made capable of holding real estate, the considerations applicable to the question will be simplified; the inducement which now most commonly leads foreigners to apply for naturalization will be removed; the rights conferred by it will be political rights; and we think, on the one hand, that these rights should in no case be granted without the security which previous residence affords, and on the other, than when granted they should be full and complete. We recommend, therefore, that the Act should be amended so as to make a certain length of residence in the United Kingdom, or of service under the British Crown, to be proved to the satisfaction of the Secretary of State, a necessary condition of obtaining the privilege of naturalization; that, subject to this condition, the privilege should continue to be granted at the discretion of the Secretary of State; and that a person so naturalized should be thereupon entitled to all the rights and privileges of a natural-born British subject within the United Kingdom.

This alteration of the law, if made, will be incompatible with the continuance of the practice of issuing certificates of naturalization revocable or determinable if the naturalized person resides abroad for six months without the permission of the Secretary of State, a practice which in other respects appears to us to be open to serious objections.

VI.

We have previously stated our opinion that British-born subjects, who have already been naturalized in foreign countries, should be allowed a period of not less than two years within which to resume their original nationality.

We further recommend that provision should be made to enable British-born subjects, who may at any time have lost their British nationality, to be readmitted to the privileges of British subjects by a system similar to that by which aliens are naturalized in this country, and on the same condition of a previous term of residence. Such persons should only be readmitted to British nationality at the discretion of one of Her Majesty's Principal Secretaries of State, on addressing a memorial to the Secretary of State, setting forth the grounds on which they seek readmission, and their intention thenceforth to reside and settle within the British dominions. The Secretary of State, might then, if he saw fit, and on being satisfied that the prescribed conditions were complied with, grant certificates readmitting the applicants to the rights and capacities of natural-born British subjects on their taking an oath of allegiance; but such certificates should not entitle the holders to British privileges within the country of their foreign naturalization, should they return thereto, unless according to its law they had ceased to be subjects or citizens of that country.

The wives, or children under 21 years of age, of persons so readmitted to British nationality, should also, if resident within the British dominions, be considered and taken to be British subjects from the date of that readmission, subject to the above reservation.

The same rule as to readmission should apply to women of British birth whose British nationality had been lost by marriage with an alien, on their becoming widows; but the children of such women born of an alien father should not by the readmission of the mother become naturalized as British subjects.

The foregoing provision will apply to the case of persons who shall desire to be readmitted within the United Kingdom to the privileges of British subjects.

It seems also desirable to make provision for the case of persons who, having lost their British character, may desire to be readmitted within the Colonial dominions of the Crown to the advantages of British nationality.

In the case of an alien born, naturalization in the United Kingdom under the Act of 1844 does not confer any rights of nationality within the Colonies (10 & 11 Vict. c. 83). On the other hand, Colonial naturalization confers no rights of nationality beyond the limits of the Colony granting naturalization.

The case of persons, however, who have lost their British nationality by force of such enactments as those which we recommend will stand upon a different footing. When they are readmitted to British nationality within the United Kingdom they will also recover it in the Colonies, since no Colonial law has deprived them of their nationality.

We think it advisable that the Governors or chief officers in the Colonies should have a similar power to readmit such persons to British nationality upon the same conditions as to residence and otherwise as those prescribed for readmission in the United Kingdom. Persons so readmitted will thereupon revert to their former rights, as in the case of readmission within the United Kingdom.

VII.

In the foregoing Recommendations we have endeavoured to diminish the number of cases in which one who by British law is a British subject is regarded by foreign law as a foreign subject or citizen, and to obviate, as far as possible, the difficulties and inconveniences arising from such a double allegiance. But this, we are aware, cannot be done, otherwise than imperfectly, by British legislation alone; it requires the co-operation of foreign Governments and Legislatures.

If Great Britain renounces the doctrine of indelible allegiance, and acknowledges that British subjects can divest themselves of their nationality by foreign naturalization, it may be hoped that the same principles will be recognized by other countries with respect to aliens naturalized within the British dominions; and we accordingly recommend that efforts should be made to procure that reciprocity, as well as to secure to the children of British subjects born abroad, the same power of choosing their nationality, which it is proposed to confer on the children born of alien parents within British territory.

This might be effected by agreements or conventions concluded with different States separately; or better, perhaps, by means of a general understanding arrived at, in conference or otherwise, by the Powers most interested in the subject.

VIII.

Among other matters which have been brought under our notice, we have had occasion to remark the unsatisfactory results of the operation of the law enabling aliens to claim a jury *de medietate linguæ*.

The mixed jury was instituted by Edward III. as an encouragement to foreign woollen merchants to resort to the English market (27 Edw. III. stat. 2. c. 3, and 28 Edw. III. c. 13).

The clauses of the Statutes enacting it were confirmed by the Act 8 Hen. VI. c. 29, and by the last Act for consolidating and amending the laws relating to jurors and juries (6 Geo. IV. c. 50).

It is settled law that those members of a mixed jury who are foreigners, need not be of the same nationality as the alien; they need not even speak the same language, but may each of them belong to a different nation and speak a different tongue.

We see no advantage in the maintenance of such a system, whilst the inconveniences which may arise from it are obvious; and we accordingly recommend that the statutes authorizing trials by mixed juries should be repealed.

We have not thought it necessary, in making these Recommendations, to enter into any general review of the subjects referred to us; as a full account of British and foreign laws, and of the diplomatic correspondence which has passed between Your Majesty's Government, the Government of the United States, and other Governments is contained in the Memorandum by our Secretary, Mr. Abbott, and other papers annexed to our Report.

CLARENDON. (L.S.)
EDWARD CARDWELL. (L.S.)
ROBERT PHILLIMORE. (L.S.)
W. E. FORSTER. (L.S.)
*G. BRAMWELL. (L.S.)
TRAVERS TWISS. (L.S.)
J. B. KARSLAKE. (L.S.)
ROUNDELL PALMER. (L.S.)
†W. VERNON HARCOURT. (L.S.)
*M. BERNARD. (L.S.)

CHARLES S. A. ABBOTT, Secretary.
February 20, 1869.

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* We concur, except on one point, with the Recommendations of the Report. As that point is important, we think it right to express our dissent, and to state, very briefly, the reasons on which it is founded.

The Report recommends, (Section IV., Recommendations 1, *a. b.*) that the child born within the dominions of the British Crown of an alien father, should be regarded

by British law as a British subject. This is the subsisting rule of the Common Law. A majority of the Commissioners think that it should be retained, but that provisions should be engrafted on it, which would enable such persons during minority or at any time afterwards, to assume, by simple registration, the condition of aliens. We think otherwise, for the following reasons. Such a law tends to produce, and must produce in many cases, that double allegiance which we all hold it desirable, as far as possible, to extinguish. (Report, Section VII.) It is inconsistent in principle with the recommendation that the child born abroad of a British father, should be regarded by British law as a British subject. It is at variance with the law and practice of other European states. It agrees indeed with those of the United States of America; but this very agreement, if examined, will be found to be such as to make a conflict of claims between the two countries more probable. None of the duties of a British subject could practically be enforced against a person who, though born here, had always resided in the foreign country to which his father belonged. He could not, if he happened to be here, be justly made amenable to any duties other than such as the law imposes on all commorant foreigners. But he would, nevertheless, possess the rights of a subject, without having any real title to them. He might renounce indeed, if he pleased, his British allegiance. But why should he renounce that which might be a benefit to him and could not be a burthen? If, on the other hand, he were regarded as an alien by birth, he could (provided he were resident here) obtain the advantages of British nationality by undertaking its obligations.

We do not dispute that the Common Law rule, which impresses British nationality at the moment of birth on all persons born on British soil, has arguments of some weight in its favour, nor that the substitution of a different rule would be attended by some inconveniences. But these inconveniences, which would rapidly diminish as the new rule became known and understood, do not in our judgment constitute a sufficient reason why, in deliberately revising our law on a matter which concerns foreigners as well as Englishmen, we should forego the great advantage of legislating on a consistent and generally accepted principle, and that principle one which is intrinsically reasonable and sound.

The qualification that, where the father, though an alien, was born here, the child, likewise born here, should be deemed a British subject, appears to us to limit conveniently the application of the principle, without substantially breaking in upon it. An analogous provision has been adopted in French law.

GEORGE W. W. BRAMWELL.
MOUNTAGUE BERNARD.

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† Concurring as I do in the fundamental recommendation of the Report contained in its first section, I have thought it right to sign the Report.

I feel compelled, however, after the best consideration I have been able to give to the subject, to dissent from the scheme contained in Section IV. of the Report, for determining the nationality of children of foreign parents born within the realm.

Most persons will probably agree that the true rule for determining nationality, if it were practicable, would be found in the principle of domicil, *i.e.* that the home of a man's choice should also be the country of his allegiance; and indeed the Report asserts the soundness of this principle. The difficulty, however, of ascertaining the true domicil of a person resident in a foreign country, in the legal acceptation of that term, is a bar to its adoption in a case where it is requisite that the rule should be simple and obvious. Of all questions of law those which concern domicil are the most complicated and obscure, because they ultimately depend upon intention, which is necessarily of all things the most difficult to determine. We are driven, therefore, to adopt some less accurate but more practical rule, which shall approximate to though it may not reach the same result.

In the case of persons born within British territory, of British parents, the presumption of British nationality and British domicil is of course conclusive. In the case of persons of British origin who have formally accepted a foreign naturalization, the presumption of change of domicil and therefore of nationality, is sufficiently evidenced by the overt act of naturalization; and to such a condition of things the provisions of Section I. of the Report apply themselves. Here the nationality follows distinctly the domicil which is clearly ascertained.

But there exist further two classes of cases with which Section IV. of the Report deals,

viz. (1) that of the children born of British parents abroad, and (2) that of children of foreigners born in the dominions of the Crown. In these cases the real domicil may be said to be indeterminate, or at least ambiguous. For the British subject resident abroad or the foreigner resident in England may in either case desire to adhere to the domicil of his origin.

Hitherto, as is well known, by the common law of England, inherited rather than adopted by the United States, the nationality of such children has been determined solely by the locality of their birth. The inconveniences of this principle, where rigorously applied, have been universally recognized. The statute law of England and America has made provision to remedy its operation in the case of the children of their own subjects born abroad. Indeed the rule is wholly indefensible in principle. By the law of all modern nations the condition of the child primarily depends on that of the father. But the doctrine of deriving nationality from the locality of birth makes it depend on the accidental situation of the mother; and by this rule a child may become a subject of a country in which his father not only never made his home, but which he never even entered.

The rule of determining nationality by locality of birth was of purely feudal origin, and accordingly in the legislation of modern Europe since the French Revolution it has been discarded as the governing principle amongst continental nations. The Code Napoléon has adopted another principle; viz. that the nationality of the child should follow the nationality of the father, in the absence of any proof of an election on the part of the child to adopt the nationality of the country of his birth. This doctrine seems sound in principle. In the absence of naturalization by the father in the country of the birth of the child, there is no ostensible evidence of the desire of the father to change his domicil or his country. The nationality of the child ought not therefore to be altered whilst that of the father remains unchanged, except by some deliberate act of the child. That this principle is also convenient in its operation is proved by the fact that almost all continental states have in practice adopted the doctrine of the Code Napoléon; and, as has been mentioned above, it has been incorporated into the statute law of England and America in the case of their own subjects born abroad. That the Commissioners do not dissent from this rule is shown by the fact that in Section IV. (§ 2) as to persons born of British fathers out of the dominions of the Crown, they recommend that the nationality of the child shall in the first instance be determined by that of the father.

But in the same section (Section IV., § 1), in the case of children of foreign parents born within the realm, the Report proposes that the old rule of the locality of birth should *primâ facie* prevail.

From this latter recommendation I dissent, and that for several reasons:

(1.) If it is desirable to recast the doctrine of nationality by such extensive changes as those proposed in the Report, it seems expedient to found the whole system on some intelligible and self-consistent principle. It would be difficult to suggest any reason for adopting the rule by which the nationality of the father determines that of the child in the case of the children born of British fathers abroad, which does not equally apply to the case of the children born of foreign fathers in England; and to lay down an opposite rule in the two cases seems not only indefensible in principle, but to be a course which, in respect of policy, is very likely to be misunderstood by foreign governments. If, whilst we assert that the child born of an Englishman abroad is a British subject, we also claim that the child born of a foreigner in England is likewise a British subject, it will be thought that acting for our own advantage on inconsistent principles we are grasping at the combined chances of a double event.

(2.) It seems very desirable, as is stated in Section VII. of the Report, to lay down some rule in which all or most states are likely to agree. Now the rule of determining the nationality of the child *primâ facie* by that of the father is adopted by all States as regards the children born of their own subjects abroad. As regards the children of foreigners born in the realm, it is adopted by all States except England and America. It is obvious, therefore, that this is the rule by the adoption of which will be most readily obtained that consent of nations which on such a subject is of capital importance. It is stated in Section VII. of the Report that "we have endeavoured to diminish the "number of cases in which one who by British law is a British subject is regarded by "foreign law as a foreign subject, and to obviate as far as possible the difficulties and "inconveniences arising from a double allegiance." In that object I entirely concur; but it seems to me that it is not accomplished but rather defeated by laying down the rule that the child born of a foreigner in England is *primâ facie* a British subject. In the view of every State (including the United States, so far as regards the children of

born Americans in England) such person is a subject of the State of his father's origin; and therefore the proposed rule necessarily creates all the difficulties and inconveniences of a double allegiance. Assume, on the other hand, the rule, adopted by the Report in the case of the children born of British parents abroad, to be applied consistently to the case of the children born of foreign parents in England, it will be seen that the desired object will be completely accomplished. If the child B, of a foreigner A, is born in England, he would then be regarded by the English law as a foreigner; and so he would be regarded by all the world; and thus there would be no conflict of allegiance. Suppose A, the father, to become naturalized in England, then B, the child, would be by English law a British subject, and cease to be the subject of the country of his father's origin; and so he would be regarded by all the world; assuming the United States to adopt (as we have reason to believe they would adopt) the principle laid down in Section I. of the Report, viz., that foreign naturalization extinguishes the native allegiance. The same thing would occur if B were himself naturalized. And thus, by the adoption of a simple and consistent rule, we should lay the foundation of a general harmony in the doctrine and practice of nations which is not only of theoretical value, but of great practical consequence. For nothing would more solidly conduce to the peace of the world than that the same allegiance should be predicated of the same person by all governments.

(3.) I am by no means insensible of the practical conveniences which may result in some cases from the adoption of the rule of the locality of birth, which are set forth in Section IV. of the Report, but there appear to be grave disadvantages attendant on the rule which more than counteract them. Such a rule, as has been shown above, will have the effect of imposing the quality of British subjects, on a number of persons who neither seek nor desire it. It is true that the Report makes provision in the case of such persons for a machinery by which they may divest themselves of that character. Upon this it may be observed that a foreigner *in transitu* may, through ignorance or carelessness, omit to take measures which shall have the intended effect. But it is not necessary to urge this point, because in fact it would be as impossible in the future, as it has proved in the past, to insist against the will of the individual on his British character thus imposed by the mere accident of birth. The real evil to this country is of an exactly opposite character, viz. that by this rule persons are clothed with the character of British subjects, and become entitled to all its benefits, who have no real connexion with the community, and who ought to have no claims upon it. It is not probable that any foreigner accidentally resident in this country would disclaim the citizenship for his child which the law would confer, for the simple reason that the child would be enabled to take all the benefits, but could in no case be really made to fulfil the obligations of a British subject. Under this rule the child of a foreigner born here might return to his own country in his infancy, and he would thereafter possess whenever he chose to claim them, not only for himself, but (since he is a natural-born British subject) for his children also, all the benefits of the character of a British subject, whilst it is abundantly clear that neither he nor his children could ever be called upon to perform any of its duties. This is the practical mischief of the present rule, and to re-enact it would be to give fresh authority to a principle the inconvenience of which is sufficiently apparent. Nothing can be more politically inexpedient than that this country should be exposed to the claims of a class of persons who have no interest in its welfare, and who, neither by origin or domicil, have any community with its affairs.

On the other hand, in the case of foreigners and their children who really desire to incorporate themselves and their interests in the common stock of this country, and to embark their fortunes with ours, there seems neither hardship or inconvenience in requiring that they should evidence their intention to change their nationality and adopt a new domicil by some formal act which, whilst it would establish their British nationality, would at the same time terminate their foreign allegiance. They would then no longer be able to blow hot and cold, and adopt in turn such nationality as happened for the moment to suit their interests. If the alien father is domiciled in England, and intends to cast in his lot and that of his family with this country, why should he object to naturalize himself or his child? But if he is unwilling by such an act to sever his connexion or that of his family with the country of his origin, why should we embarrass our relations with foreign states by conferring our nationality on such a person—to his advantage it may be, but certainly not in any respect to our own?

If the father and the child are really domiciled in this country, the process of naturalization would be simple and easy, and having regard to the recommendation in Section V. of the Report it will be seen that a person so naturalized will enjoy all the

advantages which belong to a natural-born subject; if they are not so domiciled I venture to think the child ought not to acquire the privilege of British nationality by the simple accident of birth. The great importance of insisting on naturalization in such cases is, that it is by this means alone that the double allegiance can be avoided. For this purpose it is essential that the act which confers the new nationality should in itself openly and unambiguously terminate the old allegiance. This, the rule which requires naturalization of a foreigner born in England as a condition of British nationality would do; whilst the rule conferring nationality by the mere fact of birth would give the new nationality without dissolving the old allegiance.

I should therefore propose that in the case of the children of foreigners born within the realm, the following rule should be adopted:

"Children born within the realm of alien fathers who have been themselves born abroad, shall be deemed aliens. But such children shall become British subjects (1) upon the naturalization of their fathers, or (2) upon their being themselves naturalized either by their fathers during their minority or by themselves at full age."

This rule would make the child born in this country, of an alien father also born in this country, a British subject by birth, and in this respect it accords with the French law. Though apparently somewhat in conflict with the general principle, it is in fact in strict conformity with the principle which makes domicil the governing rule of nationality; for though the presumption of domicil is very small from the mere fact of the place of birth of a single individual in one generation, it becomes very strong when the birth both of the father and the child takes place in the same country. Such a condition of things may be safely taken as a sufficient proof of permanent change of domicil and of the election of a new nationality, which could not be inferred from a solitary and isolated instance.

There is another point affecting the latter part of Section IV. of the Report on which I feel great difficulty. Though I concur in the principle laid down in Section IV. (§ 2 a) of the Report, by which it is declared that the children born of British fathers abroad "should be regarded by British law as British subjects," I greatly doubt the expediency of the declaration in the same section (§ 2 b), that "in the administration of British criminal law" such children are under certain conditions not to be treated as British subjects. The word "subject" in my understanding of the term involves of necessity subjection to the laws of the State of which such person is a subject, and above all subjection to its criminal law. If it is necessary (though I think that is more than doubtful) to create a class of persons who shall be capable of all the privileges whilst they are liable to none of the obligations of citizens, it would be desirable to discover for such a class some more appropriate title than that of "subjects." What is no doubt intended is that such persons should have the capacity of becoming at their election British subjects, and that till they have exercised the option to enjoy the benefits, they shall not be called upon to bear the burthens of that character, but that after they have claimed the advantages they shall not be able to decline the obligations of subjects. But surely if this be the view which it is intended to present, it should be distinctly asserted that whilst the person is not amenable to the law of England he is not yet a British subject, and that as soon as he becomes a British subject he is at once amenable to that law. I cannot therefore assent to a definition which speaks of a person as "regarded by British law as by birth a British subject" (Section IV. § 2 a), and of the same person, at the same time, under certain conditions, as a person "who in the administration of British criminal law should be treated as a subject of the country in which he was born" (Section IV. § 2 b). The question of whether a particular individual who is thus declared a British subject is or is not amenable to our criminal law is made to turn upon the point of whether he has or not "ever exercised or claimed any right or privilege as a British subject." I confess that in terms so general and vague there seems to me to lurk a dangerous ambiguity very intractable in the administration of criminal law. What are these "rights and privileges;" what is to be the extent of the "exercise" or the nature of the "claim" which by their absence or their presence are to sustain or to defeat the jurisdiction of the Crown over persons who are nominally British subjects? This distinction seems to constitute the same person a British subject by birth in the view of the English civil law, and to leave him an alien in the eye of the English criminal law. There may be persons against whom it is inexpedient that the rights of the Crown should be actually enforced in particular cases. But this is a very different thing from a formal declaration that there exist persons legally called "British subjects" who are not justiciable in the courts of the Queen.

W. VERNON HARCOURT.

APPENDIX.

No. I.—NATURALIZATION AND ALLEGIANCE.

MEMORANDUM BY MR. ABBOTT.

CONTENTS.

Part		Page
I.	British and Colonial Laws	5
II.	Laws of the United States	16
III.	Laws of other Countries	19
IV.	Correspondence between the United States and Great Britain	29
V.	Correspondence between the United States and other Countries	52
VI.	Correspondence between Great Britain and other Countries	60

TABLE OF CONTENTS.

PART I.—BRITISH AND COLONIAL LAWS.

No.			Page
1.	Definition of Allegiance. British Legislation from Edward III. to George III.		5
2.	Irish Statutes		7
3.	Naturalization by special Act of Parliament		7
4.	Denization		8
5.	Aliens Committee, 1843		8
6.	Act now in force (7 & 8 Vict. c. 66., 1844)		8
7.	Present practice respecting Denization and special Acts—Case of Mr. Bischoffsheim		8
8.	British Legislation does not require any Renunciation of Allegiance		9
9.	Restrictions placed by Home Office on Certificates of Naturalization. Certificates not granted to persons not intending to reside in the United Kingdom; case of M. Santilana. Minor children not naturalized by the father's naturalization; case of Mr. Rysell		9
10.	Colonial Naturalization—Antigua, Grenada, St. Vincent		10
	Ditto	Bahamas	10
	Ditto	Barbados, St. Vincent, St. Lucia, Grenada	10
	Ditto	Bermuda	10
	Ditto	British Columbia	10
	Ditto	British Guiana	10
	Ditto	Canada	10
	Ditto	Cape of Good Hope	11
	Ditto	Honduras	11
	Ditto	Hong Kong	11
	Ditto	Jamaica	11
	Ditto	Natal	11
	Ditto	New Brunswick	11
	Ditto	Newfoundland	12
	Ditto	New South Wales	12
	Ditto	New Zealand	12
	Ditto	Nova Scotia	12
	Ditto	Prince Edward's Island	12
	Ditto	Queensland	12
	Ditto	St. Kitt's and Anguila	12
	Ditto	Sierra Leone	12
	Ditto	South Australia	13
	Ditto	Tasmania	13
	Ditto	Trinidad	13
	Ditto	Turk's Island and Caicos Island	13
	Ditto	Victoria	13
	Ditto	Western Australia	13
11.	Regulations respecting the Issue of Passports to Aliens naturalized in the Colonies		13
12.	Naturalization in India		14
13.	Expatriation not recognized by English Law		14
14.	Blackstone on "Allegiance"		14
15.	Forfeiture of British Privileges		15
16.	Ownership of British Vessels		15
17.	Merchant Shipping Act of 1854		15
18.	Case of Æneas Macdonald-		16
19.	Case of Elijah Clark		16

PART II.—LAWS OF THE UNITED STATES.

20.	Naturalization provided for by the Constitution	16
21.	Acts of Congress	16
22.	Naturalization Laws now in force	16
23.	Nationality Act, 1855: Expatriation not provided for in United States' Statutes	17
24.	State Citizenship	18
25.	Statistics of Birthplaces of Aliens Resident in the United States, 1860	18

PART III. LAWS OF OTHER COUNTRIES.

26.	France—Nationality	19
27.	Ditto Loss of Civil Rights	19
28.	France—Decree of 1811—Naturalization of Frenchmen abroad	19
29.	Ditto Law of 1851—Nationality of the Sons born in Africa of Aliens themselves born in France	20
30.	Ditto Conscription of Frenchmen naturalized abroad—Count Walewski's Note to the United States Chargé d'Affaires in 1859	20
31.	Ditto Conscription—Zeiter's Case—Report by M. Treitt	21
32.	Ditto Naturalization of Aliens in France	23
33.	Ditto Ditto —Laws of 1849, 1867	23
34.	Ditto Debate on Army Bill, 1867	24
35.	Ditto Statistics—Naturalization in France, 1851–61	24
36.	Prussia—Naturalization of Aliens	25
37.	Ditto Expatriation	25
38.	Austria—Naturalization and Expatriation	25
39.	Bavaria—Wurtemburg—Netherlands	26
40.	Russia—Naturalization Law, 1864	26
41.	Hamburg—Belgium—Switzerland	27
42.	Italy—Codes of Sardinia and Two Sicilies	27
43.	Ditto Conscription Law, 1855	27
44.	Ditto Revised Italian Code, 1866	27
45.	Spain. Constitution of 1845. Decree of 1852	28

PART IV. CORRESPONDENCE BETWEEN THE UNITED STATES AND GREAT BRITAIN.

From the Declaration of Independence to the War of 1814–15.

46.	Complaint of Obstructions to Naturalization in American Provinces, 1776. Questions as to Allegiance after the Peace, 1783	29
47.	Treaty of 1794	30
48.	Impressment of Seamen—United States' Proposal, 1792	30
49.	Mr. King's Negotiations, 1796–1803	30
50.	Mr. Monroe's Negotiations, 1804–1806	31
51.	Ditto Sir W. Scott's Opinion	32
52.	Messrs. Monroe and Pinckney—Special Mission, 1806–7	32
53.	Ditto Sir J. Nicholl's Report	32
54.	Ditto "Chesapeake" Affair. Non-intercourse. Proclamation. Berlin Decree. British Orders in Council	33
55.	Ditto King's Proclamation recalling British Seamen, 1807	33
56.	Mr Jackson's Mission to the United States	34
57.	Correspondence respecting Orders in Council and "Chesapeake" case	34

War of 1812–14.

58.	War declared by the United States	34
59.	Mr. Russell's Negotiation for an Arrangement	34
60.	Prince Regent's Declaration, 1813	35
61.	Refusal to exchange British Subjects taken Prisoners in United States Service—Retaliation	35
62.	Debate in Congress, 1814	36
63.	Negotiations for the Treaty of Ghent, 1813-14	36
64.	Restoration of Hostages	38

Miscellaneous.

65.	Case of the "Ann." A British Subject can by domicil in a foreign country acquire another national character for Commercial Purposes	38
66.	Mr. Rush's Negotiations, 1818	38
67.	Lord Ashburton's Mission, 1842	39
68.	Cases in Ireland, 1848	40
69.	Ditto Lord Palmerston's Note to Mr. Bancroft	41

Civil War in the United States, 1861–65.

70.	Conscription	41
71.	Refusall of American Passports to intended Citizens	42
72.	Suspension of Habeas Corpus Act in Northern States	42

No. Page

73. Claim to British Protection of Minor Children of Naturalized Americans - - - - 42
74. Status in Confederate States of Persons naturalized in the United States - - - - 42
75. Oath of Allegiance at New Orleans - - 43
76. Conscription in Northern States—Liability of intended Citizens, Voters, and Sons of Naturalized Citizens - - - - - - 43
77. Southern Conscription—Domicil—Instructions to Her Majesty's Consuls, 1862 - - 43
78. Mr. Shaver's Case—(Domicil)—Mr. Seller's Case
79. Forced Military Labour - - - - 44
80. Status of Widows - - - - 44
81. Southern Conscription - - - - 44
82. Liability of Voters to Conscription - - 44
83. Opinion of Mr. Att.-Gen. Bates on Citizenship - 45
84. Intended Citizens included in Northern Conscription, 1863 - - - - - - 45
85. Time allowed for Intended Citizens to leave the Country - - - - - - - 45
86. Mr. Scott's Case—Ownership of Land - - 45
87. Status of Sons of Naturalized Citizens - - 46
88. Cases of Cap. Sherwin, Messrs. Matchett and Hamilton 46
89. Confederate Conscription—Expulsion of British Consuls - - - - - - - 46
90. Forced Confederate Conscripts taken Prisoners by United States - - - - - - 46
91. Cases of Hansard, Crutchett, and Gray - - 46
92. Conscription Act, 1864 - - - - 46
93. Status of Sons of Americans born in British Territory - - - - - - - 47
94. Prisoners captured in Blockade Runners - - 47
95. Residents in Places under Martial Law - - 47
96. Enrolment in New Orleans Police - - - 47
97. Proclamation of Penalties on Aliens concerned in Blockade Running - - - - 47
98. Mr. Foden's Case - - - - - 47
99. End of the War - - - - - - 47

Fenian Arrests.

100. Suspension of Habeas Corpus Act in Ireland, February 1866 - - - - 47
101. Mr. Adams' Reports to his Government - - 48
102. Interview with Lord Clarendon—Consul West not allowed to visit Naturalized Americans. This distinction subsequently waived - - - 48
103. Mr. Seward's Instructions to Mr. Adams—Naturalization—Fisheries - - - - - 48
104. Cases of Colonel Burke, Cavesford, and others Mr. Adams reports that the persons arrested were all guilty of Fenianism - - - 48
105. All proved American Citizens released - - 48

Imprisonment of Fenians in Canada.

106. Fenian Raid, June 1866—Mr. Seward deprecates severity in dealing with the Prisoners - - - 48
107. Resolutions in House of Representatives—Cases of McMahon and Lynch - - - - 49

Cases of Burke and McCafferty.

108. Tallaght Affair—Sentences of death commuted - 49

Refusal of Mixed Jury.

109. Cases of Warren and Costello—Chief Baron Piggott's Ruling - - - - - 49

Proceedings in Congress.

110. Mr. Robinson's Motion censuring Mr. Adams, November 25, 1867 - - - - - 49
111. Ditto Mr. West, December 2—Nagle's Petition—Foreign Committee to Report - 50
112. Resolutions in favour of McMahon, Lynch, Warren, and Nagle—Report of Foreign Affairs Committee - - - - - - 50
113. Bill proposed by the Committee - - - 50
114. Debates on the Bill. Bill as amended - - 51
115. Bill referred to the Senate and passed with the reprisal clause omitted - - - - 52

PART V. CORRESPONDENCE BETWEEN THE UNITED STATES AND OTHER COUNTRIES.

116. Prussia—Mr. Wheaton's Doctrine, 1840 - - 52
117. Ditto Mr. Barnard's Doctrine, 1851 - - - 53
118. Mr. Everett's Doctrine, 1853 - - - 53
119. Ditto Baron Manteuffel's explanation of Prussian Practice and Law of 1843 - - - 53
120. Ditto Mr. Cass Doctrine 1858 - - 54
121. Ditto Correspondence interrupted by Civil War 54
122. Ditto Ditto resumed 1865—Count Bismarck's suggestions for an arrangement by a Convention - - - - - - 54
123. Ditto Further Proposals of Prussian Government - - - - - - - - 55
124. Ditto Austro-Prussian War—Renewed Negotiations - - - - - - 55

No. Page

125. Prussia—Substance of Treaty of February 22, 1868 - - - - - - - 55
126. German States—Hamburg Expatriation Law—Correspondence with Bremen, &c. - - 55
127. Austria—Case of Martin Kozta - - 56
128. Ditto Ditto —Mr. Marcy's assertion of claim to protection acquired by domicil - - - - - 56
129. Austria—Case of Simon Tousig—Such claim forfeited by return to native country - - 57
130. Bavaria — Case of Amthor — Renunciation of Naturalization - - - - - 57
131. France—Mr. Webster's Doctrine, 1852 - - 57
132. Ditto—Alibert's Case—French Conscription - 57
133. Ditto Zeiter's Case ditto - - 58
134. Ditto Recent Conscription Cases, 1866 - 58
135. Spain—Thrasher's Case—Domicil—Exercise of Foreign Jurisdiction over Americans in cases of Treason - - - - - - 58
136—Ditto Case of Liaño—Mr. Webster's Doctrine, 1852 - - - - - - 59
137. Denmark—Boie Smidt—Conscription Case - 59
138. Russian—Law as to renouncing Naturalization—Russians naturalized abroad expelled from Russia 59
139. Costa Rica—Protection refused to Persons fraudulently naturalized in United States without intention of residing - - - - 60

PART VI. CORRESPONDENCE BETWEEN GREAT BRITAIN AND OTHER COUNTRIES.

140. Observations—Conflict between British Statute Law and Common Law of Native Allegiance in regard to Children of British Subjects born abroad 60
141. Instructions given as to their Protection to Vice-Consul Dale, December 20, 1842 - - 60
142. Argentine Republic — Buenos Ayres — Sir R. Peel's Statement in the House of Commons, 1845 61
143. Ditto As to British Subjects wearing the Badges of Foreign Citizenship - 61
144. Ditto Conscription—Substitutes allowed to the Sons of Aliens - - - 61
145. Ditto Correspondence between English and French Governments as to Protection to be accorded to the Sons of their Subjects born in Buenos Ayres — Anomaly of French Law of Nationality - - - - - - 61
146. Argentine Republic—Further as to Conscription Law of 1863 declaring all Persons born in the Confederation to be Argentines - - 62
147. Austria—Venetian Cases in 1848 — Citizenship acquired by Domicil - - - - 62
148. Belgium—Rules as to Protection to be afforded by Her Majesty's Ministers abroad to Naturalized Englishmen - - - - 62
149. Brazil—Nationality and Conscription Cases - 63
150. Ditto Mr. Spence—Brazilian Law of Nationality 63
151. China—Notification of 1868. Distinctive dress to be worn by British Chinese within the Chinese Empire - - - - - 64
152. Columbia—New Granada—British Protection not forfeited by entering Foreign Civil Service Panama Riot Claims—United States' Doctrine of Domicil—Laws respecting Foreigners - - 64
153. Ditto Señor Montoya—As to Status of Sons of a Columbian born in England - - 65
154. Denmark—Mr. Rainal's Case—Effect of taking a "borgerbrev" - - - - - 65
155. France—Señor Braza's Children—Status of Minor Children of Aliens born in France - - 66
156. Ditto Militia in British Guiana—French residents refused Exemption - - - 66
157. Ditto Julien Colonna Walewski, born in England of Polish Parents - - - - 67
158. Ditto Answer returned to French Government as to British Law of Native Allegiance - 67
159. Ditto British Naturalization does not protect in Native Country—Mr. Casaubon—Conscription Case—Domicils - - - - - 68
160. Ditto Mr. Zwinger — Marriage of a Naturalized Swiss at British Embassy - - 68
161. Germany—Frankfort — Mr. Grimm — Claim to British Protection from English or Colonial Naturalization - - - - - 68
162. Ditto Hans Towns—James Terry — Liability to Conscription of Sons of British Subjects who have taken up Hamburgh Citizenship—Messrs. C. and A. Bosdet - - - - 68
163. Ditto Saxony—Children born on board British Vessels, or born without the Queen's Dominions Naturalized Parents - - - - - 69
164. Greece—Conscription of British Subjects domiciled in Ionian Islands - - - - 69
165. Ditto, Don Pacifico, a native of Gibraltar -
166. Guatemala—Conscription—Sons of British Subjects exempted up to Twenty-one Years of Age and can then provide Substitutes - - - 69

No.		Page
167.	Italy—Sicilian Nationality Cases, 1837	69
168.	Ditto Mr. Vertu; born in England of Sardinian parents	70
169.	Ditto Messrs. Salteri and Sofio—Sicilian and Tuscan Nationality	70
170.	Ditto Phillip Smith, 1866—Provisions of New Code as to the Sons of Domiciled Aliens render them liable to Conscription until they are 21	70
171.	Ditto Liability of British Subjects to Forced Loans on Mines, &c. in which they are associated with Italians	70
172.	Mexico—Protection to be given to Naturalized British Subjects	70
173.	Ditto Law as to Aliens holding Land, and Illegitimate Children of Aliens	70
174.	Ditto Mr. Crowther not debarred from British Protection by Service in American Army	71
175.	Monte Video—Instructions to Mr. Vice-Consul Dale	71
176.	Netherlands—Liability to Conscription of Domiciled Aliens, British Subjects exempted—Question as to the Enrolment of Aliens in British Militia	71
177.	Norway—Conscription of Domiciled Aliens	71
178.	Persia—Protection to Children born in British India of Persian Parents—Such Cases must be treated exceptionally in Countries like Persia	71
179.	Ditto. As to the Protection to the Grandson of a British-born subject	71
180.	Peru—Registration of Children of British Subjects	72
181.	Portugal—Children born in Portugal of British Parents cannot be protected against Portuguese Laws	72
182.	Prussia—Status of British Widows of Foreigners	73
183.	Ditto Mr. Consul Crossthwaite—Liability to Conscription of Sons of Aliens naturalized in Prussia	73
184.	Ditto Answer returned to Prussian Government as to British Practice of Enlistment on Return to England of British Subjects naturalized abroad	73
185.	Russia—Madame Von Essen—Claim to a British Passport of the Widow of a Naturalized Russian	73
186.	Ditto Status of British Jews in Russia	73
187.	Ditto As to Children of British Subjects who have been naturalized in order to carry on Trade in Russia—Case of Mr. Woolff born in England of Hanoverian Parents	74
188.	Spain—Conscription—Sons of Domiciled Aliens exempted—Claims of Grandsons of British Subjects	74
189.	Switzerland—Answer to Swiss Government as to loss of English Nationality	75
190.	Ditto Conscription of British-born Sons of naturalized Swiss	75
191.	Ditto European Central Railway Company, as to British Protection to Companies whose Direction is domiciled Abroad—Mr. Roch—Conscription Case	75
192.	Tunis—Grazia Abela, Maltese turned Mahometan	75
193.	Turkey—Protection to Naturalized British Subjects and their Agents	76
194.	Ditto Cases of Messrs. Casavetti, Calimachi, Theologo and Giro—Protection of naturalized Turkish Rayahs in Egypt	76
195.	Ditto Mr. J. Aslan—Ionian Nationality—Mr. S. Theologo's Agent at Galatz—Mr. Rodocanachi, Scian bankrupt—Claim of a naturalized British Subject resident abroad to be registered as part Owner of a British Ship—Mr. T. G. Aslan	76
196.	Ditto Messrs. Cuppa's Claim to British Nationality as Sons of a British Naval Officer—M. Mavrogodato's Case	76
197.	Venezuela—Status of Illegitimate Children of British Parents	77
198.	Ditto Objection of Venezuelan Government to Persons born in Venezuela being regarded as British Claimants	77
199.	Ditto Venezuelan Nationality Law of 1863	78

ADDENDA.

		Page
(A.)	Attorney-General Cushing's Opinion on Expatriation	78
(B.)	United States' Naturalization Act, 1802, Oaths, and Certificate	85
(C.)	Sir W. Scott's Judgment in the Case of the "Ann"	86
(D.)	Judgment of Wissembourg Court in Zeiter's Case (French Conscription)	87
(E.)	Attorney-General Bates' Opinion on Citizenship	87
(F.)	Chief Baron Piggott's Ruling in Warren's Case (Mixed Jury)	90
(G.)	Memorandum on Prussian Laws	91
(H.)	Report by Counsel to Vienna Embassy on Austrian Laws	92
(I.)	British Naturalization Acts, 1844, 1847 (7 & 8 Vict. cap. 66, 11 & 12 Vict. cap. 83)—Form of Certificates—Regulations respecting Issue of Certificates of Naturalization	93
(K.)	Foreign Office Circulars respecting the Grant of Passports and Protection to Naturalized British Subjects	96
(L.)	Mr. Vernon Harcourt on British Nationality	97
(M.)	Report of the Committee of Foreign Affairs of House of Representives	98
(N.)	Nationality Statutes. 25 Edw. III. stat. 2; 7 Anne, c. 5; 10 Anne, c. 5; 4 Geo. II. c. 21; 13 Geo. III. c. 21	107

Observations to accompany Memorandum on Naturalization and Allegiance.

The practical question at the present time is whether Great Britain shall adopt the principle of expatriation, advocated by the Government of the United States and incorporated in the recent treaty between that country and Prussia?

In order fully to understand the position occupied by the United States and Great Britain on this matter, it is necessary to consider the principles on which naturalization and expatriation are carried out by different countries.

There are five main systems of naturalization:

1. By taking an oath of allegiance and obtaining a certificate, granted at the discretion of the Government, as in England.

2. By certificate from a court of law, granted on proving residence for a stated period and taking oath of allegiance, as in Canada.

3. By residence for a stated period, and certificate from the Government, without oath, as in France.

4. By employment in the public service, or certificate from the Government, as in Prussia.

5. By residence for a stated period, renunciation of native allegiance, and by taking an oath of allegiance to adopted country, as in the United States.

Provision is also made by many countries for the exceptional naturalization of aliens, as in England by two years' naval service during war, and in the United States, by service in the army with one year's residence.

There are three distinct doctrines of expatriation:

1. The Continental, as embodied in the Code Napoléon, by which an emigrant incurs the loss of civil rights in his native country ("privation des droits civils par la perte de la qualité de Français;" "perdita della cittadinanza"). Should the emigrant return to his native country, this loss of civil rights may be accompanied by penal consequences, as in Austria, when the emigration has taken place without the permission of the Government.

Looking to the circumstances under which the Code Napoléon was framed, and to the continental practice of conscription, it is obvious that expatriation, as provided for in that Code, and in the laws subsequently founded on it, was intended to punish, and not to encourage, emigration.

2. The American, or theoretical. The American doctrine has varied from Mr. Wheaton's axiom, when Minister at Berlin in 1840, that native nationality reverted on return to the native land, to Mr. Cass's in 1858, that, should a naturalized foreigner "return to his native country, he returns as an American citizen, and in no other character."

While American politicians argue that "perpetual allegiance is a doctrine of barbarism," no

provision is made in the statutes of that country for the expatriation of Americans. This anomaly has been frequently pointed out, and was remarked upon in the recent debates in the House of Representatives, when one of the speakers urged that, before asking other countries to alter their laws, the United States should set the example by altering their own.

3. The English. Originating in the feudal idea of native and indelible allegiance to the Prince of the country in which the subject was born, the English doctrine has been gradually modernized into a system of native nationality adapted to a commercial people.

It is in this latter spirit, with a view to retaining the connexion between British subjects residing for mercantile purposes in foreign countries and their native land, that the statutes declaring the sons and grandsons of British subjects born abroad to be British subjects, must now be regarded.

There are, therefore, two conflicting principles of expatriation; the Continental, which punishes emigration by loss of civil rights, but does not necessarily admit that such emigration can free the emigrant from the obligations of his native nationality; and the American doctrine, which claims for the subjects of other countries (but does not grant by law to Americans) the right of free expatriation.

That this right is denied by most continental countries is shown by the fact that a Frenchman, whose certificate of foreign naturalization is not of three years' date, is liable to the French conscription; a Russian, naturalized abroad, may be expelled from Russia; even a Prussian, under the new treaty with the United States, must reside uninterruptedly in America for five years, as well as be naturalized, before he can change his nationality. Each country hampers expatriation with such restrictions as it thinks fit, and this must probably continue to be the case so long as the present conscription laws are retained.

There does not seem any evident reason why such restrictions should be imposed by Great Britain if the principle of expatriation were adopted.

In the Prince Regent's Declaration of 1813, the necessity for maintaining the doctrine of indissoluble allegiance is based upon the right of the Crown to the services of its subjects, especially seamen, in time of war.

A similar argument was urged by Lord Stowell, and at the negotiations for the treaty of Ghent.

In fact, in those days, Great Britain stood towards the United States, as regards maritime conscription, much in the same position as the Continental countries now stand with regard to their military conscription.

But the practice of impressment has now fallen into desuetude, and is not likely ever to be revived.

The further claim to punish as traitors British subjects found in arms against their native country, was practically abandoned when the prisoners taken in the United States service were unconditionally exchanged in 1814 without having been brought to trial as threatened.

It must be remembered that the theory of treason is the same in England and in the United States. The law of France punishes with death a Frenchman (whether naturalized abroad or not) who is taken in arms against France.

The right of impressment having been given up, and the doctrine of treason thus modified by practice, there does not now remain any claim which Great Britain need seek to maintain upon the allegiance of British subjects emigrating to foreign countries.

Moreover, the interest of the British Colonies in urging the right of free expatriation is only second to that of the United States. Indeed any privileges or rights which may be accorded to Germans, or others, becoming naturalized in the United States, and which may not be secured equally for emigrants to the Colonies, more especially Canada, would offer a direct premium on emigration to the former, to the manifest disadvantage, and probably discontent, of the latter.

The importance of this view of the subject will be seen from the following statistics, taken from the census of 1861 :—

Upper Canada.

Total population - - -	1,396,091
Born in the United States - -	50,758
Born in Prussia, German States, and Holland - - - -	22,906

Lower Canada.

Total population - - -	1,110,664
Born in the United States - -	13,641
Born in Germany, &c. - - -	949

New South Wales.

Total population - - -	350,860
Born in Germany - - -	5,467

Queensland.

Total population (exclusive of Aborigines)	30,059
Born in Germany - - -	2,124

Victoria.

Total population - - -	540,322
Born in Germany - - -	10,418

South Australia.

Total population - - -	126,830
Born in Germany - - -	8,863

It is stated that Germany affords 7 per cent. of the immigrants to this Colony.

On the other hand, it must be remembered that, with the exception of the Fenians, who wish to take advantage of the liberality of British laws, to enable them to carry on filibustering expeditions against Ireland and Canada, and to contrive Irish treason under cover of American nationalty, there are few British-born subjects who really want, or who could in any way be benefited by, the privilege of expatriation. In the voluminous correspondence which has been consulted in compiling the accompanying Memorandum, there are hundreds of cases of persons claiming British nationality and protection, but not one, with the exception of sailors anxious to evade the press and Fenians, in which British allegiance has been repudiated.

This is not, of course, any reason why the principle of expatriation, if it is a good one, should not be adopted; but it suggests the necessity for caution in dealing with a matter in which so many and various interests may be involved.

Even the Fenians would derive very little benefit from a change in the law, or from a Treaty stipulating that they should be considered American citizens, for they do now claim and receive the protection of the American Minister. According to Judge Fitzgerald's ruling in Nagle's case, an overt act of treason within the realm must be proved before a true bill can be brought in against them for that offence; and it is difficult to see what advantage an Irish American can secure for himself by being tried before a jury composed of six Irishmen, two Germans, three Portuguese, and an Italian.

It is to be presumed that, if Treaties could be agreed upon which would be practicable in operation and acceptable to foreign nations, a corresponding alteration in the law, at all events of this country, would have to be made; and it must be a matter of consideration how such an alteration can be carried out, affecting as it will do, the rights of property in the Colonies as well as in England, and altering the whole system on which the hitherto received doctrine of British protection to British subjects resident abroad rests.

While it seems perfectly fair to expatriate a

person who wilfully severs his connexion with his native country, care should be taken to make a distinction between persons residing temporarily abroad for commercial purposes, and compelled by local laws to take an oath of allegiance, in order to carry on their trade or profession as was formerly the case in Russia and Denmark, and persons permanently incorporating themselves and their interests in a foreign country.

Thus it would be a hardship on British merchants that a person who had taken out a burgher licence to enable him to carry on a broker's agency in Denmark, should be thereby absolutely expatriated and disabled from inheriting real property in England.

Nor should a British subject be expatriated for having worn a red waistcoat at Buenos Ayres (see Memorandum), or resided two years in Columbia.

The Merchant Shipping Act of 1854 provides that no person who has taken an oath of allegiance to a foreign Sovereign shall be entitled to be registered as owner of a British merchant vessel unless he shall have subsequently taken another oath of allegiance to the British Crown.

The principle of expatriation here recognized, could not be carried out without some further provisions, as it will have been already seen that an oath of allegiance is not required for naturalization in France and other countries.

The simplest plan would be to provide that a British subject naturalizing himself in a foreign country should be deemed, from the time of his being so naturalized, to be a subject or citizen of that country. The advantage of making the Act of Expatriation depend upon the Act of Naturalization would be that a record of the fact would be preserved; whereas if the expatriation is made to depend also upon domicil (as in the Prussian Treaty) the difficulties of subsequently proving such uninterrupted domicil would probably be almost insuperable.

The Prussian Treaty likewise contains a provision for repatriation by domicil. In Prussia this may be of importance, as it would no doubt be inconvenient to allow naturalized Prussian-Americans to return to Prussia and to claim continued exemption from the military service to which all their neighbours would be exposed.

The new Italian Code enables an expatriated citizen to recover his civil rights: 1. By returning to the realm with the special permission of the Government. 2. By relinquishing foreign employment. 3. By declaring before the proper civil authority of the State an intention to re-establish his domicil within the realm, and by so *bonâ fide* establishing it within a year. The son of an expatriated Italian can also recover his nationality by making a similar declaration on coming of age, either before the authorities in Italy, or before any Italian Diplomatic or Consular Agent abroad.

Having regard to the British law of alienship, particularly as respects the right to inherit real property, there might be great difficulty in making similar provisions for the repatriation of British expatriates, especially as there is no machinery in England or the colonies for local registration for police and conscription purposes, as in Italy, Prussia, and France.

A careful consideration, therefore, of this intricate subject leads to the following conclusions:—

1. That the time has arrived when the principle of free expatriation may be adopted, and even (in the interests of the colonies) advocated by Great Britain.

2. That such expatriation should depend on the expatriate being naturalized by some legal process in a foreign country, and not on domicil; care being taken that the interests of persons resident abroad and assuming local and temporary allegiance for mercantile purposes are not injuriously affected.

3. That an expatriate should become from the time of his alien naturalization absolutely an alien, subject both as regards himself and his children (whether minors at the time of his naturalization or born subsequent to it) to all the disabilities of alienship.

4. That repatriation should be effected in the same manner as naturalization, *i.e.*, the expatriate having become an alien should only recover the rights and privileges of a British subject by the same process as aliens are admitted to them.

(Signed) CHAS. S. A. ABBOTT.

Foreign Office,
March 19, 1868.

PART I.—BRITISH AND COLONIAL LAWS.

The following is the definition of allegiance given by Spelman:—"Vinculum arctius inter subditum "et Regem utrosque invicem connectens; hunc ad "protectionem et justum regimen, illos ad tributa "et debitam subjectionem. . . . Custu- "mar. vet. Norman. Cap. 43. Legiantiam autem "sive legalitatem de omnibus hominibus suis totius "provinciæ debet [Princeps] habere: ex quo ei "tenentur contra omnes homines qui mori possunt "aut vivere proprii corporis præbere consilii et "auxilii adjuvamentum; et ei se in omnibus "innocuos exhibere; nec ei adversantiam partem "in aliquo confovere. Ipse etiam eosdem tenetur "regere, protegere ac defensare eosque secundum "jura et consuetudines et leges patriæ pertractare." —(Spelman's Glossary "Ligantia et inde Ligiantia "et Allegiantia.")

By the common law all persons above the age of twelve years were required to take the oath of *allegiance* in courts leet.

There were several statutes requiring the oath of *allegiance* and supremacy to be taken under penalties; justices of the peace might summon persons above the age of eighteen years to take these oaths. 1 Eliz. c. 1. 1 W. & M. c. 18. 1. A. st. 1. c. 22. (Tomlins' Law Dictionary, 1835).

By the English common law, founded on the principle of feudal ligeance and homage, none were admissible as natural born subjects, if they were not born in a place actually possessed at the time of their birth, either by the king himself or by some prince doing homage to him for it: except, first, the children of any subjects born beyond sea, who at the birth of those children should be in the service of the Crown; secondly, the sovereign's children born during the royalty of their parents; and thirdly, the heir of the Crown wherever born.

"Chitty's Commercial Law," Vol. i, c. 5. Report of the House of Commons' Select Committee on the Laws affecting Aliens, 1843.

"There be regularly (unless it be in special "cases) three incidents to a subject born—1. "That the parents be under the actual obedience "of the King; 2. That the place of his birth be "within the King's dominion; and 3. The time of "his birth is chiefly to be considered, for he can- "not be a subject born of one kingdom that was "born under the ligeance of a King of another "kingdom, albeit afterwards one kingdom descend "to the king of the other. 1. For the first, it is "termed actual obedience, because the King of "England hath absolute right to other kingdoms or "dominions, as France, Aquitain, Normandy, &c., "yet seeing the King is not in actual possession

" thereof, none born there since the crown of " England was out of actual possession thereof are " subjects to the King of England. 2. The place " is observable, but so as many times ligeance or " obedience, without any place within the King's " dominions may make a subject born ; but any " place within the King's dominions without " obedience can never produce a natural subject, " and therefore, if any of the King's ambassadors " in foreign nations have children there of their " wives, being English women, by the common " laws of England they are natural-born subjects, " and yet they are born out of the King's domi- " nions. (Cr. Car. 601, 602. March 91. Jenk. " Cent. 3.) But if enemies should come into any " of the King's dominions, and surprise any castle " or fort, and possess the same by hostility, and " have issue there, that issue is no subject to " the King, though he be born within his domi- " nions ; for that he was not born under the King's " ligeance or obedience. But, 3, the time of his " birth is of the essence of a subject born ; for he " cannot be a subject to the King of England, " unless at the time of his birth he was under the " ligeance and obedience of the King."—(Lord Coke's report of Calvin's case — State Trials, Vol. 2. p. 639.)

In the 17th year of the reign of Edward III. (A.D. 1343) doubts having arisen whether the King's sons born without the realm could inherit ("grante donte et difficultee ont este entre les " Grantz de cest Roialme et les Communes, aussi " bien Gentz de lei come autres") the Archbishop of Canterbury laid the question before the Lords. The Lords replied unanimously that there was no doubt that the King's sons could inherit, wherever born, but that with regard to children of other persons there were great difficulties in deciding the question.

The matter was again brought jointly before the Lords and Commons, who concurred in the opinion previously given by the Lords, and recommended that a law should be passed on the subject, but, as Parliament was about to be prorogued "et ceste " busoigne demand grant avisement et bone deli- " beration coment ele se purra mieltz faire et plus " surement," the further consideration of it was deferred. (Rotuli Parliamentorum, Vol. II., p. 139.)

Owing to the Plague, legislation on this and other subjects was deferred and not resumed until A.D. 1350, when the Act 25 Edward III. stat. 2. was passed.

Addenda M, p. 98. This Statute is intituled, "A Statute for those " that be born beyond sea," and provided "that " all children inheritors which from henceforth " shall be born without the legiance of the King, " whose fathers and mothers at the time of the birth " be and shall be at the faith and legiance of the " King of England, shall have and enjoy the same " benefits and advantages, to have and bear the " inheritance within the same legiance, as the " other inheritors aforesaid in time to come ; so " always the mothers of such children do pass the " sea by the licence and wills of their husbands."

Lord Bacon, in his speech as Calvin's counsel in the case of the Postnati, thus refers to this Act:—

" By the Statute of 25 Edward III., which, if " you will believe Hussey, is but a declaration of " the common law, all children born in any parts " of the world, if they be of English parents con- " tinuing at that time as liege subjects to the King, " and having done no act to forfeit the benefit of " their allegiance, are *ipso facto* naturalized. " Nay, if a man look narrowly into the law on this " point, he shall find a consequence that may seem " at the first strange, but yet cannot well be " avoided ; which is, that if divers families of " English men and women plant themselves at " Middleborough or at Roan, or at Lisbon, and " have issue, and their descendants do intermarry " amongst themselves, without any admixture of " foreign blood, such descendants are naturalized to " all generations ; for every generation is still of " liege parents, and therefore naturalized: so as " you may have whole tribes and lineages of " English in foreign countries.

" And therefore it is utterly untrue that the " law of England cannot operate or confer natural- " ization, but only within the bounds of the " dominion of England."—State Trials, Vol. 2, p. 586).

It is to be observed that Lord Bacon was speaking of persons of pure English descent by their fathers and mothers having done no act to forfeit their allegiance ; such persons, he declared, were naturalized by the statute to all generations. He did not say that they did not also owe allegiance to, and were entitled to protection from, the country of their birth.

The Statute 15 Charles II., c. 15, after making several provisions for enabling aliens to exercise certain trades (linen spinning, net weaving, tapestry making), enacts that all foreigners who shall really and *bonâ fide* set up and use any of the trades and manufactures aforesaid by the space of three years in England, Wales, or Berwick-upon-Tweed, shall from thenceforth, on taking the usual oaths, enjoy all privileges whatsoever as the natural-born subjects of this kingdom.

An attempt was made by the 7th Anne, c. 5, to naturalize all Protestants within the realm.

This Act contains the following clause: "That " the children of all natural-born subjects born out " of the legiance of Her Majesty, her heirs and " successors, shall be deemed, adjudged, and taken " to be natural born subjects of this kingdom, " to all intents, constructions, and purposes what- " soever." Addenda M, p. 98.

With the exception of this clause, the statute of 7 Anne, c. 5, was repealed by 10 Anne, c. 5.

4 Geo. II., c. 21, explains the above-mentioned clause by enacting that "all children born out of " the legiance, that is, out of the *domain* of the " Crown of England, or which shall hereafter be " born out of such legiance, or whose *fathers* were " or shall be natural-born subjects of the Crown " of England or of Great Britain at the time of " the birth of such children respectively, shall and " may, by virtue of the said recited clause in the " said Act of the seventh year of the reign of " Her said late Majesty and of this present Act, " be adjudged and taken to be, and all such chil- " dren are hereby declared to be natural-born " subjects of the Crown of Great Britain, to all " intents, constructions, and purposes whatsoever." Addenda M, p. 98.

By 13 Geo. II., c. 3, foreign seamen serving for two years during war on board English men-of-war or merchant ships are naturalized *ipso facto*. But it is provided that such naturalization shall not enable the party naturalized to be of the Privy Council, or a member of either House of Parliament, or to have any grant of lands, tenements, or hereditaments, from the Crown to himself, or to any person in trust for him.

By 13 Geo. II., c. 7, all foreigners who have resided seven years in any of His Majesty's colonies in America, without having been absent longer than two months at any one time are naturalized on taking the oaths, making the declaration, and receiving the sacrament as therein prescribed ; subject, nevertheless, to the same proviso as the last-mentioned statute.

20 Geo. II., c. 44, extended the benefits of this Act to the Moravian Brethren and to all foreign Protestants conscientiously scrupulous of taking an oath.

By 22 Geo. II., c. 45, foreign Protestants are naturalized upon serving three years on board any ship fitted out as therein mentioned and employed in the whale fishery; but they lose this benefit if they go out of the king's dominions in England,

Ireland, or the American plantations, for more than twelve months at a time.

The statute of 13 Geo. III., c. 21, enacts that all persons whose *fathers* by the statute of 4 Geo. II., c. 21, are entitled to the rights of natural born subjects shall be adjudged natural-born subjects also; thus the provisions which by the Act 4 Geo. II. extended only to the children of natural born subjects are by this Act extended to the *grandchildren* also.

It will be seen therefore that Lord Bacon's doctrine as to the transmission of British nationality was not undisputed, as the statutes of Anne and George II. having naturalized the children of British subjects, another statute was considered requisite to naturalize the grandchildren.

Inconvenience having been experienced from persons becoming naturalized merely to enable them to claim the privileges of British subjects under treaties with foreign powers, without any intention of taking up their residence in Great Britain, an Act was passed (14 Geo. III., c. 84) declaring that no bill of naturalization should be received which did not contain a proviso that the person so naturalized should not be entitled to any such privileges or immunities unless he had resided within British territory for seven years subsequent to the passing of the Act without having been absent for longer than two months.

The 26 Geo. III., and 28 Geo. III. provide that every foreigner who has established himself and his family in Great Britain, and carried on the southern whale fishery, and imported the produce thereof for the space of five years successively shall be entitled to all the privileges of a natural-born subject.

2 Geo. III., c. 25, naturalized foreign Protestants serving two years in the Royal American Regiment or as engineers in America.

The persons naturalized by these statutes were not placed on the same footing with English subjects to all intents and purposes. They were all, by the statutes that conferred the privilege, as well as by the Statute of 12 and 13 Wm. III., c. 2, prohibited from being members of the Privy Council or of either House of Parliament, and from enjoying *any office or place civil or military*, or any grant from the king of lands within the Kingdom of Great Britain and Ireland.

In general, therefore, a person naturalized was not even eligible to the office of constable.

These stringent restrictions were owing to the jealousy of foreigners, arising from the prejudices of the English against the Dutch favourites of William III. and the Hanoverian courtiers of the two first Georges.

Irish Statutes.

Stock's Evidence, Aliens Committee, 1843.

The Irish common law with regard to aliens was the same as the English, but, from motives of policy and a desire to encourage Irish manufactures the legislation (for before the Union the Irish Parliament had the power of conferring rights of naturalization) was much more liberal.

The first Irish Parliament held in the reign of Charles II. (14 & 15 Car. II., c. 13.) passed an Act reciting the advantages which would be derived from the resort of foreign traders, artificers, and seamen, and providing that any aliens who should transport their stocks and families with intent to reside therein should be admitted to the privileges of a natural-born subject on taking the oaths of allegiance and supremacy before the Lord Chancellor or Judges on circuit, and further that any such person should be admitted a freeman of any town, corporate, or borough on taking those oaths and tendering a fine of 20*s.* to the magistrates of such town or borough.

The operation of this Act was limited to seven years from the end of Parliament then sitting, and it was continued by the 2d of Anne, c. 14, for five years on the express ground that it had been proved to be highly beneficial.

It was made perpetual by the 4th Geo. I., c. 9, containing a similar preamble.

The 19th & 20th Geo. III., c. 29, extended the benefits of the previous Acts to persons of all religious persuasions; the oaths to be taken being the oath of allegiance and abjuration, with the usual clause that the Pope has no temporal power in this country.

This Act, however, contains a new restrictive clause: "That no person naturalized by this Act "shall be enabled to served in Parliament, nor to "be of the Privy Council, nor to hold any office of "trust, civil or military"

The 23d & 24th Geo. III., c. 38, enacted that any aliens of any sect, religion, or persuasion (except Jews), who should at any time come to Ireland with intent to settle and reside there should, from and after taking the oath (or affirmation) specified, be deemed and adjudged a liege, free, and natural subject, as fully and effectually as if born within the kingdom.

The 2d section of this Act provided "That no "person naturalized under this Act should have "power to be or be entitled to serve in Parliament, "nor be of His Majesty's Privy Council, nor be a "Peer of the realm, nor should be entitled to hold "any office of trust or profit, civil or military, "unless he should have resided in the kingdom "three years, at one or different periods from the "day of passing the Act."

The 36th Geo. III., c. 48, added a fresh provision that no person should have the benefit of that Act or of the previous Acts who should not have previously obtained a licence from the Lord Lieutenant of his being a fit and proper person to be naturalized, which licence shall be produced to the magistrate administering the oath and subsequently filed with the magistrate's certificate in the Court of Chancery.

Mr. Serjeant Stock gave it as his opinion, at the Aliens Committee in 1843, that that Act was still in force, and that "a residence of three years in "Ireland and a licence from the Lord Lieutenant "would qualify any person taking the oaths as a "British subject in the fullest sense of the word, "to be admitted to all the privileges belonging to "a British-born subject."

Naturalization by Special Act of Parliament.

Besides the persons naturalized by the above-mentioned English and Irish Statutes, any person could be naturalized by Act of Parliament passed in his favour.

1st Geo. I. c. 4, provided that no bill of naturalization should be received without a clause disabling the alien applying for it from being a member of the Privy Council or of Parliament, or holding a public office, or receiving grant of crown lands, as specified by the 12th & 13th William III. c. 2.

To these disabilities was added the restriction contained in 14th Geo. III. c. 84, (*vide ante*,) requiring seven years residence to entitle the naturalized alien to the privileges of British Commercial Treaties, &c.

An order of the House of Lords of 1807 required a certificate from the Home Secretary respecting the applicant's conduct.

This certificate was always granted on the recommendation of any person known to the Secretary of State.

The bill then passed as a matter of course on the applicants taking the usual oaths of allegiance and supremacy if Protestants, and, if Roman Catholics, the oaths settled by the Act for the removal of Catholic Disabilities. Before the passing of that Act it appears that it was not customary for Roman Catholics to be naturalized.

The only practical benefits to be formerly derived from a Naturalization Act were the rights of inheriting and holding real property and voting at elections.

Denization.

State Trials, vol. ii. p. 607.

"A denizen," said Lord Bacon in his speech as counsel in Calvin's case, "is one that is but *subditus insitivus or adoptivus*, a subject engrafted or adopted, and is never by birth, but only by the King's charter, and by no other mean, come he never so young into the realm, or stay he never so long. Mansion or habitation will not indenize him; no, nor swearing obedience to the King in a leet, which doth in law the subject; but only, as I said, by the King's grace and gift. To this person the law giveth an ability and capacity abridged not in matter but in time. And as there was a time when he was not subject, so the law doth not acknowledge him before that time. For if he purchase freehold after his denization, he may take it; but if he have purchased any before, he shall not hold it: so if he have children after, they shall inherit it; but if he have any before, they shall not inherit."

A denizen therefore was a person on whom the King by his own authority was empowered to bestow certain of the privileges of a British subject.

The status of denization has been recognized by English Statute Law from a very early period. By 22 Henry VIII. c. 8, and some other Acts of that reign, denizens were subjected to certain pecuniary burdens and to the alien duty; and 32 Henry VIII. c. 16, enacts that all aliens made denizens shall be obedient to the laws of the realm, and that a proviso to that effect should be inserted in their letters of denization.

12 & 13 Wm. III. c. 2, subjects them to the usual disabilities of naturalized aliens.

In modern times it became the practice for the Home Secretary to issue letters patent under the Great Seal, conferring the privileges of denization on aliens who petitioned the Crown for them, through him.

The expense of the fees was about 120*l.*, and to save expense several names used to be inserted in the same letters patent.

The process of denization was the same in Ireland as in England.

See Mr. Mallet's Evidence, Aliens Committee.

It is not very clear what was the exact difference between the privileges conferred by Letters of Denization and Acts of Naturalization.

The principal differences seem to have been that denization did not confer the privileges of foreign factories, the sons of denizens born before denization could not inherit real property; and it had been held that denizens themselves were incapable of inheriting lands, as that privilege could only be conferred by Parliament.

Chitty's "Commercial Law," vol. i. c. 5. p. 151.

On the other hand, the alien could be made a denizen without being called upon to take any oaths.

A Naturalization Act cost the petitioner about 100*l.* in fees; and both systems were condemned as costly and cumbersome by the Committee appointed to consider the state of the Law relating to Aliens, in 1843.

The result of their recommendations was that an Act was passed considerably modifying the laws affecting aliens, and affording greater facilities for their naturalization.

Present Law.

This Act (7 & 8 Vict. c. 66, August 6, 1844), is at present in force, and is as follows:—

Addenda I, p. 93.

Clause 1, repeals certain former Acts.

2. Repeals the disabling provision of 1 George I. c. 4., as to aliens naturalized under Act of Parliament, being Members of Parliament or of the Privy Council, or receiving grant of Crown lands.

3. Every person born of a British mother is rendered capable of inheriting or holding real or personal estate.

4. Alien friends may hold every species of personal property except chattels real.

5. Alien friends may hold lands, houses, &c., for twenty-one years with the same rights, &c., as a British subject, except the right of voting at Elections.

6. Persons naturalized under the Act to have all the privileges of British subjects with the exception of becoming a member of the Privy Council, or of either House of Parliament, and subject to such further restrictions as may be imposed by the Certificate of Naturalization.

7. Authorizes an alien to present a Memorial to one of Her Majesty's Principal Secretaries of State, stating the grounds on which he wishes to be naturalized.

8. The Secretary of State to inquire into the circumstances of each case, and, if he thinks fit, to issue a Certificate granting the Memorialist the rights and privileges of a British subject, except those mentioned in clause 6, and with any further disabilities he may consider it necessary to impose, subject to his taking an oath as prescribed.

9. Certificate to be enrolled in Court of Chancery.

10. Prescribes the oath to be taken as follows:—

"I, *A.B.*, do sincerely promise and swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, and will defend her to the utmost of my power against all conspiracies and attempts whatsoever which may be made against her person, crown or dignity; and I will do my utmost endeavour to disclose and make known to Her Majesty, her heirs and successors, all treasons and traitorous conspiracies which may be formed against her or them; and I do faithfully promise to maintain, support, and defend to the utmost of my power, the succession of the Crown, which succession, by an Act intituled 'An Act for the further 'Limitation of the Crown, and better securing the 'Rights and Liberties of the Subject,' is, and stands limited to the Princess Sophia, Electress of Hanover, and the heirs of her body, being Protestants, hereby utterly renouncing and abjuring any obedience or allegiance unto any other person claiming or pretending a right to the Crown of this realm.

"So help me God."

This oath to be taken before one of the Judges or a Master in Chancery.

11. The Secretary of State to make such regulations for obtaining certificates as he considers proper.

12. Fees to be fixed by the Treasury.

13. Persons naturalized before this Act, and who shall have resided five years successively in England, to be entitled to its privileges.

14, 15, Save existing rights.

16. Women married to natural-born subjects to be deemed naturalized.

The passing of this Act put a stop to the practice of granting Letters of Denization or special Acts of Parliament save in exceptional cases.

It appears from inquiry at the Home Office that Letters of Denization are still applied for in some instances. A case occurred recently in which letters of denization were made use of to enable an alien to be trustee for freehold land, &c., occupied by a Dutch chapel, without being naturalized.

Nationality Statistics, Appendix, p. 154.

The Act of 1844, having repealed the provision of 1st Geo. I. c. 4, special Acts have been on one or two occasions since passed (as the Act of 1867, in the case of Henri Louis Bischoffsheim), to confer on the alien "*all the rights, privileges, and capacities whatsoever*" of a natural-born subject of the Queen, including, of course, the right to sit in Parliament.

But unless an alien has some particular reason, such as the disposal of real property, or desires to sit in Parliament, he does not go to the expense of procuring a Naturalization Act or Letter of Denization, but contents himself with the certificate under the Act of 1844, which is given gratuitously by the Home Office, and the whole expense for which, including enrolment and taking the oath, is only 17*s.* 6*d.*

It must be remembered that under 13 Geo. III., c. 21, the grandchildren of British subjects are British subjects; no naturalization is therefore required in the case of persons born abroad who are descended in the third generation from British subjects.

Such a case occurred recently when Mr. Bernhard Samuelson was returned for Banbury in 1859 and 1865. Mr. Samuelson was born in Hamburgh, and maintained his right to sit in Parliament in virtue of his grandfather having been born in the City of London.

The intention of the legislation for granting naturalization to aliens in Great Britain has always been to confer upon those who are *bonâ fide* resident in this country such rights and privileges (with certain exceptions) as they would otherwise be debarred by their alienship from enjoying; but it was never meant to encourage aliens to become naturalized with a view to their being able to claim British protection in foreign countries, and certainly not to entitle them to such protection as against the sovereign of their native land, which would be entirely contrary to the spirit of the English law.

The oath which they are called upon to take, is accordingly one of allegiance to the Sovereign within this realm, and not of renunciation of allegiance (as in the American law) to their native sovereign.

By the 6th clause of the Act of 1844, the Secretary of State is empowered to make such exceptions as he may think fit in the Certificate

It seems that at first the certificates were granted unconditionally, but much inconvenience being experienced from persons applying for naturalization in order to secure British protection abroad for political and other purposes, in 1850 a clause was inserted in the certificates of naturalization excepting "any rights and capacities of a natural-born British subject, out of and beyond the dominions of the British Crown and the limits thereof."

Addenda K. p. 96. Circular, Jan. 8, 1851.

This exception was enforced from the 24th of August 1850, to the 12th of March 1854, when it was modified by the addition of the words "other than such as may be conferred upon him by the grant of a passport from the Secretary of State to enable him to travel in foreign parts."

Home Office, July 13, 1858. To ditto, July 1, 1858. Home Office, August 23, 1858.

In July 1858, the Home Office proposed to place a further restriction on the issue of certificates of naturalization, by limiting the grant of such certificates to *bonâ fide* residents in the United Kingdom. This was done by adding to the clause previously quoted the following stipulation:—"Provided always, and I do hereby declare, that all the before-mentioned rights and capacities of a natural-born British subject are granted to the aforesaid . . . upon the condition that he shall continue to reside permanently within the United Kingdom, and that if at any time hereafter he shall voluntarily be absent from the United Kingdom for a period of six months at any one time without licence in writing under the hand of one of Her Majesty's Principal Secretaries of States, he shall be deemed to have ceased to reside permanently within the United Kingdom, and then and in such case this certificate and all the rights and capacities thereby granted shall absolutely cease and determine."

In accordance with this condition, naturalized British subjects whose certificates date from 1858 are only entitled to passports "good for six months."

It has been ruled by the Home Office that the Act of 1844 does not empower the Home Secretary to grant a certificate of naturalization to an alien about to proceed to India, as such certificates can only be granted to aliens "residing in any part of Great Britain and Ireland, or who shall 'come to 'reside in' any part of Great Britain or Ireland with intent to settle therein."

It has also been decided by the Foreign Office, on the advice of the law officers, that an alien could not be naturalized under the Act in order to become British Consul exercising consular jurisdiction in Japan, as he could not under such circumstances make the requisite declaration of an intent "to settle" in the United Kingdom.

Sir Moses Montefiore, August 28, 1845.

In 1845 Mr. David Diaz Santillana, interpreter to the British Consulate General at Tunis, applied for a certificate of naturalization. Mr. Santillana was the son of Mr. M. Santillana of Leghorn, and was born at Tunis in 1780. The family moved to France, where Mr. M. Santillana died. Mr. Santillana returned to Tunis in 1800, and was appointed to the post of Consular interpreter. His case was strongly recommended by Sir T. Read, but the Home Office could not grant a certificate as he was not resident in England. In 1849, in consideration of his long services as interpreter, he was placed on the list of British protected subjects.

Home Office, October 6, 1845.

Mr. Moses Santillana, January 15, 1857.

Mr. Santillana was succeeded as interpreter in 1851 by his son, Mr. Moses Santillana, likewise born in Tunis, who, being in England in 1857, applied to Lord Clarendon to recommend him to the Home Office for naturalization. The Home Office gave the usual answer that as he held an appointment abroad he could not be supposed to "intend to reside" in England as required by the Act, but suggested that letters of denization might be granted to him at a cost of about 80*l.* Lord Clarendon having forwarded to the Home Office a despatch from the Consul-General in support of Mr. Santillana's application, the letters of denization were issued to him under the Great Seal.

Home Office, January 27, 1857.

To Home Office, February 17, 1857.

By the Act 21 & 22 Vict. c. 106. employment in the civil service of India is limited to "natural-born British subjects." As certificates cannot be granted under the Act of 1844 to aliens about to proceed to India, it would seem that a certificate could not be granted to an alien to enable him to compete at an examination for the Indian Civil Service.

Home Office to Mr. M. H. Picciolto, February 15, 1853. Home Office to India Office, April 21, 1856.

The rule excluding aliens from that service has given rise on various occasions to questions whether the naturalization of an alien father naturalized a minor son born abroad, and the opinion of the law officers was taken in the case of Mr. J. E. Ryssel in 1860.

Mr. Ryssell was informed by the Home Office (August 25th, 1860) that the Attorney and Solicitor General had been consulted—

"1. Whether the children of an alien to whom a certificate of naturalization has been granted, under the Act 7 & 8 Vict. c. 66. born out of the Queen's dominions before the granting of the certificate, and under 21 years of age at the time it bears date, are entitled to the rights and capacities of a naturalized born British subject, either without the exceptions set forth in the above-named statute and in the certificate of naturalization or with them.

"2. What is the condition of a child born out of Her Majesty's dominions after its father has obtained a certificate of naturalization under the above-mentioned Act? If a British subject, is it to all intents and purposes, or do the exceptions contained in the Act of Parliament and certificate still adhere to it," and that the Attorney and Solicitor General had reported—

"1. That by the Act 7 & 8 Vict. c. 66. s. 6. it is enacted that on obtaining the certificate and taking the oath prescribed accordingly, an alien residing, &c. in Great Britain shall enjoy all the

rights and capacities which a natural-born subject of the United Kingdom can enjoy and transmit—words which are prospective only, and may give to the children of the alien born in the United Kingdom the status of natural-born British subjects, but there is nothing in the statute or in the law which can alter or affect the status of the children of an alien born out of the Queen's dominions and before the naturalization of the parent. Such children, although infants at the date of the naturalization, are still aliens, and must obtain certificates of naturalization to entitle them to the rights and capacities of natural-born British subjects.

"2. That by the terms of the certificate of naturalization, a naturalized alien does not carry with him into foreign countries the rights and capacities of a natural-born British subject (except the benefit of a British passport), and consequently the child of such naturalized alien born in a foreign country, the parent being abroad, would not answer the description of the child of a natural-born British subject; such child, therefore, is, in the opinion of the Attorney and Solicitor General, an alien, and not a natural-born British subject."

Colonial Naturalization.

Addenda I. p. 93.

Doubts having arisen whether the Act 7 & 8 Vict. c. 66, of 1844, extended to the colonies, an Act was passed in 1847 (10 & 11 Vict. c. 83) declaring that it did not extend to the colonies, and that all laws, statutes, or ordinances duly passed or to be passed within Her Majesty's colonies or possessions abroad conferring the privileges of naturalization within the limits of such colonies were valid, subject to the usual confirmation by the Crown.

It may be interesting to notice the naturalization Acts at present in force in the principal colonies.

Antigua, Grenada, St. Vincent.

Colonization Circular, No. 27, 1868, published by the Emigration Commissioners.

In Antigua (Act No. 739, October 1861), Grenada (Act No. 230, 1858) and St. Vincent (Act of October 1857, sect 17), alien immigrants of African descent arriving from the United States or from the British North American Colonies who may have entered or may enter into a written contract of service for not less than a year, shall after three years' residence enjoy all the privileges of a natural-born subject upon taking the oath of allegiance before the Governor, in the presence of the Secretary to the Government. This officer is to keep a register of the names, &c. of such naturalized immigrants, and the register or an official extract is, upon proof of the identity of the immigrant, to be evidence of his rights.

Bahamas.

Ditto.

By the Colonial Act, No. 11 Vict. cap. 4, passed 22nd March 1848, aliens become naturalized upon taking the oath of allegiance and obtaining a certificate from the Governor in Council under the great seal of the colony that the oath has been taken. The certificate is obtainable on presentation to the Governor in Council of a memorial setting forth full particulars respecting the memorialist and the grounds on which the privileges of naturalization are sought, and when obtained the certificate must be recorded in the office of the public secretary and registrar of records. The fees are to be regulated by the Governor in Council and to be paid into the public treasury.

Barbados, St. Vincent, St. Lucia, Grenada.

Ditto.

In Barbados, St. Vincent, St. Lucia, Grenada, and generally in the minor West Indian Colonies there is no general naturalization law, but special Acts are required on each occasion.

Bermuda.

Colonization Circular, No. 27, 1868, published by the Emigration Commissioners.

In this colony the rights of aliens and the steps to be taken for obtaining naturalization are prescribed by a Colonial Act, No. 11 of 1857. They are similar in their main features to those in force in New South Wales.

The time, however, within which the oath is to be taken is extended to three calendar months from the date of the certificate of naturalization. The oath is to be taken before the Governor, and a memorandum of the fact endorsed on the certificate, which document is to be registered in the Colonial Secretary's office, and then enrolled in the Court of the Chancery.

British Columbia.

Ditto.

In this colony the privileges of aliens are at present regulated by a proclamation, dated 14th May 1859, and issued by the Governor, under the authority of the Imperial Act, 21 & 22 Vict. cap. 99, and of his commission. By this proclamation aliens have the same capacity to hold and transmit landed and real estate of every description as natural-born British subjects, and after a residence of three years may demand naturalization on producing a declaration of residence and character from some British subject, on making himself a declaration of residence, and on taking the oath of allegiance. The latter declaration must be made and oath taken before a justice of the peace, who is to declare that he knows no reason why the applicant should not be naturalized. These conditions being fulfilled the Court of British Columbia is to record the proceedings, and the alien is then to be deemed a British subject for all purposes whatsoever while within the Colony. The cost of this process is 18*s*. Aliens, wives of British subjects, are to be deemed to be naturalized.

Parliamentary Papers on British Columbia, Part 3. 1860.

The naturalization may be annulled (in addition to the penalties for perjury) if any party to either of the above declarations is convicted of perjury therein.

British Guiana.

Colonization Circular, 1868.

In this colony there is no General Act for Naturalization. A special ordinance is therefore passed on each occasion, authorizing the Governor to issue letters patent, granting to the alien the rights and capacities of naturalization.

The letters patent must be recorded in the Registrar's Office of the counties of Demerara and Essequibo, and within 10 days from their date the alien must take and subscribe the oath of allegiance before a Judge of the Supreme Court, and a certificate thereof is issued by the Registrar of the Court, whose certificate is to be received as sufficient evidence of the fact.

These ordinances are reserved for Her Majesty's pleasure, and do not take effect until the same has been notified in the official gazette of the colony.

Canada.

Naturalization Act, 22 Vict. c. 8, 1859.

Consolidated Statutes of Canada, page 154.

Section 1. "Every alien residing in any part of "this province before or since 18th January 1849, "with intent to settle therein, and who, after a "continued residence of three years or upwards, "has taken the oaths or affirmations of residence "and allegiance, shall thenceforth enjoy and "transmit all the rights and capacities which a "natural-born subject of Her Majesty can enjoy "and transmit."

Oath of Residence.

Section 2. "I, *A.B.*, do swear that I have resided "three years in this province with intent to settle "therein without having been, during that time, a "stated resident in any foreign country. So help "me God."

The oath of allegiance is the same as in the English Act of 1844.

These oaths are to be taken before the Justices of the Peace at Quarter Sessions, or before the Recorder, and a certificate is to be at the same time produced, signed, if practicable, by a magistrate, testifying to the truth of the statement as to residence.

Thereupon the Clerk of the Court is to issue a certificate stating that "under and by virtue of "the said Act, the said *A.B.* hath obtained all the "rights and capacities of a natural-born British "subject within this province."

Section 7. Any woman married to a natural-born British subject or person naturalized under the authority of this Act to be deemed naturalized, and have all the rights and privileges of a British subject.*

Section 10. The rights to be enjoyed under this Act to be subject to the conditions and limited to the province, as provided by the Act of the Imperial Parliament.

There are no disabling clauses.

Cape of Good Hope.

Colonization Circular, 1868. By a proclamation issued on the 2nd day of May 1817, by the then Governor-General, Lord Charles Henry Somerset, deeds of burghership, subject to the approbation of the Crown, can be granted to all foreigners and aliens of good character and conduct applying for the same, provided they shall have resided for the last five successive years within the settlement, and upon their taking the usual oaths of allegiance, and paying the usual fees for the deed of burghership in addition to a stamp of 18*l.* 15*s.*

By an Act, No. 8 of 1856, all former laws, customs, or usages inconsistent with the Act are repealed, and from its promulgation (4th June 1856) aliens may purchase, acquire, and own fixed property in the colony, in like manner as natural-born subjects. But beyond this nothing in the Act is to be taken as naturalizing any aliens or bestowing upon them any of the privileges conferred by deeds of burghership.

By an Act, No. 37 of 1861, the Governor is empowered to grant letters of naturalization to any alien of full age and good character, and able to read and understand some European language, and to write his name; provided he has been resident in the colony five years, or is married to a natural-born British subject, or possesses unencumbered landed property in the colony of not less value than 300*l.*

This Act also provides that naturalization elsewhere within British dominion shall hold good at the Cape.

The fee for these letters of naturalization is fixed at 20*l.*

Honduras.

Ditto The Naturalization Act for this Colony, 18 Vict. cap. 18., was proclaimed 19 July 1855. It is similar to the New South Wales Act. By the 23rd section, Immigration Act, 24 Vict. cap. 5., passed in 1861, every immigrant born out of the British dominions who shall have obtained or become entitled to a certificate of industrial residence, shall immediately thereafter become entitled to all such privileges as are conferred by the Act 18 Vict. cap. 18. on naturalized aliens, except the capability to become a member of assembly, which privilege, however, may be allowed by the Superintendent.

Hong Kong.

Ditto. By the Colonial Ordinance, No. 2. of 1853, passed on the 17th November of that year, aliens, though not naturalized, may acquire and dispose of real estate within the colony as effectually as natural-born subjects. The Ordinance confers no other rights on aliens.

* This clause, which is the same as the 16th section of the English Act, is repeated in all the Colonial Acts.

Jamaica.

The Governor may by instrumen under the broad seal, make any alien or foreigner coming to settle and plant in the island, having first taken the oath of allegiance, to be completely naturalized, and the persons named to enjoy the same immunities and rights to the laws of this island as natural-born subjects. Digest of Laws of Jamaica, by the Attorney-General of Jamaica, Ed. 1865, p. 5.

The statute 13 Geo. II. c. 7, naturalizing foreign Protestants and others settling in the colonies to be in full force and operation.

The alien disabled from being a member of the council or assembly.

The provisions, &c., as to the rights of aliens enacted by the English Act of 1844 made applicable to Jamaica by 14 Vict. c. 40., 1851.

By another Act, 22 Vict. cap. 1. (Nov. 1858), every "immigrant" born out of the British dominions, who may obtain or become entitled to a "certificate of industrial residence" under the Act, thereby becomes entitled to all the privileges of a natural-born subject within the island. An immigrant is defined to be any person introduced at the public expense from certain specified places. Colonization Circular, 1868.

Natal.

Under the Law No. 1, of 1860, the Lieutenant-Governor is authorized and empowered to grant, under the public seal of the colony, letters of naturalization to any alien who shall have attained the full age of 21 years, and who shall be able to read and understand one or more of the languages of Europe, and to write his name, and shall have presented to the said Governor a memorial praying to be naturalized; and every such alien, prior to obtaining such letters of naturalization, shall pay into the treasury of the colony a sum of five pounds sterling. Ditto.

No alien shall (except as in the next succeeding section is excepted) be capable of receiving letters of naturalization unless he shall have been a resident within the colony during the five years immediately preceding the presentation of his memorial praying to be naturalized.

Any alien who shall be married to a natural-born subject of Her Majesty the Queen, or who, being married to an alien, shall have had by his said wife, during their marriage and residence within the colony, not less than three children, and any alien who shall be the owner of landed property within the colony, and registered in his name, of not less a value than 300*l.*, over and above all special conventional mortgages affecting the same, shall be capable of obtaining letters of naturalization, although he shall not have resided in the colony for five years.

No letters of naturalization shall be granted to any alien who is an uncertificated insolvent, or of unsound mind, or has been convicted and sentenced for treason, murder, rape, theft, fraud, perjury, forgery, or any other infamous crime.

When such letters of naturalization shall have been obtained by any alien he shall be bound to take the oath of allegiance to Her Majesty the Queen.

Any alien woman already married or who shall be hereafter married to a natural-born subject or person naturalized under this or any other law, shall be deemed and taken to be herself naturalized. All minor children, alien born, of any alien parent, who shall himself or herself be naturalized under this or any other law, and which children shall be within the colony at the time of the naturalization of their parent, shall be themselves naturalized *ipso facto* by such naturalization.

New Brunswick.

The Colonial Act, 24 Vict. c. 24., April 1861, required one year's residence and an oath of allegiance. By the Dominion Consolidation Act, however, (cap. 66., 1868,) the process of naturalization in New Brunswick has been assimilated to that previously in force in Canada. (*See* Canada.) Ditto. Dominion Act, c. 66. 1868.

Newfoundland.

Colonization Circular, 1868.

By a Colonial Act, 19 Vict. cap. 20., passed on the 12th May 1856, the Governor may, by letters patent under the great seal of the colony, naturalize any alien resident therein.

Within 10 days thereafter the alien must take and subscribe in duplicate, before a judge of the Supreme Court, the oath of allegiance, one copy of which is to be filed in the registry of the court, and the other in the office of the Government secretary. The alien is then entitled to all the privileges, and subject to all the liabilities of a natural-born subject.

The judge shall, if required, certify on the letters of naturalization that the oath has been taken, which certificate shall be evidence of its contents.

New South Wales.

11 Vict. No. 39, 1848.

Callaghan's Statutes of New South Wales, vol. ii. p. 1830.

The same as the English Act of 1844, *mutatis mutandis*.

The Governor to grant the certificates.

Section 4 disables from being a member of the Executive or Legislative Councils.

The rights and capacities conferred by the certificate limited to "within the said colony."

Naturalized aliens who shall have resided in the colony for three years, being otherwise qualified, are entitled to vote at elections, and, after five years residence, to be elected members of the Assembly.

New Zealand.

Colonization Circular, 1868.

The Colonial Act (30 Vict. No. 17, 1866) is the same as the English Act *mutatis mutandis*, with the following additional provisions.

Persons resident in the colony who have been naturalized in the United Kingdom, or in any British colony on the continents of Australia (including Tasmania), Africa, or America, may if the Governor thinks fit, be naturalized in New Zealand on exhibiting the certificate of naturalization and stating in their memorials that such certificate has been obtained without fraud or intentional false statement, and that the signature and seal, if any, thereto are genuine.

The Colonial Secretary is to enrol all letters of naturalization and a certified copy of every such certificate, and shall be entitled to a fee of 1*l.* from every person to whom the letters are granted, and shall cause indices to be made to such letters and certificates which shall be open for inspection or copying on payment of a fee of 1*s.* for each inspection.

The penalty for false statements in the memorial is the avoidance of the letters of naturalization (except against *bonâ fide* purchasers for valuable consideration) in addition to the penalties of perjury. All pre-existing rights are saved, whether of aliens or natural-born subjects.

Nova Scotia.

Revised Statutes of Nova Scotia, 2nd series, p. 153.

After one year's residence, and on taking the oath of allegiance, the alien was entitled to all the rights and privileges of a British subject within the province, under the Colonial Act of 1858, (Title 8, c. 43).

By the Dominion Act, however, (c. 66, 1868,) the Canadian naturalization law was extended to Nova Scotia. (*See* Canada.)

Prince Edward's Island.

Naturalization Law, April 17, 1862.

Laws of Prince Edward Island, vol. ii. p. 567.

After seven year's residence, and on taking the following oath, the alien is entitled to "all the "privileges of a natural-born subject of Her "Majesty":—

OATH.

"I, *A.B.*, of do swear that I "have resided seven years in this island, without "having during that time been a stated resident in "any foreign country, and that I will be faithful "and bear true allegiance to the Sovereign of "Great Britain and Ireland, and of this island as "dependent thereon. So help me GOD."

It is somewhat remarkable that the period of seven years, required by the Act of Geo. 2., and which the Americans complained against as excessive in the Declaration of Independence, should be purposely retained to this day in Prince Edward's Island.

Queensland.

Queensland Act, 31 Vict. December 28, 1867.

A Colonial Act passed in 1867 contains the same clauses as the English Act with regard to the possession of leasehold property by aliens and the rights of aliens descended from British mothers, with the following additional provisions:—

1. Any alien, native of a friendly European or North American state can become naturalized on taking an oath of allegiance.

2. No Asiatic or African alien to be naturalized unless he has resided in the colonies for three years, and is married, and his wife resident in the colonies at the time of his naturalization.

Asiatic and African aliens only to be naturalized on obtaining a certificate from the Governor, subject to such reservations as he may think fit to insert in such certificate.

Such aliens disqualified from being members of the Executive or Legislative Council or Legislative Assemby.

OATH OF ALLEGIANCE.

"I, *A. B.*, do sincerely promise and swear that "I will be faithful and bear true allegiance to Her "Majesty Queen Victoria as lawful Sovereign of "the United Kingdom of Great Britain and Ire-"land and of the colony of Queensland, dependent "and belonging to the said United Kingdom, and "that I will defend Her to the utmost of my power "against all traitorous conspiracies and attempts "whatsoever, which shall be made against Her "person, crown, and dignity; and that I will do "my utmost endeavour to make known to Her "Majesty, Her heirs and successors, all treasons "and traitorous conspiracies and attempts which I "shall know to be against Her or any of them. So "help me GOD."

The fees under this Act are remarkably small, viz.: oath, 1*s.*; filing record, 1*s.*; certificate, 2*s.* 6*d.*; so that any white alien can be naturalized for 4*s.* 6*d.*

St. Kitts and Anguila.

Colonization Circular, 1868.

By a Local Act, No. 127, passed on 3d February 1857, all domiciled or resident liberated Africans are to be deemed to be natural-born subjects, and capable of holding and conveying real and personal estate. The children, wherever born, of a mother a natural-born subject are made capable of taking real or personal estate by purchase or descent; and wives of natural-born or naturalized subjects are to be deemed to be naturalized.

Aliens, subjects of a friendly state, may acquire and hold either real or personal estate as effectually as natural-born subjects, but they are not thereby made capable of becoming members of the Council or of the Assembly, nor of voting at the election of members of the Assembly.

Sierra Leone.

Ditto

By the Imperial Act 16 & 17 Vict. cap. 86. (20 Aug. 1853), liberated Africans domiciled or resident in Sierra Leone are to be deemed within the colony to be natural-born subjects as from the date of their arrival, and to be capable of holding and transmitting any estate, real or personal, within the colony. Power is given to the local legislature to alter or repeal any of the provisions of the Act so far as they relate to the right to real property.

Liberated Africans are also to be considered as British subjects for the purposes of treaties with native chiefs.

South Australia.

olonization rcular, 1868. By the Colonial Amending and Consolidating Act, No. 5 of 1864, every person born of a mother who is a natural-born or naturalized subject is capable of holding real or personal estate.

Friendly aliens may hold every description of property whether real or personal.

A certificate of naturalization may be applied for by any alien and upon receipt of such application, countersigned by a justice of the peace, the Governor, if he think fit, shall direct the applicant to take the oath of allegiance before one of the judges of the Superior Court, and, on such oath being taken, he shall issue letters of naturalization. The fee for obtaining the certificate in duplicate is 1*l.* 1*s.*

The effect of this certificate is to vest all the rights and privileges of a natural-born British subject in such naturalized alien.

A subsequent Act, 23 & 24 Vict., No. 20, provides that aliens who obtain certificates of naturalization in any British colony or possession may obtain the privileges of naturalization in South Australia on lodging with the Registrar General of the colony their original certificates of naturalization, together with a true copy thereof. The original is then returned with an endorsement that the alien had made the declaration and taken the oath of allegiance prescribed by the Act.

The fee for this process is fixed at 10*s.* 6*d.*

Tasmania.

Ditto. By a Colonial Act, 25 Vict., No. 2, passed in November 1861, repealing 5 Will. 4., No. 4, the Governor in Council is empowered, on the presentation of a memorial, stating particulars, to issue a certificate granting all the rights and capacities of a natural-born British subject within the colony, such certificate to be enrolled in the Supreme Court, and an oath of allegiance to be taken before a judge or commissioner of the Supreme Court (within 60 days from the date of the certificate), who will grant a certificate of the taking and subscribing the oath. The cost of the whole process is 6*s.*

Trinidad.

Ditto. In this island a special ordinance of naturalization is required on each occasion, to obtain which the alien must present a petition to the Governor. When the ordinance has been passed, and the alien has taken the oath of allegiance before the Governor, he becomes entitled, within the limits of the colony, to all the privileges of a natural-born subject.

The taking of the oath is to be immediately certified by the Governor, and the certificate is to be recorded in the Registrar General's office.

These ordinances are reserved for Her Majesty's pleasure, and do not take effect until it has been signified.

Turk's Island and Caicos Island.

Ditto. By the Colonial Act, No. 1, Vict. c. 4, passed 22d March 1848, aliens become naturalized upon taking the oath of allegiance and obtaining a certificate from the President in Council, under the great seal of the colony, that the oath has been taken. The certificate is obtainable on presentation to the President of a memorial setting forth the grounds on which the privileges of naturalization are sought, and when obtained it must be recorded in the office of the Public Secretary and Registrar of Records. The fees are to be regulated by the President in Council.

By ordinance No. 8, of 1857, (passed 17th October 1857, and confirmed 13th February 1858,) aliens may hold lands, salt ponds, &c. (except salt ponds at Turk's Island), on lease not exceeding 21 years, which lease may be renewed at the end of the term.

Victoria.

The Colonial Act, 28 Vict., No. 256, which came into operation on the 1st of June 1865, and is called "The Alien's Statute, 1865," repeals the previous Acts, 24 Vict., No. 112, and 26 Vict., No. 166. It provides that alien friends resident in the colony may inherit, acquire, hold, and dispose of every description of property, whether real or personal, in the same manner as natural-born subjects of the Crown; and all dispositions of property made before the passing of this Act to or by such aliens are declared to be valid. The Governor may, if he thinks fit, grant under the seal of the colony letters of naturalization to resident alien friends, provided they be of good repute and take the oath of allegiance to the British Crown. But they are rendered incapable of being members of the Legislative Council and the Legislative Assembly. Colonization Circular, 1868.

To obtain naturalization, the alien is to present a memorial to the Governor, signed by himself, and verified on oath, stating his name, age, birthplace, occupation, length of his residence in the colony, and his desire to settle therein. The memorial must be accompanied by a certificate, signed by a warden, police magistrate, or justice of the peace, that the applicant is known to him, and is a person of good repute.

If the application be favourably entertained, the alien must take the oath of allegiance before a judge of the Supreme Court, or of a county court, or court of mines, or police magistrate, and, on production of a certificate from the judge or magistrate to that effect, the Governor in Council issues the letters of naturalization; they, and a certified copy of the certificate, are then to be recorded by the Chief Secretary, for which a fee of 1*l.* is to be paid.

The penalty for false statements in the memorial is the avoidance of the letters of naturalization (except against purchasers for valuable considerations) superadded to the penalties of perjury.

The alien wives of natural-born or naturalized subjects are to be deemed naturalized.

Persons resident in Victoria who have been naturalized in the United Kingdom, or in any British colony in Australia (including Tasmania and New Zealand), Africa, or America, may, if the Governor thinks fit, be naturalized in Victoria on exhibiting the certificate of naturalization, and stating in their memorials that such certificate has been obtained without fraud or intentional false statement, and that the signature and seal, if any, thereto, are, to the best of their belief, genuine.

Western Australia.

Aliens can become naturalized by local ordinance, which is introduced on their own application, and on payment of 5*l.* for expenses of preparing the bill. The ordinance does not become law until it has received the confirmation of the Crown. Ditto.

Naturalized aliens may hold lands and enjoy all the rights within the colony of a natural-born subject, except the right of holding any place or office of trust in the courts of law or connected with the treasury.

Regulations respecting the issue of Passports to Aliens naturalized in the Colonies.

In the case of Mr. Schloss, it was decided by Mr. Addington in 1852 that persons naturalized in the Colonies were entitled to passports in the same manner as persons naturalized in Great Britain; and this seems to have been the subsequent practice of the Foreign Office. Foreign Office Memorandum, May 15, 1852.

In 1863, however, a Circular was issued to Her Majesty's Representatives and Consuls, stating Circular, July 21, 1863.

"That the mere fact of a foreigner having been "naturalized in a British Colony does not entitle "such foreigner to British protection out of the "Colony in which the certificate of naturalization "may have been granted, nor does it entitle him "to claim a British passport."

The Colonial Office sent a similar Circular to the Governors of British Colonies.

Colonial Office, June 12, 1865.

In 1865 remonstrances were received from Canada against the operation of this rule, by which naturalized Canadians were precluded from obtaining passports, while passports were freely granted by the United States Government to naturalized Americans.

Law Officers, March 10, 1865.

The opinion of the Law Officers having been taken a short time previously, who were of opinion that a foreigner duly naturalized in a British Colony is entitled, as a subject of the Queen in that Colony, to the protection of the British Government in every other State but that in which he was born, and to which he owes a natural allegiance, it was arranged that Foreign Office passports should be granted to persons naturalized in the Colonies, on the recommendation of the Secretary of State for the Colonies, but limited to six months, as in the case of persons naturalized in Great Britain.

Circular, May 21, 1866.

Provision was likewise made for the renewal of these passports by Her Majesty's Diplomatic and Consular Agents abroad for such a period as would enable the bearer to reach England, or one of Her Majesty's other possessions, and for the same protection to be afforded to naturalized Colonials as to other naturalized British subjects.

The period for which these passports are granted has recently been extended to twelve months.

The following are the instructions given by the Colonial Office to the Governors of Colonies on this subject:

Rules and Regulations for Her Majesty's Colonial Service, 1867, p. 100.

"404. Governors are authorized to issue Passports for foreign travel to persons naturalized in the Colonies. The form of Passport, and a Memorandum to accompany it relative to the renewal of the Passport or its exchange for a Foreign Office Passport, are inserted in the Appendix. These Passports must be signed by the Officer administering the Government, and must contain an express declaration that the person receiving it is naturalized as a British subject, stating the period for which it is available, which must not exceed twelve months from the date of issue."

"*Form of Passport.*

"This Passport is granted to *A.B.*, naturalized as a British subject of , to enable him to travel in foreign parts, and is available for the period of months, from the day of , 18

"(Signed) *C.D.*
"Governor (or otherwise as the case may be) of the Colony of ."

"*Memorandum.*

"The Passport accompanying this Memorandum may, on the recommendation of the Secretary of State for the Colonies, be exchanged in London for a Foreign Office Passport, available for the un-expired portion of the period for which it was originally granted.

"It can be renewed only at the Foreign Office in London, on the recommendation of the Secretary of State for the Colonies; but it may be exchanged, if run out, at any of Her Majesty's Missions or Consulates in foreign countries, for a Passport strictly limited to such length of time as will enable the bearer to reach England or any of Her Majesty's possessions abroad. Such limited renewal may be effected once, and once only, by a British Minister or Consul in foreign ports. The Passport confers on the bearer no claim to British protection in the country of his birth."

Naturalization in India.

Act No. XXX. of 1852, Passed by the Governor-General of India in Council on the 16th of July 1852.

This Act is substantially the same as the English Act but with some slight additional reservations.

The certificate to be issued by the Government.

VI. If any material statement in the Memorial presented by the alien be false, the Government may cancel the certificate either wholly or in part.

VIII. The naturalized alien on taking the oath to be deemed a natural-born subject of Her Majesty as if he had been born within the said territories, and to be entitled, within the said territories, to all the rights, &c., of a subject of Her Majesty born therein.

Oath.

I, *A.B.*, of , do swear (or affirm) that I will be faithful and bear true allegiance to the Sovereign of the United Kingdom of Great Britain and Ireland and of those Territories as dependent thereon, and that I will be true and faithful to the East India Company.

(Signed) *A.B.*

So much of this Act as relates to the East India Company is now, of course, obsolete, but it does not appear that any Act has been substituted for it.

It seems that recourse is rarely had to it, at all events in some of the Presidencies, as Sir Henry Anderson, Secretary to the Judicial Department of the India Office, and who served for some time in India, says that he only recollects one case, that of a German, named Bubb, an advertising hatter at Calcutta.

EXPATRIATION.

Expatriation, in the sense of divestment of allegiance, is not recognized by the English law, (see the Chief Baron's ruling in the Warren case Addenda F).

"Blackstone's Commentaries," vol. i. p. 369.

"Allegiance, both expressed and implied, is however distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from all men born within the Sovereign's dominions immediately upon their birth. For, immediately upon their birth, they are under the protection of the Crown: at a time too when (during their infancy), they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude, which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor anything but the united concurrence of legislature, that is, of course, not the legislature of the adopted state, but the legislature of the state where the individual in question was born. An Englishman who removes to France or to China owes the same allegiance to the King of England there as at home, and 20 years hence as well as now, for it is a principle of universal law that the natural-born subject of one Prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former, *nemo potest exuere patriam;* for this natural allegiance was intrinsic and primitive and antecedent to the other, and cannot be divested without the concurrent act of that Prince to whom it was due. Indeed the natural-born subject of one Prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another, but it is his own act that brings him into these straits and difficulties, of owing service to two masters, and it is unreasonable that, by such voluntary act of his own, he should be able at pleasure to unloose those bands by which he is connected to his natural Prince . . . . . "

"Blackstone's Commentaries," vol. i. p. 370.

"*Local* allegiance is such as is due from an alien or stranger born, for so long a time as he continues within the King's dominion and protection, and it ceases the instant such stranger transfers himself from this kingdom to another. *Natural* allegiance

is *perpetual, local* allegiance is only *temporary*, and for this reason, evidently founded upon the nature of government, that allegiance is a debt due from the subject upon an implied contract with the Prince, that so long as the one affords protection, so long will the other demean himself faithfully. As therefore the Prince is always under a constant tie to protect his natural-born subjects at all times and in all countries, for this reason their allegiance due to him is equally universal and permanent. But on the other hand, as the Prince affords his protection to an alien only during his residence in this realm, the allegiance of an alien is confined in point of time, to the duration of such his residence, and in point of locality to the dominions of the British Empire."

Chitty's Commercial Law," vol. i. p. 118.

The extent to which the doctrine of natural allegiance could be carried is shown by a rather curious case quoted by Chitty :—

" The father of Joseph Celt and his wife who was *enceinte*, inhabiting Calais when it was taken by the French, fled into Flanders, and there the woman was delivered of the said Joseph, and it was adjudged that he shall be entitled to the privileges of a natural-born British subject, under the Act 25 Edward III. because the parents were born in Calais, and he himself was begotten there, though born in Flanders."

bid. p. 112.

However, Lord Coke states that " the time of his birth is of the essence of a subject born," so that it is unnecessary to go back beyond that period to decide a subject's allegiance.

bid. p. 130.

But though a natural-born subject cannot voluntarily emancipate himself from his natural allegiance so as to exempt himself from the duties incident thereto, yet he may by his violation of the law, forfeit many of the advantages of a natural-born subject, and place himself in the situation of an alien. Thus it was enacted, that if an English subject go beyond the seas, and there become a sworn subject to any foreign Prince or State, he shall, during his residence abroad, pay such impositions as aliens do, with a proviso, that if he returns and lives here he shall be restored to his liberties and privileges (14 and 15 Henry VIII. cap. 4), and a more recent statute provided, that if any artificer or manufacturer of Great Britain should go into a foreign State, and there exercise or teach his art to foreigners, and should not return within six months after warning from the British Minister or Ambassador, he should be deemed an alien (5 Geo. I. cap. 27).

By the Act 26 Geo. III. cap. 60, sec. 8, " No " subject of His Majesty whose usual residence is " in any country not under the dominion of His " Majesty, shall be deemed or entitled during the " time he shall continue so to reside, to be the " owner, in whole or in part of any British ship " authorized to be registered by that Act, unless he " be a member of some British factory, or agent for " or partner in any house or co-partnership actually " carrying on trade in Great Britain and Ireland."

' Abbott on the Law of Merchant Ships and Seamen," 7th edition, by Shee, cap. ii. p. 67.

" Under that statute it was held* that an occasional residence for the purpose of obtaining a colourable qualification would not give a title ; that no person was entitled who had not his *usual* residence in Great Britain or in the dominions belonging to the Crown, unless he was within some of the exceptions ; that if a man went to another country and there had a more usual residence than in this, he was no longer entitled to the same privileges, and that a person who was continually shifting his residence between the British dominions and the American States so as not to have what, under any extension, could be deemed an usual residence in the British dominions, did not come within the description of the statute."

* By Lord Stowell, in the case of the "Eleanor Hall," 1 Edwards, 135.

A question having been raised whether a British subject, admitted a burgher of Memel, could be considered as a Prussian for the purposes of the Navigation Act, so as to be master of a Prussian vessel it was decided by the Law Officers, as stated in an Order of the Board of Customs, dated the 9th August, 1816, that though a native British subject could not throw off his allegiance, yet he could by domicil in a foreign country, so incorporate himself therewith as to be regarded as an alien for commercial purposes.

" Chitty's Commercial Law," vol. i. p. 189.

But, where a Scotchman had been admitted a burgher of Stockholm, Sir Philip Yorke held that he could not be considered as a Swede in Great Britain, as he still continued a British mariner entitled to navigate a British vessel.

Ibid. p. 123.

See also the case of the " Ann." (Addenda G.)

On the other hand, in the case of Wilson and Marryatt, it was decided that a natural-born subject of England having been admitted a denizen of the United States of America, was entitled as such denizen to the benefit of the Treaty between England and the United States, which authorized the trade of Americans to the Territories of the British East India Company ; although as an English subject he would not have been permitted to carry on such a commerce.

" Abbott on the Law of Merchant Ships and Seamen," 7th edition, by Shee, cap. ii. p. 66.

By 3 and 4 Wm. IV. cap. 55. sec. 513, " The " owners must be subjects of Great Britain. No " foreigner may directly or indirectly have any part " or share in the ship. No person may be an owner " of any ship authorized to be registered, who has " taken the oath of allegiance to any foreign State, " except under the terms of some capitulation, un- " less he shall afterwards become a denizen or " naturalized subject of the United Kingdom, nor " any person not usually residing in any country " not under the dominion of His Majesty, unless he " be a member of some British factory, or agent for " or partner in a house or co-partnership actually " carrying on trade in Great Britain or Ireland."

The Merchant Shipping Act, 17 & 18 Vict. c. 104 (10th of August 1854), contains the following clause :

" *Description and Ownership of British Ships.*

" 18. No ship shall be deemed to be a British ship unless she belongs wholly to owners of the following description ; that is to say,

" (1.) Natural-born British subjects :

" Provided that no natural-born subject who has taken the oath of allegiance to any foreign Sovereign or State shall be entitled to be such owner as aforesaid unless he has, subsequently to taking such last-mentioned oath, taken the oath of allegiance to Her Majesty, and is and continues to be during the whole period of his so being an owner resident in some place within Her Majesty's dominions, or if not so resident, member of a British factory, or partner in a house actually carrying on business in the United Kingdom or in some other place within Her Majesty's dominions.

" (2.) Persons made denizens by letters of denization, or naturalized by or pursuant to any Act of the Imperial Legislature, or by or pursuant to any Act or Ordinance of the proper legislative authority in any British Possession :

" Provided that such persons are and continue to be during the whole period of their so being owners resident in some place within Her Majesty's dominions, or if not so resident, members of a British factory, or partners in a house actually carrying on business in the United Kingdom or in some other place within Her Majesty's dominions, and have taken the oath of allegiance to Her Majesty subsequently to the period of their being so made denizens or naturalized.

" (3.) Bodies corporate established under, subject to the laws of, and having their principal place of business in the United Kingdom or some British Possession."

This section of the Act is still in force.

Case of Æneas Macdonald.

This case has been so frequently referred to that it may be useful to give a brief account of it.

State Trials, Vol. xviii. p. 867.

"Æneas Macdonald was tried at the Court of King's Bench in 1747 before Lord Chief Justice Lee, for having been concerned in the rebellion of 1745. He pleaded that he was an alien, born in France, and had acted under a French commission, thereby entitling him to the privileges of the cartel between England and France for the exchange or ransom of prisoners.

"His counsel, however, apprehending that the weight of the evidence might be against them, as indeed it was, with regard to the place of the prisoner's birth, endeavoured to captivate the jury and bystanders by representing the great hardship of a prosecution of this kind against a person, who, admitting him to be a native of Great Britain, had received his education from his early infancy in France, and had spent his riper years in a profitable employment in that kingdom where all his hopes centered. And speaking of the doctrine of natural allegiance, they represented it as a slavish principle, not likely to prevail in these times. The court declared that it never was doubted that a subject born, taking a commission from a foreign Prince and committing high treason may be punished as a subject for that treason, notwithstanding his foreign commission. It is not in the power of any private subject to shake off his allegiance and to transfer it to a foreign Prince. Nor is it in the power of any foreign Prince by naturalizing or employing a subject of Great Britain to dissolve the bond of allegiance between that subject and the Crown."

The chief justice directed the jury that the only fact they had to try was whether Macdonald was a native of Great Britain, as the overt acts laid to his charge had been admitted by his counsel.

The jury found him guilty, but recommended him to mercy. He received sentence of death as in cases of high treason; but was afterwards pardoned on condition of his retiring out of the King's dominions and continuing abroad during his life.

Brakendridge's Miscellanies, p. 409, quoted in Mr. Caleb Cushing's opinion, Addenda A. p.

The leniency shown to him contrasts favourably with the treatment of Elijah Clark, a native of the United States, who was hung by the Americans as a traitor and spy in 1812, though he also set up the defence that he was an alien, having been domiciled in Canada.

PART II.—Laws of the United States.

Naturalization.

Tucker's "History of the United States," Vol i, pp. 652-658.

The Constitution of the United States, adopted on the 17th of September 1787, provides:—

"Article I, Section 8. The Congress shall have power . . . to establish an uniform rule of naturalization.

"Section 2. No person shall be a representative who shall not have . . . been seven years a citizen of the United States.

"Section 3. No person shall be a senator who shall not . . . have been nine years a citizen of the United States.

"Article II, Section 1. No person, except a natural-born citizen, or a citizen of the United States at the time of the adoption of this constitution, shall be eligible to the office of president.

"Article IV, Section 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

Wheaton's "Elements." Edition 1863. Note by Mr. Lawrence on Naturalization and Expatriation. Appendix pp. 900-901.

There have been several Acts of Congress enabling aliens to become naturalized.

The Act of March 26, 1790, required two years' residence in the United States: one year to have been passed within the State to whose Court of Record application for naturalization was made; the applicant to take an oath to support the Constitution of the United States.

The Act of January 29, 1795, required a preliminary declaration of intention to become a citizen, a renunciation of all foreign allegiance three years before admission, and a residence at the time of admission of five years within the United States, and of one year within the State.

By the Act of June 18, 1798, no alien could become a citizen unless he had declared his intention five years before his admission, and proved a residence of fourteen years in the United States, and five years in the State where he applied.

Lawrence's note, p. 901. "Government and Laws of the United States," by Professor W. Wedgwood, LL.D., New York, 1866, p. 413.

By the Act of April 14, 1802, "and which is the law now applicable in ordinary cases,—

"Any alien, being a free white person, may be admitted to become a citizen of the United States or any of them on the following conditions:

"1. That he shall have declared on oath or affirmation, before the supreme, superior, district, or circuit court of some one of the States or of the territorial districts of the United States, or a circuit or district court of the United States, three years at least before his admission, that it was *bonâ fide* his intention to become a citizen of the United States, and to renounce for ever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whatever, and particularly, by name, the prince, potentate, state, or sovereignty whereof such aliens may, at the time, be a citizen or subject.

"United States Statutes at Large" Vol. ii. p. 153. Seventh Congress, Sess i, chap 28. "An Act to establish an Uniform Rule of Naturalization and to repeal the Acts heretofore passed on that subject."

"2. That he shall, at the time of his application to be admitted, declare on oath or affirmation, before some one of the courts as aforesaid, that he will support the Constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty whatever, and particularly, by name, the prince, potentate, state, or sovereignty whereof he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court.

Addenda B. p. 85.

"3. That the court admitting such alien shall be satisfied that he has resided within the United States five years at least, and within the state or territory where such court is at the time held, one year at least; and it shall further appear to their satisfaction that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same, provided that the oath of the applicant shall in no case be allowed to prove his residence."

"4. That he shall renounce any title of nobility."

The Act further provides:

1. For saving existing rights.
2. For the registration of persons naturalized.
3. For Courts of Record.
4. Minor children of persons naturalized to be citizens if dwelling in the United States at the time of their father's naturalization.

"5. Children of citizens born out of the limits of the United States to be citizens, provided that the right of citizenship shall not descend to persons whose fathers have never resided within the United States."

6. No person proscribed or convicted of having joined the army of Great Britain during the late war to be admitted a citizen without the consent of his State Legislature.

7. Treatment of alien enemies resident within the United States.

By an Act of March 26, 1804, the widow and children of an alien who had declared his intention to became naturalized, become citizens upon taking the oaths prescribed by law.

atutes at ge." Vol. ii. 09. Twelfth gress, Sess. ap 42.

The Act of the 3rd of March 1813, for the regulation of seamen, which was passed with a view to the then existing war with England, provided (Section 12) that no person should be admitted as a citizen who had not resided within the United State for a continuous period of five years previous to his admission. This clause was repealed by an Act of June 26, 1848.

i. Vol. ix. 40. hteenth gress, Sess. i, . 186.

The Act, May 26, 1824, provides for the naturalization of minors, and further enacts that "a "declaration by any alien, being a free white "person, of his intended application to be admitted "a citizen of the United States made in the manner "and form specified in the first section of the Act "to which this is in addition, two years before his "admission, shall be a sufficient compliance with "said condition; anything in the said Act, or in any "subsequent Act, to the contrary notwithstanding.

irty-seventh ngress, Sess. ii, . 200. tatutes at ge," Vol. xii. 594.

An Army Act of the 17th of July 1862, contains the following clause, which deserves attention at the present time:—

"Section 21. And be it further enacted that any alien of the age of twenty-one years and upwards, who has enlisted or shall enlist in the armies of the United States, either the regular or the volunteer forces, and has been or shall be hereafter honourably discharged, may be admitted to become a citizen of the United States upon his petition, without any previous declaration of his intention, to become a citizen of the United States, and that he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and that the Court admitting such alien shall, in addition to such proof of residence and good moral character as is now provided by law, be satisfied by competent proof of such person having been honourably discharged from the service of the United States as aforesaid."

ddenda E. p. 87.

Attorney-General Bates, in a report dated the 29th of November 1862, thus explains the law of the United States with regard to the children of American citizens born in foreign countries:—

"In the United States it is too late now to deny "the political rights and obligations conferred and "imposed by nativity; for our laws do not pre- "tend to create or enact them, but do assume and "recognize them as things known to all men, "because pre-existent and natural; and therefore "things of which the laws must take cognizance. "Acting on this guiding thought, our constitution "does no more than grant to Congress (rather "than to any other department) the power to "'establish a *uniform rule* of naturalization.' "And our laws made in pursuance thereof indue "the made citizen with all the rights and obliga- "tions of a natural citizen. And so strongly was "Congress impressed with the great legal fact that "the child takes its political status in the nation "where it is born, that it was found necessary to "pass a law to prevent the *alienage* of children of "our known fellow-citizens who happen to be "born in foreign countries. The Act of February "10, 1855, 10 Statutes, 604, provides that "'persons,' (not *white* persons) 'heretofore "'born, and hereafter to be born, out of the "'limits and jurisdiction of the United States, "'whose fathers were or shall be at the time of "'their birth, citizens of the United States, shall "'be deemed and considered and are hereby "'declared to be citizens of the United States: "'*Provided, however,* That the rights of citizen- "'ship shall not descend to persons whose fathers "'never resided in the United States.'"

Sec. 2. *And be it further enacted,* "That any "woman who might lawfully be naturalized under "the existing laws, married, or who shall be "married to a citizen of the United States, shall "be deemed and taken to be a citizen."

"But for that Act, children of our citizens who "happen to be born at London, Paris, or Rome, "while their parents are there on a private visit "of pleasure or business, might be brought to the "native home of their parents, only to find that "they themselves were aliens in their father's "country, incapable of inheriting their father's "land, and with no right to demand the protection "of their father's government."

"That is the law of birth at the common law of "England, clear and unqualified; and now, both "in England and America, modified only by "Statutes, made from time to time, to meet "emergencies as they arise."

Expatriation.

It will have been seen that the Acts of Congress, here cited, deal only with the naturalization of aliens within the territory of the United States.

"There is no provision of Federal law which defines citizenship, and none which expressly forbids, or expressly authorizes, the expatriation of citizens of the United States." "Opinions of Attorneys-General of the United States," Vol. viii. p. 139.

The omission on the part of the Statutes of the United States to make provision for the voluntary relinquishment of allegiance by citizens is, of course, of considerable importance in regard to the pretensions which have been put forward by the Executive Government of that country to an absolute right of protection over naturalized aliens, even when within the country of their birth.

The question is dealt with at length in a Report drawn up by Mr. Caleb Cushing, Attorney-General of the United States, dated October 31, 1856.

This Report discusses the doctrines of allegiance and expatriation, reviews the cases bearing upon them which have been brought before the Supreme and District Courts, and cites the opinions of the principal legal authorities of the United States.

[As this report is the State Paper to which constant reference is made by Lawrence, Dana, and other subsequent writers, and is also of great interest, a copy of it is appended to this memorandum.] Addenda A.

Mr. Cushing thus sums up the views of the Supreme Court and its members:—

"Here . . . . the matter stands, unadjudicated as decision, but not undetermined as opinion. After carefully reviewing the whole subject, Chancellor Kent pronounces the better opinion to be, that a citizen cannot renounce his allegiance to the United States without permission of the Government to be declared by law (Commentaries, Vol. ii. p. 49). It is a significant fact, at all events, that, on so many occasions where the question presented itself, not one of the Judges of the Supreme Court has affirmed, while others have emphatically denied the unlimited right of expatriation from the United States."

Mr. Lawrence, in the Appendix to his edition of Wheaton of 1863, gives a valuable note, or rather essay, upon "Naturalization and Expatriation," in which he embodies the greater part of Mr. Cushing's report.

In this note Mr. Lawrence quotes, as an argument in support of the necessity for legislation on this subject in England and the United States, the following passage from Sir Travers Twiss' "Rights and duties of Nations in times of Peace": "Law of Nations," Vol. i. p. 281. Edition 1861.

"Natural allegiance, or the obligation of perpetual obedience to the Government of the country, wherein a man may happen to have been born, which he cannot forfeit or cancel, or vary by any change of time or place, or cir-

cumstance, is the creature of Civil Law and finds no countenance in the Law of Nations, as it is in direct conflict with the incontestable rule of that law, 'Extra territorium jus dicenti impune non paretur.'"

State Citizenship.

Besides the rights of national citizenship conferred by naturalization, there is a minor form of state-citizenship.

Mr. Cushing's Opinion, p. 140.

"The conditions of citizenship in the United States and of any one of the States are not identical; that is to say, it may happen that by the laws of a given State, a person shall be a citizen thereof and still not be a citizen of the United States. Nor does it follow, because he is a citizen of a given State by the very letter of its laws, that, therefore, he is of every or any other State. Persons may be, and in fact are, citizens of the State of Massachusetts, that is, invested with all the rights, political and municipal, which its institutions can bestow, without being citizens of the State of Virginia or of the United States."

Mr. Cushing's Opinion.

There are certain material advantages attached to citizenship. "Many ordinary municipal rights "are, by other laws, capable of being enjoyed by "citizens alone: such as the ownership of mer- "chant ships, the command and in part the man- "ning of such ships, and the purchase of public "lands by pre-emption. To this may be added, "that in many of the States the right to own land "within the same is, by their laws, restricted to "citizens of the United States."

By the Laws of New York, no person can hold a civil office, or vote at elections, who is not a citizen of that State.

"Manual of the Naturalization Laws," by a United State Lawyer, published at Baltimore, 1855, p. 60. (Lent by Mr. Wilkins, Her Majesty's Consul at Chicago,)

The right of voting at elections is restricted to national citizens in Alabama, Arkansas, Connecticut, California, Iowa, Louisiana, Mississippi, Missouri, Maine, Ohio, Rhode Island, Tennessee, and Utah.

In Indiana and Wisconsin aliens who have declared their intention to be naturalized are admitted as electors.

In the other States all *State* citizens are voters.

The term of residence required varies from six months to two years, and in some States there is a property qualification.

Most emigrants therefore get themselves constituted citizens of the States in which they settle as soon as they can.

The conditions on which State-citizenship is conferred vary greatly in the different States. In the more populous States the admission is restricted by regulations of greater or less severity, while in some of the Western States, and States where the capital and labour of emigrants are eagerly welcomed, the terms on which citizenship is granted are made as easy as possible. The result is, that aliens are often in the anomalous position of being citizens of a State for some time before they can become citizens of the United States.

During the late civil war all persons who had voted as State citizens were claimed by the United States' Government as liable to the conscription; and the Act of Congress of the 3rd of March 1863, expressly declared that the levy should include "all persons of foreign birth who shall have "declared on oath their intention to become "citizens."

Many of the persons thus forced into the army appealed to Her Majesty's Minister for protection, pleading that, as by the Constitution of the United States they were not citizens of that country, they must still be British subjects, and, as such, entitled to exemption from military service.

In order to explain the correspondence which ensued, as well as the difficulty which has occasionally arisen in other ways from this double citizenship, it has been necessary to notice it at some length, though in regard to international relations it would otherwise have no more importance than the Italian *cittadinanza* or any other system of territorial division for municipal or electoral purposes.

"Manual of Naturalization

It may be interesting to add that it is stated that in 1855 upwards of 2,500 names appeared in the Statute Books of New York State, of aliens authorized by Acts of the State Legislature to purchase and hold real property. "Among them "those of John Jacob Astor, Thomas Addis Emmet, "and others of note and eminence. These Acts "generally provided that the lands should escheat "if the said alien, if alive, was not within a limited "period naturalized." By the laws of New York, provision is made for persons to hold real property who have declared their intention of becoming naturalized.

Compiled from the Census of t United States, 1860, pages 620 621, 622, 623.

According to the Census of 1860, out of a total free population in the United States of 27,489,561, 4,136,175 were of foreign birth.

Birth-place:	
England - - -	431,692
Ireland - - -	1,611,304
Scotland - - -	108,518
Wales - - -	45,763
Australia - - -	1,419
British America - -	249,970
British, not specified -	1,802
	2,450,468

Total Germany, 1,301,136; of which Prussia, 227,661; Germany not specified, 598,382; France, 109,870.

Compiled fro the Census of the United States, 1860, p xxix.

The increase of population during the 10 years 1850-60, coming from Great Britain and Ireland, amounted to 858,267, of which Ireland furnished 649,585. During the same 10 years, the number of residents of foreign birth was nearly doubled, rising from 2,210,839 to 4,136,175; the total free population, in 1850, having been 19,987,571.

PART III.—Laws of other Countries.

FRANCE.

Code Napoléon: "Code Civil," liv. i. c. i.

The provisions of the Code Napoléon, March 8, 1803, are as follows:—

"Chapitre I.—*De la jouissance des Droits Civils.*

"7. L'exercice des droits civils est indépendant de la qualité de citoyen, laquelle ne s'acquiert et ne se conserve que conformément à la loi constitutionnelle.

"8. Tout Français jouira des droits civils.

"9. Tout individu né en France d'un étranger pourra, dans l'année qui suivra l'époque de sa majorité, réclamer la qualité de *Francais;* pourvu que, dans le cas où il residerait en France, il déclare que son intention est d'y fixer son domicile, et que dans le cas où il résiderait en pays étranger, il fasse sa soumission de fixer en France son domicile, et qu'il l'y établisse dans l'année, à compter de l'acte de soumission.

"10. Tout enfant né d'un Français en pays étranger est Français. Tout enfant né en pays étranger d'un Français qui aurait perdu la qualité de Français pourra toujours recouvrer cette qualité en remplissant les formalités prescrites par l'Article 9.

"11. L'étranger jouira en France des mêmes droits civils que ceux qui sont ou seront accordés aux Français par les Traités de la nation à laquelle cet étranger appartiendra.

"12. L'étrangère qui aura épousé un Français suivra la condition de son mari.

"13. L'étranger qui aura été admis par l'autorisation du Roi à établir son domicile en France y jouira de tous les droits civils tant qu'il continuera d'y résider.

"14. L'étranger, même non résidant en France, pourra être cité devant les tribunaux Français, pour l'exécution des obligations par lui contractées en France avec un Français; il pourra être traduit devant les tribunaux de France, pour les obligations par lui contractées en pays étranger envers des Français.

"15. Un Français pourra être traduit devant un tribunal de France pour des obligations par lui contractées en pays étranger, même avec un étranger.

"16. En toutes matières, autres que celles de commerce, l'étranger qui sera demandeur sera tenu de donner caution pour le paiement des frais et dommages-intérêts résultant du procès, à moins qu'il ne possède en France des immeubles d'une valeur suffisante pour assurer ce paiement.

"Chapitre II.—*De la Privation des Droits Civils.*

"Section I.—*De la Privation des Droits Civils par la Perte de la Qualité de Français.*

"17. La qualité de Français se perdra, 1°, par la naturalisation acquise en pays étranger; 2°, par l'acceptation, non autorisée par le Roi, de fonctions publiques conférées par un Gouvernement étranger; 3°, enfin, par tout établissement fait en pays étranger, sans esprit de retour. Les établissements de commerce ne pourront jamais être considérés comme ayant été faits sans esprit de retour.

"18. Le Français qui aura perdu sa qualité de Français pourra toujours la recouvrer, en rentrant en France avec l'autorisation du Roi, et en déclarant qu'il veut s'y fixer et qu'il renonce à toute distinction contraire à la loi Française.

"19. Une femme Française qui épousera un étranger suivra la condition de son mari. Si elle devient veuve, elle recouvrera la qualité de Française, pourvu qu'elle réside en France, ou qu'elle y rentre avec l'autorisation du Roi, et en déclarant qu'elle veut s'y fixer.

"20. Les individus qui recouvreront la qualité de Français, dans les cas prévus par les Articles 10, 18, et 19, ne pourront s'en prévaloir qu'après avoir rempli les conditions qui leur sont imposées par ces Articles, et seulement pour l'exercice des droits ouverts à leur profit depuis cette époque.

"21. Le Français qui, sans autorisation du Roi, prendrait du service militaire chez l'étranger, ou s'affilierait à une corporation militaire étrangère, perdra sa qualité de Français. Il ne pourra rentrer en France qu'avec la permission du Roi, et recouvrer la qualité de Français qu'en remplissant les conditions imposées à l'étranger pour devenir citoyen; le tout sans préjudice des peines prononcées par la loi criminelle contre les Français qui ont porté ou porteront les armes contre leur patrie."

Naturalization of Frenchmen Abroad.

An Imperial Decree of 1811 imposes severe penalties upon Frenchmen naturalized abroad without permission from their own Government.

It is a question whether this Decree is still in force, but it appears to have been acted upon in 1834; and it is referred to in an official communication from the French Government in 1859.

At all events it has never been formally abrogated, and its existence in the French Statute Book must be borne in mind when the liberality of the French law in recognizing expatriation is extolled.

The other disabilities mentioned in it having been abolished, the only penalty enacted by this Decree which could now be enforced is that of the 75th Article of the Penal Code: "Tout Français qui "aura porté les armes contre la France sera puni "de mort."

Les Cinq Codes: "Code Pénal," liv. iii. article 75.

Imperial Decree of the 26th of August 1811.

"Bulletin des Lois," vol. xlvii. p. 183.

"Titre I.—*Des Français naturalisés en Pays Etranger avec notre autorisation.*

"Article 1. Aucun Français ne peut être naturalisé en pays étranger sans notre autorisation.

"Art. 2. Notre autorisation sera accordée par des Lettres-Patentes dressées par notre Grand-Juge, signées de notre main, contre-signées par notre Ministre Secrétaire d'Etat, visées par notre cousin le Prince Archichancelier, insérées au Bulletiu des Lois, et enregistrées en la Cour Impériale du dernier domicile de celui qu'elles concernent.

"Art. 3. Les Français naturalisés ainsi en pays etranger jouiront du droit de posséder, de transmettre des propriétés, et de succéder, quand même les sujets du pays où ils seront naturalisés ne jouiraient pas de ces droits en France.

"Art. 4. Les enfants d'un Français naturalisé en pays étranger et qui sont nés dans ce pays sont étrangers.

"Ils pourront recouvrer la qualité de Français en remplissant les formalités prescrites par les Articles 9 et 10 du Code Napoléon.

"Néanmoins ils recueilleront les successions et exerceront tous les droits qui seront ouverts à leur profit pendant leur minorité, et dans les dix ans qui suivront leur majorité accomplie.

"Art. 5. Les Français naturalisés en pays étranger, même avec notre autorisation, ne pourront jamais porter les armes contre la France, sous peine d'être traduits devant nos cours et condamnés aux peines portées au Code Pénal, livre iii, Articles 75 et suivants.

"TITRE II.—*Des Français naturalisés en Pays Etranger sans notre autorisation.*

"Art. 6. Tout Français naturalisé en pays étranger sans notre autorisation encourra la perte de ses biens, qui seront confisqués : il n'aura plus le droit de succéder ; et toutes les successions qui viendront à lui échoir, passeront à celui qui est appelé après lui à les recueillir, pourvu qu'il soit régnicole.

"Art. 7. Il sera constaté par-devant la cour du dernier domicile du prévenu, à la diligence de notre Procureur-Général ou sur la requête de la partie civile intéressée, que l'individu s'étant fait naturaliser en pays étranger, sans notre autorisation, a perdu ses droits civils en France ; et en conséquence, la succession ouverte à son profit sera adjugée à qui de droit.

"Art. 8. Les individus dont la naturalisation en pays étranger sans notre autorisation aurait été constatée, ainsi qu'il est dit en l'Article précédent, et qui auraient reçu distinctement, ou par transmission, des titres institués par le Sénatus-Consulte du 14 Août, 1806, en seront déchus.

"Art. 9. Ces titres et les biens y attachés seront dévolus à la personne restée Française, appelée selon les lois, sauf les droits de la femme, qui seront réglés comme en cas de viduité.

"Art. 10. Si les individus mentionnés en l'Article 8 avaient reçu l'un de nos ordres, ils seront biffés des registres et états, et défenses leur seront faites d'en porter la décoration.

"Art. 11. Ceux qui étaient naturalisés en pays étranger, et contre lesquels il aura été procédé comme il est dit aux Articles 6 et 7 ci-dessus, s'ils sont trouvés sur le territoire de l'Empire, seront, pour la première fois, arrêtés et reconduits au-delà des frontières : en cas de récidive, ils seront poursuivis devant nos cours, et condamnés à être détenus pendant un temps qui ne pourra être moindre d'une année, ni excéder dix ans.

"Art. 12. Ils ne pourront être relevés des déchéances et affranchis des peines ci-dessus que par des lettres de relief accordées par nous en Conseil Privé, comme les lettres de grâce.

"Art. 13. Tout individu naturalisé en pays étranger sans notre autorisation, qui porterait les armes contre la France, sera puni conformément à l'Article 75 du Code Pénal."

The ninth Article of the Code Napoléon was modified by a Law of 1851 :—

"29–29 Janvier et 7 Février, 1851 (10e série, No. 2,730) (Article 9, C. N.)—Loi concernant les individus nés en France d'étrangers qui eux-mêmes y sont nés, et les enfants des étrangers naturalisés.

"Article 1. Est Français tout individu né en France d'un étranger qui lui-même y est né à moins que, dans l'année qui suivra l'époque de sa majorité, telle qu'elle est fixée par la loi Française, il ne réclame la qualité d'étranger par une déclaration faite, soit devant l'autorité municipale du lieu de sa résidence, soit devant les Agents Diplomatiques ou Consulaires accrédités en France par le Gouvernement étranger.

"2. L'Article 9 du Code Civil est applicable aux enfants de l'étranger naturalisé, quoique nés en pays étranger, s'ils étaient mineurs lors de la naturalisation. A l'égard des enfants nés en France ou à l'étranger, qui étaient majeurs à cette même époque, l'Article 9 du Code Civil leur est applicable dans l'année qui suivra celle de la dite naturalisation."

By the Law on the Army of 1831 (21st March, 1832), "Nul ne sera admis à servir dans les troupes Françaises s'il n'est Français."

This provision has led to much correspondence between France and other Powers, more especially the United States, respecting the right to exemption from the conscription, on their return to France, of Frenchmen naturalized abroad.

In 1859 M. Walewski furnished the American Chargé d'Affaires with an authoritative declaration of the views of the French Government on this point:

"Sir, Paris, November 25, 1859.

"I HAVE the honour to communicate to you the reply of the Government of the Emperor to the questions which the deceased Mr. Mason had put to him in his letter of the 27th July last, relative to Frenchmen emigrants to the United States who have there obtained letters of naturalization.

"After having set forth the principles of the American law in the matter of naturalization, Mr. Mason reduced his inquiry to a formula, as follows :—

"*First Question.*—Does the French legislation recognize in individuals, French by birth, the right to cause themselves to be naturalized as subjects or citizens of a foreign country, without preliminary authorization from the Government ?

"French legislation does not confer on a Frenchman the right to renounce his nationality, but he loses it by positive law (Article 7, Code Napoléon) through naturalization in a foreign country.

"That naturalization, by the terms of the Decree of August 26, 1811, may have grave consequences, provided for by that Decree, when it has not been authorized by the Government.

"Even in cases in which such authorization has been accorded, it effectively disperses the prejudicial results of an unauthorized naturalization, but expressly maintains the loss of nationality.

"*Second Question.*—Are Frenchmen by birth, but naturalized citizens of the United States, who return to France without having the intention to recover their nationality nor to establish themselves permanently, subject to the law of conscription ?

"The law of conscription imposes on every Frenchman the obligation of military service. It attaches to the fulfilment of this obligation a penal sanction.

"Therefore, the Frenchman who, before he had lost that quality, shall have emigrated, thus placing himself out of the way of the obligation of military service would assuredly be punishable on his return to France, even although he should have obtained a foreign naturalization, and he may be prosecuted, whether as refractory (Article 230 du Nouveau Code Militaire, Loi du Juin, 1859), or as a deserter (Articles 235, 236, 237, of same date).

"This, moreover, is recognized by the Government of the United States, as it is a sequence from the letter of Mr. Mason, that it refuses its protection to the Frenchman become a stranger, in the two cases following :

"1. If the obligation of military service be anterior to the epoch of emigration.

"2. If, before his emigration, the Frenchman had not satisfied the law of conscription. The question becomes more difficult when it treats of a man born abroad of French parents, and who, consequently, by the provisions of Article 10 of Code Napoléon, is himself a Frenchman, and bound to military service, in conformity with Article 6 of the Law of March 21, 1832.

"But if, in France, the quality of citizen is now actually acquired by parentage, yet, for a long time, nativity alone conferred it, and it may still be so in the United States. In such a case it would be hard to subject to French law an individual who should have fulfilled similar obligations towards the country in which he was born.

"*Third Question.*—Does the French law of conscription render the Frenchman born and resident in a foreign country subject to military service in the same degree as if he had not left the country of his birth, or as if he had not caused himself to be naturalized as a foreigner ?

"This question is disposed of by the solution which the Federal Government itself admits to the second.

"United States Senate Documents," 1859–60 vol. xi. p. 214.

"If, in effect, the Frenchman, before emigrating and causing himself to be naturalized in a foreign country, has not satisfied the obligation of military service, evidently he may be prosecuted in France, in case of his return, even though the return should be only accidental. Besides, he might, during his absence, have been sentenced for contumacy, and his presence in France would impose, as well on the public authority as himself, the duty of clearing off this contumacy.

"Such are the solutions which the three questions that the Legation of the United States has presented to me can receive. It is difficult, however, to treat them theoretically, without knowledge of the circumstances which may have given birth to them, which often are of a nature to draw out modifications of the application of strict law.

"I will add that all the points treated in the present despatch present veritable questions of State, upon which the Government of the Emperor can only express opinions, but the solutions belong exclusively to the Courts.

"Receive, &c.,

"WALEWSKI.

"Mr. Calhoun, Chargé d'Affaires of the
"United States at Paris."

It will be seen from M. Walewski's note that he considered that a Frenchman naturalized abroad was liable to the law of conscription on his return to France; but a case occurred in 1860 in which it was decided by a civil tribunal that naturalization in a foreign country exempted a Frenchman from the conscription.

The case, that of M. Zeiter, is frequently referred to in the correspondence, and is of importance as establishing a principle of French law.

It has never been published, but a copy has now been procured from Wissembourg, where the Judgment was delivered, and is printed in the Addenda (F).

These conscription cases are ordinarily dealt with by the local military tribunals (Conseils de Guerre), and there does not seem to have been any other instance of a recent decision on the subject by a Civil Court, nor does this Provincial Judgment appear to have been revised by a Superior Court.

Lord Lyons has been good enough to procure a report from M. Treitt, the Counsel to the Paris Embassy, upon the general question of the status in France of Frenchmen naturalized abroad, with reference especially to their liability to the conscription.

As this report gives a full explanation of the French Law and of the practice of the French Government, it is here inserted at length:—

"A Son Excellence Lord Lyons, Ambassadeur de
Sa Majesté Brittanique à Paris.

"My Lord, "Paris, le 26 Janvier 1868.

"Votre Excellence m'a demandé la copie d'un jugement rendu par le Tribunal Français de Wissembourg, en faveur de Michel Zeiter, né citoyen Français. Le jugement est cité par Laurence dans ses Notes sur Wheaton (édition de 1863) comme ayant déchargé Michel Zeiter de toutes les obligations qu'un Français doit à sa patrie, entre autres l'obligation du service militaire. Le motif de cette décision serait que Zeiter avait été naturalisé citoyen des Etats-Unis.

"Il est ajouté que ce jugement semble être une des rares décisions (si ce n'est la seule) où un Tribunal ait reconnu que la naturalisation d'un individu dans un pays étranger suffisait pour effacer les droits souverains de la mère-patrie et les obligations qu'il y a contractées par sa naissance.

"Par suite d'observations que j'eus l'honneur d'adresser à votre Excellence elle ma signalé une note que M. le Comte Walewski, Ministre des Affaires Etrangères en France, a adressée à M. Calhoun, Ministre Américain, à la date du 25 Novembre 1859, note qui a été publiée en 1860 parmi les documents distribués au Congrés des Etats-Unis.

"Dans cette note M. Walewski n'admet point qu'un citoyen Français puisse, par le seul fait de sa naturalisation à l'étranger, s'exonérer des obligations que lui imposent les lois de sa patrie, et se soustraire, entre autres charges, au service militaire. Dans ce dernier cas, dit le Ministre, ce Français réfractoire encourt les peines du Code Militaire (Article 230) relatives à l'insoumission. De plus, M. de Ministre Walewski vise le Décret Impérial du 26 Août, 1811, lequel applique des peines sévères aux Français qui se sont fait naturaliser étrangers sans l'autorisation du Gouvernement.

"Enfin votre Excellence a bien voulu encore me signaler le cas d'un nommé Alibert, insoumis de la classe de 1839, lequel a été, le 10 Octobre 1852, condamné à un mois de prison pour insoumission par le Conseil de Guerre de Marseille.

"Mais il a fait appel de cette sentence devant le Conseil de Revision de Toulon, et là, avec l'assistance du Consul Américain, il a excipé de sa naturalisation aux Etats-Unis, et il a été acquitté.

"En résumé votre Excellence m'a posé la question suivante:—

"'Quelle est la loi qui régit le Français qui s'est fait naturaliser étranger, après son retour en France?'

"La question est simple, mais la réponse sera nécessairement complexe.

"Voici d'abord la copie du jugement du Tribunal de Wissembourg, en date du 2 Juin 1860. [Vide Addenda F.]

"Comme on le voit, ce jugement constate uniquement que Zeiter a perdu la qualité de Français; la conséquence légale de cette constatation est qu'il ne peut pas servir dans les troupes Françaises; mais le jugement n'avait pas à se préoccuper des pénalités et des incapacités civiles que Zeiter pouvait avoir encourues, comme nous le verrons plus loin; cette décision est fondée en droit, comme plusieurs autres rendues par différents tribunaux dans des cas analogues, surtout depuis la guerre du Nord et du Sud, à cause de laquelle, bien des Français, naturalisés Américains, sont revenus en France.

"La naturalisation d'un Français, à l'étranger, quelle que soit cette nouvelle patrie, entraîne pour lui la perte de la qualité de Français, et celle-ci entraîne *ipso facto* l'incapacité pour le service militaire. C'est là aussi le cas Alibert; il aura justifié de sa qualité d'Américain, et aura été acquitté de la peine de l'insoumission, qui est de un mois à une année d'emprisonnement d'après l'Article 38 de la Loi de 1832 concernant l'armée. Cas Alibert.

"Les deux cas ci-dessus ne sont rapportés dans aucun recueil de jurisprudence: mais ils ne sont pas les seuls; il y en a une dizaine au Bureau de la Justice Militaire au Ministère de la Guerre.

"L'autorité militaire en France voit avec regret la facilité qu'ont les jeunes gens de s'exonérer du service militaire par une naturalisation à l'étranger, acquise depuis plus de trois ans. Jurisprudence du Ministère de la Guerre.

"Voici comment le Ministre de la Guerre procède aujourd'hui en cette matière.

"Quand un *insoumis* lui est signalé, il le traduit devant un Conseil de Guerre, car un insoumis est un soldat qui n'a pas rejoint son drapeau.

"Si l'insoumis excipe de sa naturalisation en pays étranger, le Conseil de Guerre surseoit à l'application de la peine et accorde au prévenu un délai pour faire constater par les tribunaux civils sa qualité d'étranger.

"S'il obtient un jugement déclarant qu'il a perdu sa qualité de Français, le Conseil de Guerre l'acquitte, mais seulement quand sa naturalisation est *antérieure à trois années;* sinon les juges lui appliquent la peine de l'insoumission: en effet, l'insoumission est un *délit successif*, c'est-à-dire, Prescription du délit d'insoumission.

qu'il ne peut se prescrire (se pardonner) par aucun laps de temps, qu'il dure aussi longtemps que l'insoumission elle-même, et ne finit que quand l'insoumission *cesse*. Or, la jurisprudence des Conseils de Guerre est que l'insoumission *cesse* le jour de la naturalisation en pays étranger. Dès ce jour, la prescription court contre le délit d'insoumission ; alors ce délit, comme tous les autres délits, se prescrit par trois ans, et l'insoumis dont la naturalisation remonte à plus de trois ans n'encourt plus aucune peine. Si, au contraire, la naturalisation n'a pas trois années de date, l'ex-Français est traité comme un insoumis et puni lors même qu'il serait citoyen d'un autre pays, quelqu'il soit.

"Ainsi pour échapper à la peine de l'insoumission, l'ex-Français est obligé de passer au moins trois années loin de la France ; s'il revient avant ce délai, il risque que les Conseils de Guerre lui appliquent une peine de un mois à un an de prison, car il est encore en état d'insoumission.

Libération de l'insoumis.

"Il ne faut pas oublier de dire que quand, dans ce cas, l'insoumis a fait sa peine, il est libre, et sa qualité d'étranger empêche qu'il soit incorporé dans l'armée Française.

"Telles sont les regles que suit le Bureau de la Justice Militaire au Ministère de la Guerre.

Garde Nationale.

"Les choses se passent à peu près de même pour la garde nationale. Là il existe des Conseils de Recensement.

"Ces Conseils ont pour mission de statuer sur les motifs d'exemption des citoyens qui refusent le service.

"Or, il arrive souvent (et cela est à ma connaissance personnelle) que des Français, appelés au service de la garde nationale, ont opposé des lettres de naturalisation Américaine ou autre; en présence d'un pareil document ces individus ont été déclarés exempts du service à cause de leur extranéité. Du reste, un avis du Conseil d'Etat du 18 Novembre, 1842 (affaire Vignié), a consacré cette jurisprudence.

"De toutes les observations qui précèdent que conclure ? C'est que le Français peut, en se faisant naturaliser à l'étranger, se soustraire aux obligations que lui impose la mère-patrie.

"Cette conséquence découle du droit commun et du droit exceptionnel.

Droit commun.

"En effet l'Article 17 du Code Civil dit en termes formels que la qualité de Français se perd par la naturalisation *acquise* en pays étranger. Il résulte des discussions du Législature de 1803, que le mot *acquise* s'appliquait à un acte d'expresse volonté, accompli selon les *formes légales* de la nouvelle patrie, et ayant pour but de renoncer *proprio motu* à la qualité de Français. (Locré, "Esprit du Code Civil," vol. 1er, page 333.)

"Le Code Civil permet donc aux Français d'acquérir une nationalité étrangère. C'est, en effet, un principe inhérent à la liberté humaine, un principe de droit naturel, qu'un individu puisse quitter le sol sur lequel l'a jeté le hasard de sa naissance. Ce principe est admis par tous les publicistes depuis Cicéron* jusqu'à nos jours. Les lois Françaises en contiennent maintes fois l'énonciation. Cependant en Prusse la naturalisation à l'étranger est soumise, dit-on, à l'autorisation préalable du Gouvernement. (Code Prussien, Article 2, livre 17, § 127.)

"Mais en France, d'après le Code Civil, qui est le droit commun, le droit de se faire naturaliser à l'étranger est absolu.

Droit exception.

"Le 26 Août 1811, l'Empereur Napoléon I promulgua un Décret relatif à la naturalisation des Français à l'étranger.

"L'Article 1 de ce Décret est ainsi conçu :

"'Aucun Français ne peut être naturalisé en pays étranger, sans notre autorisation.'

"Les Articles suivants mentionnent les droits civils dont les Français naturalisés en pays étranger avec autorisation continueront de jouir en France.

"Puis l'Article 6 s'exprime ainsi :—

"Article 6. 'Tout Français naturalisé en pays étranger sans notre autorisation encourra la perte de ses biens, qui seront confisqués ; il n'aura plus le droit de succéder, et toutes les successions qui viendront à lui échoir passeront à celui qui est appelé à les recueillir après lui, pourvu qu'il soit régnicole.'

"Enfin l'Article 11 donne au Gouvernement la faculté d'expulser de la France le Français naturalisé en pays étranger sans autorisation ; et en cas de retour sur le territoire de l'empire une seconde fois, il peut être condamné à une peine de une à dix années d'emprisonnement.

"Ce Décret a été, dit-on, inspiré à Napoléon I par le ressentiment qu'il éprouvait de voir chez les nations ennemies et dans les armées étrangères des Français rebelles à l'empire. C'est ainsi qu'on explique la sévérité de ce Décret, qui a été l'objet des plus vives attaques. D'abord on lui a reproché d'être inconstitutionnel, parcequ'il a été fait et promulgué sans le concours du Corps Législatif, contrairement aux Constitutions Impériales; aussi, depuis la chûte du premier empire, plusieurs écrivains ont soutenu que ce Décret est tombé en désuétude. Il y a même des actes du Gouvernement de la Restauration qui ont annulé des jugements rendus en vertu de ce Décret. (Arrêts du Conseil d'Etat du 19 Juin 1814, insérés au Bulletin des Lois.)

"Cependant un plus grand nombre d'auteurs ont écrit que ce Décret avait encore force de loi, par le motif qu'il n'avait jamais été attaqué et annulé comme inconstitutionnel par le Corps Legislatif. De plus, de nombreux arrêts ont jugé que les Décrets Impériaux promulgués et exécutés comme lois du temps de l'Empire sont restés en vigueur dans toutes leurs dispositions qui n'ont pas été abrogées par des lois postérieures. En effet, le Décret de 1811 a été appliqué dans des cas de succession de Français qui s'étaient fait naturaliser à l'étranger sans autorisation.*

"Mais ce Décret n'en est pas moins une violation de la loi naturelle, en frappant de peines sévères la naturalisation à l'étranger, alors que tout les publicistes proclament le droit qu'a tout homme de changer de patrie.

"Aujourd'hui ce Décret est paralysé dans son application ; en effet, la confiscation des biens a été abolie par la Charte de 1814. Puis est venue la Loi de 1819 (14 Juillet), qui place, *quant aux biens et aux successions*, tous les étrangers dans les *mêmes droits* que les Français, sans distinction entre les étrangers d'origine et les étrangers par naturalisation. Un arrêt solemnel de la Cour de Paris a jugé que ce Décret n'est plus applicable au droit de succéder.†

"Les annales de la jurisprudence ne fournissent depuis plus de vingt ans pas un seul cas où, soit le Gouvernement, soit des parties intéressées dans des successions, aient provoqué l'application du Décret de 1811. Je crois que si le cas se présentait, les Cours hésiteraient beaucoup avant d'appliquer les dispositions si rigoureuses de cette législation exceptionnelle.

"Mais que d'incertitudes en cette matière, si importante puis qu'elle touche au status personnel!

"Remarquons cependant que le Décret du 26 Août 1811 (qu'il soit encore en vigueur ou qu'il soit tombé en désuétude) n'annule pas les naturalisations à l'étranger sans autorisation ; il les punit, mais il les laisse subsister. Le Français a donc une

* Ciceron, "Oratio pro Cornelio Balbo," c. 13 ; Grotius, lib. ii. et v. § 24; Puffendorff, lib. viii. c. 11. § 2; Merlin, "Répertoire Général," verbo "Souveraineté," § 4; Wolf, 76 partie, p. 187 ; "Constitution Française de Frimaire, An 8," dans son Article 4 ; Toullier, "Code Civil," tome i. No. 266; &c.

* Voyez, entre autres, un Arrêt de la Cour de Pau, de 19 Mars 1834. "Collection des Arrêts de Dalloz," Année 1835, 2me Partie, p. 38.

† Arrêt du 1 Février, 1836. "Collection des Arrêts de Dalloz" Année 1836, 2e partie, p. 71.

nouvelle patrie, à laquelle il a été obligé de prêter serment. Personne ne peut avoir deux patries.* L'intérêt général des nations exige qu'on n'ait pas deux patries.†

"La patrie d'adoption efface la mère-patrie; dans mon opinion, l'ex-Français est dégagé de ses obligations envers cette dernière. Le Gouvernement Anglais en délivrant des lettres de naturalisation aux étrangers, les avertit en même temps qu'il n'entend point les dégager de leurs obligations envers leur mère-patrie.

"C'est là un acte de prudence. Mais la loi Française est muette sur les droits qu'elle retient contre les individus qui se font naturaliser au dehors sans autorisation. Elle les assimile aux étrangers *quant aux droits civils.* La loi Française rompt ainsi elle-même tous les liens qui rattachent un ex-Français à la mère-patrie. En dehors de la confiscation des biens et de la déchéance du droit de succéder en France—pénalités de 1811, aujourd'hui inapplicables et inappliquées—la loi n'impose à l'ex-Français que l'obligation de ne jamais porter les armes contre la France, sous peine de mort.‡

"Le Français qui renonce à sa qualité sait les droits dont il sera privé en France. Les tribunaux peuvent lui refuser leur justice dans ses débats avec des étrangers. S'il est plaignant ou demandeur, il peut être soumis à la caution *judicatum solvi.* Il ne jouit plus d'aucun droit politique ou municipal. Il est incapable de fonctions publiques et de l'exercice de certaines professions; enfin, pour abréger cette nomenclature, il peut être expulsé du territoire Français, comme tous autres étrangers, par simple mesure de police.§

"Le Français a du calculer les inconvénients et les avantages de sa naturalisation à l'étranger. Il est exonéré des charges imposés par la mère-patrie.

"Cet état des choses est fâcheux; ainsi, pour se faire naturaliser Suisse, il suffit d'un an de séjour dans le pays et du paiement de quelques francs. C'est une grande facilité donnée aux jeunes Français que veulent échapper à la loi militaire. Ce point mériterait l'attention du législateur Français, mais en ce moment il faut prendre la loi telle qu'elle est, et dire que la naturalisation à l'étranger dégage le Français de ses obligations envers la France. Les jugements des tribunaux ne font que constater l'extranéité; les conséquences de l'extranéité découlent des lois elles-mêmes; l'une de ces conséquences est l'exonération du service militaire.

"Je crois avoir ainsi répondu en tous points à la question que votre Excellence m'a posée; je l'ai dégagée de toutes les questions accessoires que la perte de la qualité de Français fait surgir, mais qui auraient obscurci la matière. En résumé, je suis amené à conclure que La France n'impose à l'ex-Français d'autre obligation que de ne pas porter les armes contre elle.

"Je me permets d'ajouter que cette conclusion choque mon sentiment intime; je regrette de voir une simple naturalisation à l'étranger anéantir toutes les obligations que l'on doit à la mère-patrie. Mais les questions de droit ne se résolvent pas avec le sentiment seulement; c'est avec la loi telle qu'elle est et non telle qu'elle devrait être.

"Agréez, &c.
(Signé) "TREITT,
"Avocat à la Cour Impériale,
"Conseil à l'Ambassade Anglaise.
"Paris le 26 Janvier, 1868."

Naturalization of Aliens in France.

Sir R. Phillimore, "International Law," vol. i. p. 350.

Under the old law of France, the Dutch and Swiss and other nations had, by virtue of Treaties, the rights of natives (*indigenatûs*); and by the Bourbon Family Compact of 1761, a similar privilege was conceded to Spanish subjects.

Fœlix, "Droit International Privé," Edition Demangeat, 1856, tom. i. s. 11. Mr. Ward and Mr. McGregor's evidence before the Alien Committee.

The Law of May 2, 1790, provided—

"Tous ceux qui, nés hors du royaume de parents étrangers, sont établis en France, seront réputés Français et admis, en prêtant le serment civique, à l'exercice des droits de citoyen actif, après cinq ans de domicile continue dans le royaume, s'ils ont, en outre, acquit des immeubles, ou épousé une Française, ou formé un établissement de commerce, ou reçu dans quelque ville des lettres de bourgeoisie."

The Constitution of the 3rd of September 1791, "permet au pouvoir législatif de délivrer à un "étranger, pour des considérations importantes, un "acte de naturalisation, á la charge seulement de "la résidence et du serment."

Thus was established the system of "grande et petite naturalisation," which, with various modifications, has continued in force up to the accession of the present Emperor.

The Constitution of 1793 did away with the oath, and declared French citizens all aliens aged 21 who had been domiciled in France for one year, and who lived by labour.

The Constitution of 1795 abrogated that of 1793, and made it a condition of naturalization that an alien should have previously declared his intention to domicile himself in France.

By the terms of the 3rd Article of the Constitution of 1801, "un étranger devient citoyen Français "lorsque, après avoir atteint l'âge de 21 ans ac- "complis, et avoir déclaré l'intention de se fixer "en France, il y a résidé pendant dix ans consécu- "tives."

By a Decree of the Senate of 1804, confirmed by a Decree of the 17th of February 1808, the Government was authorized to confer the quality of French citizen, after one year's residence, on any alien who had rendered important services to France, thus reviving the "grande naturalisation" of 1790, but without requiring an oath.

By an Ordinance of the 4th of June 1814, Article 1, "conformément aux anciennes Consti- "tutions Francaises, aucun étranger ne pourra "siéger, à compter de ce jour, ni dans la Chambre "des Pairs ni dans celle des Députés, à moins que, "par l'importants services rendus á l'Etat, il n'ait "obtenu de nous (du Roi) des lettres de naturali- "sation vérifiés par les deux Chambres."

The privilege of "grande naturalisation" has been conferred on Benjamin Constant, and other distinguished foreigners.

These laws were consolidated by the Law of the 3rd of December 1849.

"Bulletin des Lois," vol. clxvii. p. 545.

"Article 1. Le Président de la République statuera sur les demandes en naturalization.

"La naturalization ne pourra être accordée qu'après enquête faite par le Gouvernement relativement à la moralité de l'étranger, et sur l'avis favorable du Conseil d'Etat.

"L'étranger devra, en outre, réunir les deux conditions suivantes:—

"1. D'avoir, après l'âge de vingt et un ans accomplis, obtenu l'autorisation d'établir son domicile en France, conformément à l'Article 13 du Code Civil.

"2. D'avoir résidé pendant dix ans en France depuis cette autorisation.

"L'étranger naturalisé ne jouira du droit d'éligibilité à l'Assemblée Nationale qu'en vertu d'une loi.

"2. Néanmoins, le délai de dix ans pourra être réduit à une année en faveur des étrangers qui auront rendu à la France des services importants, ou qui auront apporté en France, soit une industrie, soit des inventions utiles, soit des talents distingués, ou qui auront formé de grands établissements.

"3. Tant que la naturalisation n'aura pas été prononcée, l'autorisation accordée à l'étranger d'établir son domicile en France pourra toujours

* "Exposé des Motifs du Premier Titre du Code Civil." 1803.

† "Répertoire Général de Merlin," verbo 'Loi,' § 6.

‡ "Article 75 du Code Pénal; et Article 11 du Décret du 26 Aout, 1811; Articles 21 et 22 du Code Civil.

§ Article 13, Loi du 3 Décembre 1849, sur les etrangers.

être révoquée ou modifiée par décision du Gouvernement, qui devra prendre l'avis du Conseil d'Etat.

"4. Les dispositions de la loi du 14 Octobre 1814, concernant les habitants des Départements réunis à la France ne pourront plus être appliquées à l'avenir.

"5. Les dispositions qui précèdent ne portent aucune atteinte aux droits d'éligibilité à l'Assemblée Nationale acquis aux étrangers naturalisés, avant la promulgation de la présente Loi.

"6. L'étranger qui aurait fait, avant la promulgation de la présente Loi, la déclaration prescrite par l'Article 3 de la Constitution de l'an VIII, pourra, après une résidence de dix années, obtenir la naturalisation suivant la forme indiquée par l'Article 1.

"7. Le Ministre de l'Intérieur pourra, par mesure de police, enjoindre à tout étranger voyageant ou résidant en France, de sortir immédiatement du territoire Français, et le faire conduire à la frontière.

"Il aura le même droit à l'égard de l'étranger qui aura obtenu l'autorisation d'établir son domicile en France; mais après un delai de deux mois, la mesure cessera d'avoir effet, si l'autorisation n'a pas été révoquée suivant la forme indiquée dans l'Article 3.

"Dans les Départements frontières, le Préfet aura le même droit à l'égard de l'étranger non résidant, à la charge d'en référer immédiatement au Ministre de l'Intérieur.

"8. Tout étranger qui se serait soustrait à l'exécution des mesures énoncées dans l'Article précédent ou dans l'Article 272 du Code Pénal, ou qui, après être sortis de France par suite de ces mesures, y serait rentré sans la permission du Gouvernement, sera traduit devant les tribunaux et condamné à un emprisonnement d'un mois à six mois.

"Après l'expiration de sa peine, il sera conduit à la frontière.

"Les peines prononcées par la présente Loi pourront être réduites conformément aux dispositions de l'Article 463 du Code Pénal."

On the 29th of June 1867 a law was passed reducing the term of residence required from 10 to three years:—

"Art. 1. Les Articles 1 et 2 de la Loi du 3 Décembre 1849, sont remplacés par les disposition suivantes:

"Art. 1. L'étranger qui, après l'âge de vingt et un ans accomplis, a, conformément à l'Article 13 du Code Napoléon, obtenu l'autorisation d'établir son domicile en France, et y a résidé pendant trois années, peut être admis à jouir de tous les droits de citoyen Français.

"Les trois années courront à partir du jour où la demande d'autorisation aura été enregistrée au Ministère de la Justice.

"Est assimilé à la résidence en France le séjour en pays étranger pour l'exercice d'une fonction conférée par le Gouvernement Français.

"Il est statué sur la demande en naturalisation, après enquête sur la moralité de l'étranger, par un décret de l'Empereur, rendu sur le rapport du Ministre de la Justice, le Conseil d'Etat entendu.

"Art. 2. Le délai de trois ans, fixé par l'Article précédent, pourra être réduit à une seule année en faveur des étrangers qui auront rendu à la France des services importants, qui auront introduit en France soit une industrie, soit des inventions utiles, qui y auront apporté des talents distingués, qui y auront formé de grands établissements ou créé de grandes exploitations agricoles.

"Art. 2. L'Article 5 de la Loi du 3 Décembre, 1849, est abrogé."

It will be seen, therefore, that there are two forms of naturalisation in France,

"La grande naturalisation,"* which confers the privilege of sitting in the Chambers, and which corresponds in some measure to the former English form of special naturalization by Act of Parliament repealing the disabilities of previous Acts in favour of a particular person, as was done in the case of Prince Albert, and to the present naturalization by Act of Parliament, as in the Bischoffsheim case.

"La petite naturalisation" corresponds with our naturalization by certificate from the Secretary of State, and is granted by *lettres de déclaration de naturalité* to aliens who have complied with the conditions of the law. The alien is supposed to have resided in France with the permission of the Government, from the fact of his name and domicile having been registered with the Ministry of the Interior, as required by the Police Regulations from all residents.

"Aliens Committee," p. 30. Mr. McGregor.

Debate in Corps Législatif on the Army Bill, December 1867.

In the recent discussion on the law for the reorganization of the army, M. des Rotours proposed the following amendment to the first clause of the Bill:—

Lord Lyons, No. 228; Dec. 31, 1867. "Moniteur," Dec. 31, 1867.

"Les individus nés en France de parents étrangers et y ayant leur résidence seront soumis à la loi du recrutement dans l'année qui suivra leur majorité.

"Ceux d'entre eux qui voudront conserver leur qualité d'étrangers en feront la déclaration et seront admis dans la légion étrangère."

Maréchal Niel, the Minister of War, spoke in favour of the principle of this amendment, and stated that the conscription ought at all events to be extended to the sons born in France of aliens themselves born in France, and who by the Law of 1851 were declared to be Frenchmen, unless they selected the nationality of their fathers on attaining their majority.

Objection was, however, taken to making such an alteration in the laws affecting the nationality of aliens by means of a clause introduced into an Army Bill; and, on M. Baroche, Minister of Justice, undertaking that the matter should receive the careful attention of the Government, M. des Rotours withdrew his amendment.

In Lord Cowley's No. 176; June 22, 1861.

Nombre des sujets Anglais qui ont obtenu de 1851 à 1861 l'autorisation d'établir leur domicile en France, et de ceux qui, pendant la même periode, ont été naturalisés Français.

Années.	Admission à domicile.	Naturalizations.
1851 - -	8	—
1852 - -	6	—
1853 - -	6	1
1854 - -	6	—
1855 - -	5	1
1856 - -	3	—
1857 - -	9	—
1858 - -	24	—
1859 - -	13	—
1860 - -	9	2
1861, Janvier à Avril	3	—
	92	4

(For further information respecting French naturalization, see Fœlix, "Droit International Privé," already cited, and "Revue de Droit Français et Etrangers," par MM. Fœlix, Duvergier,

* M. Dumangeat in his note to M. Fœlix's "Droit International Privé" doubts whether "la grande naturalisation" still exists, as by the Decree of February 2, 1852, all electors are eligible to seats in the Corps Législatif, and the Senate is composed of such citizens as the Emperor may please to select; and he cites Prince Poniatowski as an instance of a citizen naturalized by Imperial Decree and promoted to the Senate without any special law.

&c., vol. xii. p. 321 ; Article, " De la Naturalisation collective et de la perte collective de la qualité de Français," par M. Fœlix, and vol. x. p. 446 ; " Des Effets de la Naturalisation," par M. Fœlix ; and Dictionnaire de Droit," par M. Dalloz, " Naturalisation.")

PRUSSIA.

Naturalization of Aliens in Prussia.

Fœlix, " Droit International Privé," vol. i. p. 98.

" En Prusse, l'étranger acquiert le droit de citoyen par sa nomination à une fonction publique. Aussi la Loi du 31 Décembre 1842, donne aux autorités administratives supérieures (régences) le pouvoir d'accorder la naturalisation à l'étranger qui justifie d'une bonne conduite et de moyens d'existence. La loi excepte seulement les Juifs, les sujets d'un Etat faisant partie de la Confédération Germanique, les mineurs et autres personnes incapables de disposer ; à leur égard, elle contient des dispositions particulières.

" La femme étrangère acquiert le droit de sujet Prussien par son mariage avec un Prussien."

Provision was made by the Constitution of the Germanic Confederation for the reciprocal admission of the subjects of one State to the privileges of citizenship in the other States.

Expatriation.

Extract from the Laws of Prussia, of December 31, 1842, concerning the loss of the quality of a Prussian subject.

§ 15. The quality of a Prussian subject is lost :

1. By discharge upon the subject's request.
2. By sentence of the competent authority.
3. By living 10 years in a foreign country.
4. By the marriage of a female Prussian subject with a foreigner.

§ 16. The discharge has to be asked for from the police authority of the province in which the subject's domicile is situated, and is effected by a document made out by the same authority.

§ 17. The discharge cannot be granted:

(1.) To male subjects who are between seventeen and twenty-five years of age, until they have got a certificate of the military commission of recruitment of their district, proving that their application for discharge is not made merely to avoid the fulfilling of their military duty in the standing army.

(2.) To actual soldiers, belonging either to the standing army or to the reserve ; to officers of the militia and to public functionaries, before their being discharged from service.

(3.) To subjects having formerly served as officers in the standing army or the militia, or having been appointed military employés, with the rank of officers, or civil functionaries, before they have got the consent of their former chief.

(4.) To the persons belonging to the militia, not being officers, after their having been convoked for actual service.

§ 18. To subjects wishing to emigrate into a State of the German Confederacy, the discharge may be refused if they cannot prove that the said state is willing to receive them.—(See Act of the German Confederation, Art. 18, No. 2, lit. A.)

§ 19. For other reasons than those specified in §§ 17 and 18, the discharge cannot be refused in time of peace. For the time of war, special regulations will be made.

§ 20. The document of discharge effects, at the moment of its delivery, the loss of the quality as Prussian subject.

§ 21. If there is no special exception, the discharge comprehends also the wife and the minor children that are still under their father's authority.

§ 22. Subjects living in a foreign country may lose their quality as Prussians by a declaration of the police authority of Prussia, if they do not obey, within the time fixed to them, the express summons for returning to their country.

§ 23. Subjects who either—

(1.) Leave our states without permission, and do not return within 10 years, or—

(2.) Leave our states with permission, but do not return within 10 years after the expiration of the term granted by the said permission, lose their quality as Prussian subjects.

§ 24. *Entering into public service in a foreign state.*

The entering of a subject into public service in a foreign state is allowed only after his discharge (see § 20) has been granted to him. Anybody who has obtained it, is permitted to do so, without restriction.

§ 25. A subject who—

(1.) Either takes public service in a foreign state with our immediate permission,—

(2.) Or is appointed in our states by a foreign power, in an office established with our permission, as, for instance, that of consul, commercial agent, &c., remaining in his quality as a Prussian.

§ 26. *General disposition.*

Subjects who emigrate without having obtained their discharge, or violate, by their entering into public service in a foreign state, the disposition of § 24, are to be punished according to the laws existing in that respect.

Given under our hand and seal, Berlin, this 31st of December 1842.

FREDERICK WILLIAM.

(L. S.)

Extract from the Constitution of Prussia of 1850.

TIT. I. Rights of the Prussians.

Art. 1. The right to emigrate cannot be restricted by the state, except with respect to the duty of military service.

See also a memorandum furnished to the United States' Minister at Berlin by the Prussian Government in 1859. (Appendix G.)

AUSTRIA.

Naturalization of Aliens.

In Austria an alien acquires the rights of citizenship by being named a public functionary. The Government can also confer those rights upon an alien who has been previously authorized to exercise a profession, after 10 years' residence. Fœlix, vol. i. p. 98.

No one can exercise any profession in Austria without the permission of the authorities.

Mere admission into the military service does not give the right of naturalization.

The wife of an Austrian becomes an Austrian subject by her marriage.

Expatriation.

Emigration is not permitted without the consent of the proper authorities; but the emigrant who has obtained permission and who quits the empire *sine animo revertendi* forfeits his privileges as an Austrian subject.

For a fuller account of the Austrian laws, see the Report by the Counsel of the Vienna Embassy.* (Addenda H.)

* This Report was procured by the Hon. H. Wodehouse, 2nd Secretary at Vienna.

BAVARIA.

Naturalization of Aliens.

Naturalization is acquired,—

Fœlix, vol. 1. p. 99. Sir R. Phillimore, vol. 1. p. 352.

1. By the marriage of a foreign woman with a Bavarian;

2. By domicil, on affording proof of having been liberated from personal allegiance to a foreign State;

3. By Royal Decree, under the supervision of the Council of State.

Expatriation.

By naturalization in a foreign country without having previously obtained authorization from the King:

By emigration;

By the marriage of a Bavarian woman with an alien.

WURTEMBERG.

Naturalization.

Fœlix, vol. 1. p. 99.

An alien must belong to a commune in order to have the rights of citizenship, unless he has been named to some public employment.

Expatriation.

The rights of citizenship are lost by emigration under the authority of Government and by accepting foreign service.

NETHERLANDS.

Ibid. p. 100.

The power of conferring naturalization rests with the King. (Articles 9 and 10 of the Constitution of 1815.)

RUSSIA.

Fœlix, vol. 1. p. 100.

An alien becomes naturalized by taking an oath of fidelity to the Emperor; but he can, if he wishes it, renounce his naturalization and return to his native country.

Naturalization Law of the 6th of March 1864.*

Lord Napier, No. 186; March 30, 1864.

(A.)—1. A foreigner must be domiciled in the Empire before he can be admitted as a Russian subject.

2. A foreigner wishing to become domiciled in Russia must inform the Governor of the Province in which he wishes to reside of his desire to do so explaining the nature of his occupation in his own country, and the pursuits he purposes to follow in Russia. On the receipt of such declaration the petitioner is considered to be domiciled in Russia, but will nevertheless be accounted a foreigner until he shall have taken the oath of allegiance.

3. Foreigners already resident in Russia, distinguished in art, trade, commerce, or in any other pursuit, may prove their domiciliation by other means than those specified in § 2.

4. A foreigner, after being domiciled five years in Russia, may apply to be admitted to Russian allegiance.

5. Foreign married women cannot become Russian subjects without their husbands.

6. The allegiance, when sworn to, is merely personal, and does not affect children, whether of age or minors, previously born. Those born after the adoption of Russian nationality are acknowledged as Russians.

7. Specifies rules to be observed in petitioning the Minister of the Interior to be admitted to Russian allegiance (documents and declarations required, &c.)

8. It is optional with the Minister to grant the above petition or not.

9. An oath to be taken.

10. Mode of taking oath.

11. In special cases, the period requisite to constitute a domicile may be shortened.

12. Children of foreigners not Russian subjects, born and educated in Russia, or, if born abroad, yet who have completed their education in a Russian upper or middle school, will be admitted to Russian allegiance, should they desire to do so, a year after they shall have attained their majority.

13. The children of foreigners wishing to become Russian subjects will be admitted on the same terms as their parents.

14. Foreigners in the Russian military or civil service, or ecclesiastics of foreign persuasions, will be admitted to Russian allegiance without period of domicile.

15. A Russian subject marrying a foreign husband, and therefore cousidered a foreigner, may, on the death of her husband, or in case of her divorce, return to her former allegiance.

16. The children in the above case are treated as in § 12.

17. Foreign women marrying Russian subjects, and the wives of foreigners who have become Russian subjects, are admitted as Russian subjects without taking oath of allegiance. Widows and divorced wives retain the nationality of their husbands.

18. Special enactments relative to colonists, foreign agricultural labourers, Bulgarians, &c., remain in full force.

19. Foreigners admitted to Russian nationality are placed, in respect to their rights and obligations, on a perfect equality with born Russians.

20. Provides for the speedy transaction of business in connexion with the adoption of Russian nationality.

(B.)—Transitional Measures.

1. Foreigners who shall have already adopted Russian nationality may return at any time to their former nationality, on payment of all claims against them, whether Government or private.

2. Those who throw off their Russian allegiance may either quit the country, or remain in Russia, enjoying equal rights with other foreigners. They must provide themselves with national passports within a year, if resident in European Russia or belonging to a country in Europe, or within two years, if residing in Siberia, or having to obtain such passports in any other quarter of the globe. On the lapse of those dates, without production of passport, the foreigner must either leave the country or resume his Russian nationality.

3. Exceptions in cases of deserters and Asiatics.

4. Annuls all enactments compelling Russian women married to foreigners to sell their immovable property in Russia, with the exception of certain kinds of property which, as foreigners, they still have no right to possess. With respect to the enactment concerning the payment of three years' dues and export duties by foreigners wishing to leave their Russian nationality, that law is abrogated in respect to those countries which shall adopt a reciprocity in such matters.

(C.) Abrogating law by which a foreigner was obliged to take an oath of allegiance prior to his marriage with a Russian woman, and by which he was required to ask permission of the Emperor to contract marriage with a Russian woman of the orthodox faith.

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* For a full translation of this Law, see the "Journal de St. Pétersbourg," inclosed in Lord Napier's No. 207, April 13, 1864.

HAMBURGH.

Aliens Committee, p. 59.

Aliens can become naturalized after six months' residence on payment of a small fee.

The law of Hamburgh is said to recognise a double allegiance in persons thus naturalized, and does not require any renunciation of native allegiance.

BELGIUM.

Ibid. p. 53. Letter from Mr. Provost, Swiss Consul.

The law of Belgium is the same as that of France, except that the "grande naturalisation" can only be conferred by Act of the Legislature.

SWITZERLAND.

According to a paper quoted before the Aliens Committee "in some Cantons the Acts of Naturalization are granted by the Legislature, in others by the Executive Government. In most Cantons, among others in Berne, Zurich, Vaud, and Geneva, the privileges are complete and without any restriction, from the date of the act. In Tessin, a naturalized foreigner can only exercise the rights of citizenship after a lapse of five years from the date of his naturalization. In Thurgovie, no one can hold any office in or under the Government unless he has been a burgess of the Canton at least five years. In St. Gall, Thurgovie, and Tessin, a foreigner, in order to obtain his naturalization, must renounce his foreign rights of citizenship or allegiance."

(See also what M. Treitt says respecting the facility with which Swiss citizenship is acquired.)

ITALY.

Laws of the Two Sicilies.

By the Civil Code of the Two Sicilies provision was made both for naturalization and expatriation.

Codice delle Due Sicilie, Art. 11.

A Royal decree of the 17th December 1817, provided that special naturalization may be granted after one year's residence to any one who has rendered important service to the State, and ordinary naturalization after 10 years' consecutive residence, on giving proof of means of subsistence and declaring intention to become domiciled in the kingdom.

Ibid. Article 25.

Expatriation followed on entry into a foreign military service, but the person expatriated still remained subject to the penal law if he re-entered the kingdom after having taken up arms against it.

Permission was given to enter a foreign service on condition that the person to whom it was granted should not take any oath on accepting such service, except with a reservation that he should not be called upon to take arms against the Two Sicilies, and with the understanding that he should not be accredited to that country as ambassador or minister.

Laws of Sardinia.

"Lois Civiles et Commerciales" de M. Victor [illegible] vol. ix. [illegible] Code Civil.

The Civil Code of Sardinia of 1837, known as the "Codice Albertino," contains the following, among other, provisions respecting aliens :—

"19. A child born abroad of a father who enjoys civil rights, is also a subject, and exercises all the rights of one."

"24. A child, born in the State, of an alien who has established his domicile therein, with intent to remain permanently, is considered a subject.

"The intention to establish a permanent domicile is shown by an uninterrupted residence of 10 years for other than commercial purposes."

"42. Aliens who have been naturalized lose the privileges of naturalization by an absence from the kingdom for one year without the King's permission."

Conscription Law.

"Atti Ufficiali, Leggi, Decreti, &c." Vol. v. Part i. p. 292.

The Army Law of the Kingdom of Italy is very strict. ("Regolamento sul Reclutamento dell' Esercito :" March 31, 1855.

Sec. 21. The sons of an alien born within the State, who are comprised within the terms of the 24th Article of the Civil Code, are considered as citizens, and must inscribe their names, or cause them to be inscribed, on the Levy List of the communes in which they reside.

Sec. 22. Aliens and their sons who are admitted to enjoy civil rights, and are presumed to be citizens according to the Civil Code, are obliged to inscribe their names in like manner, unless the class to which they belong by age has furnished its contingent.

Sec. 23. Aliens who, according to the code, are considered citizens, or have been naturalized, must inscribe their names and satisfy the obligations of the levy, although they may be required for military service, and maintained to be subjects of their native State.

Sec. 24. The sons of a naturalized citizen born before his naturalization must be inscribed on the list of their last place of residence in the State.

Sec. 25. Naturalization abroad, without the King's permission, does not exempt from the conscription, and the inscription of the name must be at the last place of residence within the State.

Sec. 26. Diplomatic and consular agents abroad to send to the Minister of War every year lists of the citizens resident within their jurisdiction, who are liable to the conscription.

Such persons to be warned that they are required to return to their native country to fulfil their obligations, under penalty of incurring the law for the punishment of contumacy.

Regulations made for persons residing in countries distant more than 600 miles off, with certain reservations, and for the case of those who are undergoing legal punishment in a foreign country.

Revised Italian Code.

By a decree of the 2nd of April 1865, the government was authorized to publish a new Revised Civil Code for the Italian kingdom, and this Code was accordingly prepared and came into operation on the 1st of January 1866.

The Code is of great interest and importance as being the last Code published, founded on the Code Napoléon.

It may, therefore, be supposed to contain all the additions and alterations which experience has proved requisite.

"Codice Civile del Regno d'Italia," lib. in. tit. i.

An official copy has been furnished by Sir A. Paget for use in this Memorandum.

The following is a translation of the provisions of the first book of the Code.

"Of Citizenship and the Enjoyment of Civil Rights.

"1. Every citizen enjoys civil rights who has not been deprived of them by a penal sentence.

"2. Communes, Provinces, Civil and Ecclesiastical establishments, and in general all legally recognized public bodies, are considered as personal, and enjoy civil rights according to the laws and usages of public right.

"3. An alien is admitted to enjoy the civil rights appertaining to citizens.

"4. The child of a citizen is a citizen.

"5. If the father has lost his citizenship before the birth of the child, the latter is reputed a citizen if he is born within the State and resides therein.

" Nevertheless, on becoming of age, according to the laws of the realm, he may elect to take the quality of an alien on making a declaration before the authorities of the civil state in which he resides, or, if in a foreign country, before the Royal diplomatic or consular agents.

" 6. The child, born in a foreign country, of a father who has lost his citizenship before the child's birth, is reputed as alien.

" He can, however, elect to take the quality of a citizen on making a declaration as prescribed by the preceding Article, and fixing his domicil in the kingdom during the year in which he makes such declaration.

" Nevertheless, if he has accepted public employment in the kingdom, or has served in the army or navy, or otherwise satisfied the requirements of the conscription without seeking exemption as an alien, he shall be considered a citizen without further process.

" 7. When the father is unknown, the child of a citizen mother is a citizen.

" When the mother has lost her citizenship before the birth of the child, the dispositions of the two preceding Articles become applicable.

" If even the mother is unknown, a child born in the kingdom is a citizen.

" 8. The child of an alien who has established his domicil within the kingdom uninterruptedly for 10 years is considered a citizen; residence for commercial purposes is not sufficient to constitute domicil.

" The child can, however, elect to be considered an alien, on making the declaration prescribed in Article 5.

" When the alien has not established his domicil in the kingdom for 10 years, the child is considered an alien; but the dispositions of the two first paragraphs of Article 6 are applicable to the case.

" 9. An alien woman who marries a citizen acquires citizenship, and preserves it even in widowhood.

" 10. Citizenship is conferred on an alien together with naturalization by law or by Royal decree.

" Royal decree will not be effectual unless it be registered by the proper civil authority of the State in the place where the alien intends to establish or has established his domicil, and unless an oath has been taken by him, before the said official, to be faithful to the king, and to observe the statutes and laws of the realm.

" The registration must be effected within six months of the date of the decree, which will be otherwise annulled.

" The wife and minor children of an alien who has obtained citizenship become citizens, on the condition of their also establishing their residence in the realm, but the children can elect to take upon them the quality of aliens on making the declaration prescribed in Article 5.

" 11. Citizenship is lost:

" (1.) On renunciation by declaration before the proper civil authority of the province wherein the person resides, and subsequent emigration to a foreign State.

" (2.) By naturalization in a foreign country.

" (3.) By accepting employment from a foreign state without previous permission of the Italian Government, or by entry into the military service of a foreign Power.

" The wife and minor children of one who has lost his citizenship become aliens, unless they have continued to reside within the realm.

" Nevertheless, the wife can re-acquire citizenship in the case and by the means stated in the second paragraph of Article 14, and the children according to the second and third paragraphs of Article 11.

" 12. Loss of citizenship in the cases stated in the preceding Article does not exempt from the obligations of military service, nor from the penalty inflicted on anyone who bears arms against his native country.

" 13. The citizen who has lost his citizenship for any of the reasons stated in Article 11 will recover it:

" (1.) By returning to the realm with the special permission of the Government.

" (2.) By renunciation of the foreign citizenship, employment, or military service acquired in the foreign country.

" (3.) By declaring before the proper civil authority of the State an intention to establish domicil within the realm, and by so *bonâ fide* establishing it within a year.

" 14. A woman who is a citizen, and who marries an alien becomes alien; since by the act of marriage she acquires the citizenship of her husband.

" On becoming a widow she recovers citizenship by residence within or return to the realm, on declaring in either case, before the civil authority of the State, her intention to establish her domicil therein.

" 15. The acquisition or restoration of citizenship in the cases aforesaid does not take effect until the day after that in which the required conditions and formalities are complied with."

In the Articles of the Code of which the foregoing is a translation, the expression " cittadinanza " is used to express citizenship; but it will be seen, on referring to Article 10, a distinction is drawn between citizenship (" cittadinanza ") and naturalization (" naturalità).

This is owing to the fact that Italian citizenship, properly speaking, is local; the provinces being divided, for the purposes of conscription and taxation, into districts, within one of which every Italian is bound to have his name inscribed on the the district lists.

This " cittadinanza," therefore, corresponds somewhat to the German " burgher-recht," and as a local honorary privilege is conferred on distinguished persons, like our " City freedom."

Thus Garibaldi was presented with the " cittadinanza " of all the Italian towns.

The distinction is of no great importance, as by Article 1, " every citizen enjoys civil rights; " but it may be worth mentioning.

SPAIN.

Extract from the Constitution of May 23, 1845.

PART I.

Article I.

" Spaniards are:

" 1. All persons born within the dominions of Spain.

" 2. The children of a Spanish father and mother, though born out of the dominions of Spain.

" 3. Aliens who have obtained a certificate of naturalization.

" 4. Those who, without having obtained such certificate, have acquired a domicil in any part of the monarchy.

" The quality of a Spaniard is lost by naturalization in a foreign country or by admission to the employ of a foreign government without the royal license.

" The rights which aliens who may become naturalized or domiciled shall enjoy shall be determined by law."

Extracts from the Royal Decree, of the 17th of November 1852, respecting Aliens.

PART I.

CAP. I.

Collecion Legislativa de Espana, Tomo lvii. p. 482.

"Aliens are:

"1. All persons born of alien fathers without the Spanish dominions.

"2. The children of an alien father and Spanish mother born without the said dominions, unless they reclaim Spanish nationality.

"3. Children born within Spanish territory of alien fathers or of an alien father and Spanish mother, unless they make such a reclamation as aforesaid.

"4. Children born without the Spanish dominions of fathers who have lost their Spanish nationality.

"5. A Spanish woman married to an alien.

"The national vessels are considered as part of the Spanish dominions without any distinction.

"Article 2. Aliens who have obtained a certificate of naturalization or become domiciled in accordance with the law are considered Spaniards.

"Article 3. All persons residing in Spain who have neither become naturalized nor settled therein are aliens *domiciled or transitory*.

"Article 4. A legal domicil is acquired by those who have established themselves with a settled habitation or fixed residence for the space of three years, with the possession of real property or the exercise of some trade or profession or known mode of livelihood in the Spanish territory, with the permission of the superior civil authority of the province.

"Article 5. Transitory aliens are those who have not acquired a fixed residence in the kingdom in the manner prescribed by the preceding article."

CAP. II.

"Article 8. A transitory alien who desires to become domiciled must request the necessary license from the superior civil authority of the province, with proofs of his having fulfilled the conditions required by Article 4.

"Articles 9, 10. Registries of transitory and domiciled aliens to be kept by governors of provinces and foreign consuls.

"Article 12. Those whose names are not inscribed in such registries are not legally entitled to the rights of aliens.

CHAP. III.

"Article 18. Aliens may possess real property, exercise trades and professions, and share in all undertakings not expressly reserved by law to Spanish subjects.

"Article 21. Both transitory and domiciled aliens are subject to the payment of all imposts and taxes on the profits arising from their lands, commerce, or profession.

"Article 24. Both domiciled and transitory aliens and their children, who have not elected Spanish nationality, are exempt from military service.

"But this exemption does not extend to sons whose fathers have been born within Spanish territory, even though they retain their alien nationality."

PART IV.—CORRESPONDENCE BETWEEN THE UNITED STATES AND GREAT BRITAIN.

The questions of naturalization and allegiance have been a fruitful source of controversy between the two countries. Commencing from the first establishment of the American Union, they have continued with unabated vigour until the present day, when the great increase in the number of persons of British birth settled in America has raised them to a position of the utmost importance.

It would be impracticable within the compass of a Memorandum to attempt to give a full abstract of this long correspondence, and the present paper will accordingly be confined to such an account of the principal occasions which have led to it, as will be sufficient to give a general explanation of the arguments and doctrines which have been respectively advanced and maintained by the English and American Governments.

FROM THE DECLARATION OF INDEPENDENCE TO THE WAR OF 1812–14.

Chitty's "Commercial Law," 1824, Vol. i. p. 125.

By the statute 13 Geo. II. c. 7, all foreigners who have resided seven years in any of His Majesty's Colonies in America, without having been absent longer than two months at any one time, are naturalized on taking the oaths, making the declaration, and receiving the sacrament, as therein prescribed.

The statute 20 Geo. II. c. 44, extended the benefit of this Act to the Moravian Brethren, and to all foreign Protestants conscientiously scrupulous of taking an oath.

The Act 2 Geo. III. c. 25, naturalized foreign Protestants serving two years in the Royal American regiment or as engineers in America.

Tucker's "History of the United States," Vol. i. p. 632.

The Colonists complained in the Declaration of Independence of the restrictions imposed by these Acts:—

"He (the King of Great Britain) has endeavoured to prevent the population of these States; for that purpose obstructing the laws for naturalization of foreigners, refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of land."

It is to be remarked, however, that no such complaint appears in the address and protest of the people of America to the King and people of England of the preceding year, 1775.

Several cases arose, after the Treaty of Peace of 1783, in which the status of persons owing allegiance respectively to the British and United States Governments were discussed.

Kent deals with the subject at length in his 25th Lecture, especially with regard to the position of *antenati*.

Kent's "Commentaries," Boston, 1858, Vol. ii. pp. 22, 23. (See also generally on the Laws of Naturalization in the United States, and other countries.)

He says, "The sound and prevailing doctrine now is, that by the Treaty of Peace of 1783, Great Britain and the United States became respectively entitled, as against each other, to the allegiance of all persons who were at the time adhering to the Governments respectively; and that those persons became aliens in respect to the Government to which they did not adhere. This is the meaning of the Treaty of 1783, and it put an end to all con-

Treaty of Paris, Sept. 3, 1783,

Arts. V.-VI. State Papers, Vol. i. p. 782.

flicting and double allegiance growing out of the Revolution.

The Treaty of the 19th of November 1794 contains the following Articles:—

Ibid. p. 785.

"II. His Majesty will withdraw all his troops and garrisons from all posts and places within the boundary lines assigned by the Treaty of Peace to the United States . . . All settlers and traders within the precincts or jurisdiction of the said posts . . . shall be at full liberty to remain there, or to remove . . . Such of them as shall continue to reside within the said boundary lines shall not be compelled to become citizens of the United States, or to take any oath of allegiance to the Government thereof, but they shall be at full liberty to do so if they think proper; and they shall make and declare their election within one year after the evacuation aforesaid. And all persons who shall continue there after the expiration of the said year without having declared their intention of remaining subjects of His Britannic Majesty, shall be considered as having elected to become citizens of the United States."

Ibid. p. 791.

"IX. It is agreed that British subjects who now hold lands in the territories of the United States, and American citizens who now hold lands in the dominions of His Majesty, shall continue to hold them according to the nature and tenure of their respective States and titles therein, and may grant, sell, or devise the same to whom they please, in like manner as if they were natives, and that neither they nor their heirs or assigns shall, so far as may respect the said lands, and the legal remedies incident thereto, be regarded as aliens."

Impressment.—United States' Proposal, 1792.

The outbreak of the wars of the French Revolution led to a discussion on the claim of the British Crown to the allegiance of its subjects, which culminated in the war of 1812–14.

Several cases of impressment of British seamen from on board American vessels having been brought to the notice of the American Government in 1792, they instructed Mr. Pinckney, then Minister in London, to make a proposal to the British Government, to the following effect:—

Mr. Jefferson to Mr. Pinckney, July 1, 1792.

State Papers and Public Documents of the United States, 10 vols. Published 1817. (Referred to as "Congress Papers.")

That the American Government must reject any condition by which seamen on board United States' vessels should be bound to carry with them on all occasions certificates of citizenship. The simplest rule would be that "the vessel being American shall "be evidence that the seamen on board her are "such; but if it is apprehended that our vessels "might thus become asylums for the fugitives of "their own nation from impress gangs, the number "of men to be protected by a vessel may be limited "by her tonnage, and one or two officers only be "permitted to enter the vessel in order to examine "the number on board, but no press-gang should be "allowed ever to go on board an American vessel "till after it shall be found that there are more "than the stipulated number on board . . . and "even then the American Consul shall be called "in."

Nothing, however, came of this proposal, and the Treaty of 1794 did not contain any Article on the subject of impressments.

Mr. King's Negotiations, 1796–1803.

Fourth Congress, Sess. i. c. 36. May 28, 1796. "United States' Statutes at Large," Vol. i. p. 477.

In 1796, an Act of Congress was passed authorizing the appointment of Agents to reside in British and other ports for the purpose of watching over the interests of American seamen, procuring their release when impressed, and rendering an account to the United States' Government of all cases of impressment and detention.

The Act further provided for a form of certificate of citizenship to be given by the United States' Collectors of Customs to American seamen who might apply for it.

"American State Papers," Vol. iii. p. 582.

On the 30th of November, 1796, Mr. King, United States' Minister, wrote to Lord Grenville, complaining that an American had been impressed and refused his discharge on the grounds that he was "married and settled at Bristol," and that the orders of the Admiralty "usually contain a proviso "that the discharge is not to operate in favour of "any person who has entered on board Her "Majesty's ships, or who is married and settled "within any of Her Majesty's dominions." Mr. King adds, "Without admitting or contesting, on "this occasion, the rule of English law that a "subject cannot divest himself of his natural "allegiance, I take the liberty to request your "Lordship's attention to the diversity of practice, "so much to the disadvantage of the American "citizens, which prevails in the application of this "rule."

He then argues that if domicil in Great Britain rendered an American liable to the press, domicil in the United States ought to free a British subject from such liability.

Ibid. p. 574.

In the instructions furnished to Mr. King on his proceeding to England, he was directed to urge that on the high seas the American flag should protect all who sailed under it:—"In the ports of "Great Britain and Ireland the impress of British "subjects found on board our vessels must doubt-"less be admitted. . . .

Mr. Pickering to Mr. King; June 8, 1796.

"There are three classes of men concerning whom there can be no difficulty: 1st, Native American citizens; 2nd, American citizens, wherever born, who were such at the definitive treaty of peace; 3rd, foreigners other than British subjects sailing in American vessels, and whose persons ought to be as sacred, as it respects the British, as those of native citizens. The fourth class consists of British-born subjects, but who, or many of whom, may have become citizens subsequent to the treaty of peace, or who hereafter may be admitted to the rights of citizens. It is this class alone about which any pretence of right to impress can be made. With regard to these, it may be attempted to protect them as well in time of war as in peace in the following cases: First, when they shall have served in American vessels, public or private, for the same term in which foreigners serving in British vessels would acquire the rights of British subjects, which is understood to be three years; or, secondly, if so much cannot be obtained, when those persons, originally British subjects, shall have resided five years in the United States, and been formally admitted to the rights of citzens according to our laws."

Mr. Liston to Mr. Pickering; August 30, 1797. Papers on Impressment, MSS.

In 1797 a dispute arose between Admiral Sir Hyde Parker and the United States agent in the West Indies, in consequence of the agent having attempted to procure the release of some seamen from on board British ships by writ of *habeas corpus*.

In writing to the American Government on the subject, Mr. Liston, His Majesty's Minister in the United States, complained that the protections or certificates of citizenship were granted without due inquiry, and were used as a means of fraudulently evading the press.

American State Papers, Vol. iii. p. 271.

It appears that Sir Hyde Parker informed the agent that "no proofs would be regarded by him "unless specially presented by the American "Government through the British Minister, nor "then but in the single case of *native Americans*." He is stated to have positively refused to listen to applications on behalf of *naturalized* citizens.

Ibid. pp. 274, 593, 777

In 1799 the United States Government published a list of the seamen whose discharge had been applied for.

This list, as well as the similar lists published in 1803 and 1806, contain a great number of names of persons claiming to be United States citizens, with

or without protection, but there are only two cases of *naturalized* citizens.

In 1803 "Henry Kipp, a native of Hamburgh " and a naturalized citizen of the United States, " impressed into the British frigate 'Endymion,' " from the American ship 'Eagle.' No protection."

In 1806 "Lawrence Brown, naturalized citizen, with a protection."

It must be remembered that at this time the Act of Congress of 1798 was in force, requiring 14 years' residence for naturalization. It is true, however, that this Act did not interfere with those naturalized under the Acts of 1790 or 1795, requiring respectively one and five years' residence.

There is only one case mentioned in the returns of vessels seized of a vessel having been taken which was the property of a naturalized citizen.

Congress Papers," Vol. iv, . 314.

This case occurred in 1800. "Brigantine 'Sally,' " of Philadelphia, owned by Stephen Girard, from " Batavia to Philadelphia,—cargo, sugar, and coffee; " taken July 20, 1800, by the 'Cleopatra' frigate; " carried into Halifax; vessel and cargo con- " demned. The condemnation appears to be " grounded upon the allegation that the owner is " a native of France, carrying on a course of trade " to a French colony. N.B.—M. Girard was natu- " ralized a citizen of Pennsylvania in the year 1777, " and has ever since resided in the United States."*

Draft to Mr. Liston, July 5," 797, "Impress- nent Papers."

In 1797 Mr. Liston had been instructed by His Majesty's Government to propose a convention for the mutual surrender of deserters.

Some delay appears to have been occasioned by a difficulty which arose between the two Governments respecting the interpretation of the treaty of 1794, and it was not until February 1800 that Mr. Liston forwarded to the United States Government a draft of an additional article to be appended to that treaty, providing for the mutual surrender of deserters in the terms of his instructions.

merican "State Papers," Vol. iii. . 576.
Hertslett's "State Papers," Vol. i. Part 2, p. 1386, *et seq.*

The American Government objected to a clause introduced into this draft providing that its stipulations "should not extend to authorize either of the " parties to demand the delivery of any sailors, " subjects or citizens, belonging to the other party, " who have been employed on board the vessels of " either of the respective nations, and who have in " time of war or threatened hostility voluntarily " entered into the service of their own sovereign " or nation, or have been compelled to enter " therein according to the laws and practice pre- " vailing in the two countries respectively." The United States Government accordingly tendered a counter project and the negotiation fell through.

American " State Papers, Vol. ii. p. 486.

On the 20th of September 1800 Mr. J. Marshall, Secretary of State, furnished Mr. King, the United States Minister in London, with full instructions for resuming negotiations with the British Government on contraband, blockade, and impressment. On the latter subject he says:—

"The impressment of our seamen is an injury of very serious magnitude, which deeply affects the feelings and the honour of the nation.

"This valuable class of men is composed of natives and foreigners who voluntarily engage in our service.

"No right has been asserted to impress the natives of America, yet they are impressed.

"Those seamen who, born in a foreign country, have been adopted by this, were either the subjects of Britain or some other Power.

"The right to impress those who were British subjects has been asserted, and the right to impress those of every other nation has not been disclaimed. Neither the one practice nor the other can be justified.

"With the naturalization of foreigners no other nation can interfere further than the rights of that other are affected. The rights of Britain are certainly not affected by the naturalization of other than British subjects; consequently those persons who, according to our laws, are citizens must be so considered by Britain, and by every other Power not having a conflicting claim to the person.

"The United States therefore require positively that their seamen who are not British subjects, whether born in America or elsewhere, shall be exempt from impressments.

"The case of British subjects, whether naturalized or not, is more questionable; but the right even to impress them is denied. The practice of the British Government itself may certainly, in a controversy with that Government, be relied on. The privileges it claims and exercises ought to be ceded to others. To deny this would be to deny the equality of nations and to make it a question of power and not of right.

"If the practice of the British Government may be quoted, that practice is to maintain and defend in their sea-service all those of any nation who have voluntarily engaged in it, or who, according to their laws, have become British subjects."

The negotiations were interrupted in February 1801 by the appointment of Lord Hawkesbury to succeed Lord Grenville as Secretary of State for Foreign Affairs.

On the 10th of March 1801 Mr. King forwarded to Lord Hawkesbury a memorandum of the points which his Government required settled, including a provision against impressment on the high seas.

American "State Papers," Vol. ii. p. 492.

In his message of the 8th of December 1801 President Jefferson recommended a revision of the naturalization laws and the substitution of a shorter term for the 14 years required by the existing law.

"Congress Papers," Vol. iv. p. 325.

The Peace of Amiens of March 27, 1802, caused the negotiations to be again suspended, but they were renewed, when war became again imminent in 1803, by Mr. King, who arranged with Lord St. Vincent an article forbidding impressment on the high seas, but on this article being submitted to Lord Hawkesbury it was objected to as not recognizing the jurisdiction of Great Britain over the narrow seas.

American "State Papers," Vol ii. p. 503.

Mr. King, who had supposed that he had settled this question of the *mare clausam* with Lord St. Vincent, then abandoned the negociation.

War broke out again in April 1803.

In 1803 Mr. King was succeeded by Mr. Monroe.

Mr. Monroe's Negotiations, 1804–1806.

Instructions were given to him by Mr. Madison (January 5, 1804), for the conclusion of a treaty and a draft forwarded to him, showing the terms to be originally proposed together with those which the United States Government were prepared to accept.

American "State Papers," Vol iii. p. 81.

In this despatch Mr. Monroe urges that Great Britain has the "less excuse for this practice (of impressment) as it is in direct contradiction to the principles in which she proceeds in other cases . . . . . whilst she impresses her own subjects from the American service, although they may have been settled and married, and even naturalized in the United States, she constantly refuses to release from her service American citizens impressed into it, whenever she can give for a reason that they were either settled or married within her dominions; . . . . when marriage and residence and even naturalization are against her, no respect is paid to either. . . .

"Should any difficulty be started respecting

* Before the adoption of the constitution, aliens were naturalized by the several States.

seamen born within the British Dominions and naturalized by the United States since the Treaty of 1783, you may remove it by saying, first, that very few, if any, such naturalizations can take place . . . Secondly, that a discontinuance of impressments on the high seas will preclude an actual collision between the interfering claims. Within the jurisdiction of each nation, and in their respective vessels on the high seas, each will enforce the allegiance which it claims. In other situations, the individuals doubly claimed will be within jurisdiction independent of both nations."

American "State Papers," Vol. iii. pp. 92, 93.

Mr. Monroe accordingly submitted a project of a convention to Lord Hawkesbury on the 7th of April 1804.

Soon afterwards Mr. Pitt succeeded Mr. Addington as Premier, and Lord Harrowby was appointed to the Foreign Office.

On Mr. Monroe calling his attention to the draft Convention submitted to his predecessor, Lord Hawkesbury, Lord Harrowby animadverted strongly on the conduct of the United States, with regard to an article in a boundary convention entered into in 1803, but which they had refused to ratify in the cession of Louisiana in 1804, and declined to enter into further engagements for the present.

The negotiations were consequently again postponed.

It appears, however, that the papers were submitted to Sir W. Scott.

"Impressment Papers," MS. Sir W. Scott; September 20, 1804.

Sir W. Scott furnished two reports; in the first of which he stated that "The exercise of the rights "claimed on the part of this country in calling for "the service of its seafaring subjects out of foreign "vessels, ought unquestionably to be rendered as "little incommodious and vexatious to those vessels "as the nature of the thing will admit; all unnecessary inconvenience, and still more all unnecessary violence of conduct or language, ought to be "avoided or repressed; and there can be no doubt "that the Admiralty will enforce a general observance of these duties, by proper regulations of "their own; but the right itself cannot be departed from; and, being as clear in its principles, "as it is important in its purposes, must neither be "surrendered nor enervated by conventional regulations that may affect its utility."

And, in the second paper—

"Impressment Papers," MS. King's Advocate; September 1804.

"The great and fundamental principle of British Maritime Jurisprudence is, *that ships upon the high seas compose no part of the Territory of a State.* The surrender of this principle would be a virtual surrender of the belligerent rights of this country.

"If a seafaring person, though born in another country, fixes his domicil here, and is habitually employed in British navigation and commerce, he assumes the character of a British Mariner, and becomes liable to its duties. It cannot reasonably be expected that such persons shall reside here, with all the advantages of British protection and navigation, without being called upon for the maritime defence of the country. . . .

"It can hardly be expected by the one Government from the other, that a mere certificated list or protection issued in such form as they shall *respectively* prescribe, shall in all cases be deemed satisfactory evidence of the citizenship or subjection of the party . . . . the contracting States may hold very different principles of law upon the question of national character and relation; if so, the parties have no common measure to resort to, and one government may find itself deprived of the most important services of those whom it deems its own subjects, upon grounds held by the other State in direct opposition to those principles which it conceives to be the only just and rational principles applicable to such a state of circumstances."

"Congress Papers," Vol. v. p. 309.

On the 23rd of September 1805 Mr. Monroe addressed a remonstrance to the English government entering into the various grounds of complaint, and concluding by pressing "the topic of impressment" as urgent. "The United States are aware, "from the similarity in the person, the manners, "and, above all, the identity of the language, which "is common to the people of both nations, that the "subject is a difficult one. They are equally "aware that, to Great Britain also, it is a delicate "one."

Lord Mulgrave to Mr. Monroe; November 25, 1805.

Lord Mulgrave (who had succeeded Lord Harrowby in January 1805) informed Mr. Monroe that he must consult the law officers before returning an answer to his representations.

American "State Papers," Vol. iii. p. 108.

Mr. Pitt died January 23, 1806, and the seals of the Foreign Office passed to Mr. Fox.

A further list of cases of impressment, up to 1806, shows only two instances of naturalization. In one the person was not on board the vessel named; in the other (James McKain, No. 3246), the seaman being a native of Ireland, the discharge was refused.

Ibid. p. 63.

Messrs. Monroe and Pinckney.—Special Mission, 1806–7.

The United States' Government supposed that the new ministry would be more favourable to their views than Mr. Pitt's administration, and on the 17th of May 1806 Mr. Pinckney, who had served for some years in London, engaged in the negotiation of the Maryland Bank Stock affairs, was associated with Mr. Monroe in a Joint Special Mission for the settlement of the various questions at issue between the two countries.

American "State Papers," Vol. iii p. 119.

Mr. Pinckney arrived in England in June, just at the time that Mr. Fox was taken ill, and Lord Auckland and Lord Holland were accordingly appointed by Lord Grenville to treat with the Special Mission.

"Statutes at Large," Vol. ii. p. 379.

On the 18th of April 1806 an Act of Congress had been passed prohibiting the importation of British leather, silk, linen, woollen, and other goods.

The British Commissioners lost no time in remonstrating against this Act, which was accordingly suspended.

Mr. Fox died September 13, and was replaced by Lord Howick (afterwards second Earl Grey).

A report of the Law Officers was sent to the American Commissioners on the 4th November.

"Impressment Papers," MS.

This report seems to have been a report by Sir John Nicholl, of the 3rd of November 1806, in reply to an inquiry addressed to him by Lord Holland and Lord Auckland on the 1st.

"On what ground does a nation which has not a right, by treaty, to reclaim its subjects from the territory of another, to which they have escaped, claim the right of taking them by force from on board its merchantmen on the high seas? and what is your opinion of the soundness of this pretension?"

Answer. "His Majesty, by his Royal Prerogative, has a right to require the service of all his "seafaring subjects against the enemy, and to seize "them by force wherever they shall be found. "This right is limited by the territorial sovereignty of other nations, and therefore His Majesty cannot seize his subjects, because he cannot "exercise any act of force within the territory of "another State. But the high seas are extra-territorial, and merchant vessels navigating upon them "are not admitted to possess a territorial jurisdiction, so as to protect British subjects from the "exercise of His Majesty's prerogative over them. "This right, I apprehend, has from time immemorial been asserted in practice, and acquiesced in

" by foreign nations. The pretension appears to " me to be sound in principle, although difficulties " may arise in its exercise, particularly on board " vessels of the United States, from the similarity " of language and appearance in British and Ameri- " can seamen." Sir John Nicholl adds, that if foreign merchants are aggrieved by it, they have only themselves to blame for engaging British seamen.

"Impressment Papers," MS.

In a further report, Sir John Nicholl gives additional arguments in favour of the right to search merchant vessels on the high seas for British seamen, and of the extension of this right, when required, to foreign ships of war, and of its enforcement by arms.

The American and British Commissioners met on the 5th of November, when, it being found impossible for them to agree on an Impressment Article, Lord Auckland and Lord Holland wrote a note, stating that His Majesty could not give up the right of which complaint was made, but that instructions should be given to avoid, as far as possible, any injury to United States' citizens, and that in the meanwhile the British Commissioners were authorized to proceed to the other articles of negotiation.

On the 27th of December the Commissioners agreed upon a Treaty, which was signed by them on the 31st.

American "State Papers," Vol. iii. p. 147.

This Treaty provided for reciprocal rights of commerce and navigation, regulations as to prize, privateering, blockade, and contraband of war, trade with the enemies' colonies not being blockaded, the extension of the territorial limit from three to five miles on the American coast, on the understanding that a similar limit be observed by other belligerents, extradition, &c.

An additional Article was annexed, on the subject of the Canada trade.

Ibid. Vol. iii. p. 153.

Mr. Madison replied to the Commissioners' despatch inclosing this Treaty, by criticising it stringently, and stating that it did not "comport " with the President's views of the national senti- " ment or the Legislative policy, that any Treaty " should be entered into with the British Govern- " ment which" did not include the subject of impressment.

Mr. Canning, on the final break up of the "All the Talents" Ministry, was appointed to the Foreign Secretaryship in March 1807.

In the meanwhile an additional complication had been introduced into the relations between the United States and Great Britain, by the publication by the Emperor Buonaparte of the Decree of Berlin,* on the 21st of November 1806, forbidding all intercourse with England or dealing in English goods, and declaring the British islands in a state of blockade.

In reply to further communications from the American Plenipotentiaries, Mr. Madison enjoined them in May 1807, that "no Treaty would be " ratified without a provision against impressments," but authorized them, if every other arrangement were rejected, to propose an article providing that neither country should permit any seaman to be engaged who was not a subject or citizen of such country, and who should not have been at least two years previously within its jurisdiction or on board its vessels.

Ibid. Vol. iii. p. 172.

Mr. Madison points out that "this proposition " is so framed as not to comprehend among British " seamen those who have been made citizens of the " United States, and who must necessarily be so regarded within their jurisdiction and under their " flag. This modification of the Article cannot " produce any real objection on the part of Great " Britain, 1. Because the legal pre-requisites to " naturalization in the United States imply what " is sufficiently known, that the number of seamen " actually naturalized, or likely to be so, is too " small to claim attention in any arrangement of " this kind. 2. Because the right of British sub- " jects to naturalize themselves in a foreign trade " and navigation as laid down by the judicial " authority of Great Britain, ought to restrain the " Government from making a difficulty on this " point. (See Durnford and East's Reports, Wil- " son *v.* Marriatt; and the same case in Bosanquet " and Buller's Reports.)"

On the 22d of June 1807 the unfortunate affair of the "Chesapeake" took place.

His Majesty's ship "Leopard" met the "Chesapeake" three leagues off Cape Henry, and demanded to search it for deserters.

This was refused, and the "Leopard" then fired into the "Chesapeake," which was unprepared for battle, and did great damage killing some men and wounding others.

The "Chesapeake" did not return the fire; and eventually four men, stated to be deserters, were given up to the "Leopard" under protest.

This led to a proclamation from the President, July 2, 1807, forbidding intercourse with British ships of war, and ordering them to depart from the ports of the United States.

American "State Papers," Vol. iii. p. 29.

On the 11th of November 1807 the celebrated British Orders in Council were published, declaring all French ports, and ports in French possession to be in a state of blockade, and that the sale of belligerents' vessels to neutrals would not be recognized.

Ibid. Vol. iii. p. 197.

In October, Mr. Canning informed Mr. Monroe and Mr. Pinckney that there was no prospect of the British Government consenting "to recede from " its declared pretensions relative to searching on " the high seas the merchant ships of neutral " nations for British seamen," and, together with the Orders of Council, the King issued a proclamation (November 11, 1807), recalling all British seamen who might be employed in foreign vessels.

This proclamation contains the following passage:—

Ibid. p. 25.

"And whereas it has been further represented unto us that divers mariners and seafaring men, our natural-born subjects, have been induced to accept letters of naturalization, or certificates of citizenship, from foreign states, and have been taught to believe that, by such letters or certificates, they are discharged from that duty of allegiance which, as our natural-born subjects, they owe to us. Now we do hereby warn all such mariners, seafaring men, and others, our natural-born subjects, that no such letters of naturalization, or certificates of citizenship, do, or can, in any manner, divest our natural-born subjects of the allegiance, or in any degree alter the duty which they owe to us, their lawful Sovereign. But, in consideration of the error into which such mariners and seafaring men as aforesaid may be led, we do hereby publish and declare our free pardon to all such our subjects, who, repenting of the delusion under which they have acted, shall immediately, upon the knowledge of this our Royal proclamation, withdraw themselves from foreign service and return to their allegiance with us. And we do declare that all such our subjects who shall continue in the service of foreign States, in disregard and contempt of this our Royal Proclamation, will not only incur our just displeasure, but are liable to be proceeded against for such contempt, and shall be proceeded against accordingly. And we do hereby declare that if any such masters of ships, pilots, mariners, seamen,

* Copies of the English and French Decrees, Proclamations, and Orders in Council from the beginning of the war, are published in the American "State Papers," Vol. iii. p. 262, *et seq.*

shipwrights, or other seafaring men (being our natural-born subjects), shall be taken in any foreign service by the Algerines or other Barbary Powers and carried into slavery, they shall not be reclaimed by us as subjects of Great Britain."

American "State Papers," Vol. iii. p. 199.

The refusal to ratify the Treaty of 1806, having been formally communicated to the English Government, Mr, Canning wrote to the Commissioners on the 22d of October to say that the King could not consent to negotiate anew.

Mr. Monroe shortly afterwards returned to America leaving Mr. Pinckney as minister.

Mr. Jackson's Mission to the United States.

It was decided about this time to send a special envoy to America, whose instructions were to be limited, *in the first instance,* to the "Chesapeake" affair.

Ibid. p. 290.

On the 17th of December 1807 the Emperor issued the Milan Decree, declaring every vessel that had submitted to be searched by a British cruiser denationalized, and liable to seizure, and reiterating the blockade of the British islands.

The relations with the United States now assumed a very unsatisfactory character. Acts of Congress were passed, laying an embargo on vessels trading with Great Britain in United States' ports, and interdicting commercial intercourse with England and France.

The British Minister having represented that the Orders in Council would be withdrawn, these Acts were revoked by the President's proclamation of April 19, 1809.

A dispute now arose as to the powers entrusted to Mr. Jackson, the British representative, to make communications to the United States' Government on matters other than the case of the "Chesapeake," and in November 1809 the President refused all further official intercourse with him.

Ibid. p. 319.

In the despatch announcing this decision to Mr. Pinckney, Mr. Smith, Secretary of State refers to the impressment question, and objects to the terms proposed by Mr. Jackson, respecting the "Chesapeake," as "admitting a right on the part of Great "Britain to claim a discharge from our service of "deserters generally, and particularly of her "natural-born subjects, without excepting such "as had been naturalized under the laws of the "United States. . . . What possible consideration could have induced the British "Government to expect that the United States "would admit a principle that would deprive our "naturalized citizens of the legal privileges which "they hold in common with their native fellow-"citizens? The British Government less than "any other ought to have made such a proposition, because it not only, like others, naturalizes "aliens, but, in relation to the United States, has "even refused to discharge from the British service "native citizens of the United States involuntarily "detained. If an American seaman has resided in "Great Britain, or has accepted a bounty in her "naval service, his discharge therefrom on the "regular application to the British Government "has been invariably refused by its Board of "Admiralty."

Correspondence respecting Orders in Council and "Chesapeake" Case.

A discussion now commenced respecting the alleged revocation of the French Decrees. The British Government declared that, as soon as those decrees were revoked, the British Orders in Council should be revoked also.

By a Proclamation of November 1810 the President announced that the Acts of Congress affecting France were revoked, but that the Acts affecting England would be enforced if the British Orders in Council were not repealed by February 1811.

In June 1811 a case was tried before Sir W. Scott, in which the question was raised, whether the French Decrees were in force or not, or, if they were not, whether the Orders in Council were revoked by the contingent promise of repeal made by the British Government.

American "State Papers," Vol. iii. p. 421.

It was then decided that the French Decrees still remain unrevoked. A long correspondence ensued.

The "Chesapeake" affair was brought to a conclusion in October 1811, by a disavowal of the proceedings of the "Leopard," the restoration of the men, and compensation to the families of the killed, and to the wounded of the "Chesapeake."

"Congress Papers," Vol. viii. p. 239.

Mr. Pinckney left London, and Mr. Russell became Chargé d'Affaires in November 1811.

Mr. Foster, who had become British Minister, in February 1811, proposed to the Secretary of State, to procure the release of certain Americans from His Majesty's ships.

Ibid. p. 371.

Mr. Monroe, the then Secretary of State, replied, "It is impossible for the United States to dis-"criminate between their native and naturalized "citizens, nor ought your Government to expect "it, as it makes no such discrimination itself." May 30, 1812.

War of 1812–14.—*War declared by United States.*

By this time much ill-feeling had arisen between America and England out of the Orders in Council, the possession by the United States of part of West Florida, and a recent encounter between the United States' ship "President" and the British sloop-of-war "Little Belt;" and on the 1st of June, 1812, the President sent a message to Congress recommending war.

In this message he lays great stress on the practice of impressment, and the proceedings of British cruizers having become intolerable.

The message was referred to the Committee for Foreign Affairs, who concurred in it; and on the 19th of June 1812 the President declared war by proclamation.

On the 23rd of June 1812 the Orders in Council were formally revoked.

American "State Papers," Vol. iii. p. 433.

In September 1812 Mr. Russell had an interview with Lord Castlereagh, with a view to some arrangement being arrived at.

Ibid. pp. 594-5.

He reports the conversation which took place respecting impressment as follows:—

"I finally offered, in order to answer at once all the observations and inquiries of Lord Castlereagh, that the proposed understanding should be expressed in the *most general terms;* that the laws to take effect on the discontinuance of the *practice* of impressment should prohibit the employment of the *native* subjects or citizens of the one State, excepting such only as had already been naturalized, on board the private or public ships of the other; thus removing any objection that might have been raised with regard to the future effect of naturalization, or the formal renunciation of any pretended right. . . . I was disappointed and grieved to find that these propositions, moderate and liberal as they were, should be treated in a manner which forbids me to expect their acceptance. I was even asked by Mr. Hamilton (Under Secretary of State) if the United States would *deliver up* the native British seamen who might be naturalized in America. Although shocked at this demand, I mildly replied that such a procedure would be disgraceful to America, without being useful to Great Britain; that the habits of seamen were so peculiarly unaccommodating that no one would patiently go through the long probation required by law to become a citizen of a country where he

could not pursue his professional occupations, and that not to employ him in this way would be virtually to surrender him to Great Britain."

Prince Regent's Declaration, 1813.

"Annual Register," 1813, p. 330.

On the 9th of January 1813 the Prince Regent issued a Declaration in reply to the President's Proclamation, entering into a full explanation of the conduct of the British Government with regard to the negotiations which had preceded the war, the Orders in Council, blockade, belligerent rights, impressment, American embargo, non-intercourse, and non-importation Acts, and concluding by a statement of the principles which Great Britain determined to maintain:—

"His Royal Highness can never admit that in the exercise of the undoubted and hitherto undisputed right of search of neutral merchant-vessels in time of war, the impressment of British seamen when found therein, can be deemed any violation of a neutral flag. Neither can he admit that the taking of such seamen from on board such vessels can be considered by any neutral State as a hostile measure or a justifiable cause of war.

"There is no right more clearly established than the right which a Sovereign has to the allegiance of his subjects, more especially in time of war. Their allegiance is no optional duty, which they can decline and resume at pleasure. It is a call which they are bound to obey: it began with their birth, and can only terminate with their existence.

"If a similarity of language and manner may make the exercise of this right more liable to partial mistakes and occasional abuse, when practised toward vessels of the United States, the same circumstances make it also a right with the exercise of which in regard to such vessels it is more difficult to dispense.

"But if, to the practice of the United States to harbour British seamen be added their assumed right to transfer the allegiance of British subjects, and thus to cancel the jurisdiction of their legitimate Sovereign, by acts of naturalization and certificates of citizenship, which they pretend to be as valid out of their own territory as within it, it is obvious that to abandon this ancient right of Great Britain, and to admit these novel pretensions of the United States, would be to expose to danger the very foundation of our maritime strength."

"Impressment Papers," MS. February 21, 1812.

It appears from an Admiralty Minute that there were supposed to be upwards of 20,000 British born seamen in the American marine; many of them provided with fraudulent protections.

These protections were regular articles of speculation, the price being about two dollars.

They were forged in large numbers in England, and procured in America by any seaman who chose to go before a Customs Collector and call himself an American. The men had no difficulty in procuring witnesses to swear to their having been born in the United States; there were plenty of people who carried on a trade in such affidavits.

The Admiralty suggested that protections should in all cases be certified by British Consuls, which would ensure their *bona fides*, but this suggestion was never carried out.

American "State Papers," Vol. iii. p. 597.

When war was declared, orders were given for the discharge from the British fleet of all native-born Americans who could satisfactorily prove their nationality.

Refusal to exchange British Subjects taken in United States' Service—Retaliation.

In September 1812 six seamen were taken prisoners from the United States' ship "Nautilus," and sent to England, their exchange being refused on the ground that they were British subjects. Four were subsequently stated to have been native Americans, and two naturalized.

Twelve British sailors, prisoners of war, were then similarly detained as hostages by the American Commodore.

Shortly afterwards, six more American prisoners were taken from the jail at Nassau and sent to Jamaica to be tried, as was affirmed, as traitors. Of these, one was naturalized, one had been domiciled in America since 1793, and four were alleged to be American born, but had no protection.

President Madison, in his inauguration speech of March 4, 1813, refers to these cases.

"Annual Register," 1813, p. 394.

After praising the honourable manner in which the contest had been conducted by the United States, he says, "How little has been the effect of "this example on the conduct of the enemy. They "have retained as prisoners of war, citizens of the "United States, not liable to be so considered "under the usages of war. They have refused to "consider as prisoners of war, and threatened to "punish as traitors and deserters, persons emigrating without restraint to the United States, incorporated by naturalization into our political family, "and fighting under the authority of their adopted "country in open and honourable war, for the "maintenance of its rights and safety. Such is the "avowed purpose of a Government which is in the "practice of naturalizing by thousands citizens of "other countries, and not only of permitting, but "compelling them, to fight its battles against their "native country."

This system of retaliation was pursued by land as well as by sea.

American "State Papers," Vol. iii. p. 632, *et seq.*

In January 1813 twenty-three soldiers of the American army were selected from the prisoners taken at Queenstown and sent to England for trial as traitors.

Some of these were naturalized and all of them domiciled in the United States.

A like number of British prisoners, officers and men, were then placed in strict confinement by the American Government.

Ibid. p. 641.

In August Lord Bathurst instructed General Sir S. Prevost to inform the American Commander-in-chief that "the Prince Regent commanded forty-"six American officers and non-commissioned "officers to be held as hostages for the safe keeping of the twenty-three British soldiers stated to "have been put in close confinement by order of "the American Government, and to apprize him "that if any of the said British soldiers shall suffer "death by reason that the soldiers now under "confinement have been found guilty, and that "the known law, not only of Great Britain, but "of every Independent State under similar circumstances, has been in consequence executed, "to select out of the American officers and non-"commissioned officers in such strict confinement, "as many as may double the number of British "soldiers who shall have been so unwarrantably "put to death, and cause such officers and non-"commissioned officers to suffer death immediately; "and further, to notify that if the American "Government persisted in the policy of retaliation, "the war would be prosecuted with 'unmitigated "'severity against all cities, towns, and villages "'belonging to the United States.'"

It appears that the "Nautilus" and "Nassau" seaman were shortly afterwards exchanged, but some other seamen were sent to England in like manner.

"Historical Register," Vol. iii. p. 4.

The President, in his speech of the 7th of December 1813, gives an account of the retaliatory measures adopted, and especially complains of the treatment of naturalized citizens.

"A standing law of Great Britain naturalizes, as is well known, all aliens complying with condi-

tions limited to a shorter period than those required by the United States; and naturalized subjects are, in war, employed by her Government in common with native subjects. In a contiguous British province, regulations, promulgated since the commencement of the war, compel citizens of the United States, being there under certain circumstances, to bear arms, whilst, of the native emigrants from the United States who compose much of the population of the province, a number have actually borne arms against the United States within their limits; some of whom, after having done so, have become prisoners of war, and are now in our possession.

In January 1814, an important debate arose in the House of Representatives on the subject of naturalization.

Some of the speakers maintained that "native "allegiance was unalienable, and yet not at all in "conflict with the practice of naturalization, which "was a mere municipal regulation, whose effects "could not extend beyond the limits of territorial "jurisdiction" (Mr. Sheffey). "By claiming to "give our naturalization laws an extended operation to other countries, we interfere in their "internal government, we set up the lofty pretension of legislating for the whole world" (Mr. Hanson).

Mr. Robertson quoted, as a precedent against England, the enlistment of Frenchmen in 1794 to serve against France, and the debate in which Mr. Burke said that "if they were taken prisoners "and treated as traitors England would retaliate "as a general principle. . . . I am ready to "repeat, and maintain that retaliation of any "severity which an enemy may practise is right "and proper. . . . But the right honourable "gentleman is fearful we may inflame the Jacobins "by this severity on our part. Inflame a Jacobin! "We might as well talk of 'setting fire to hell.'" Mr. Robertson also urged the case of the Irish brigade taken into the service of France in 1688, and recruited from Ireland, of which a whole regiment was taken in 1746, but no severity practised: the Irish who fought at Fontenoy; the French Protestants who served against France after the revocation of the Edict of Nantes; and other instances where foreigners had enlisted in Swedish and German armies and served against their native country.

On the whole the debate seems to have been pretty equally divided between those who supported and those who rejected the doctrine of natural allegiance.

"Historical Register," Vol. iii. pp. 214, 215.

In February Mr. Dana moved in the Senate for papers respecting the retaliatory measures adopted; and in March a further resolution was passed, requesting the President to lay before the Senate "such information as he may possess of "the cases, with their circumstances, in which "any civilized nation has punished its native "subjects taken in arms against her, and for "which punishment retaliation has been inflicted "by the nation in whose service they were taken." The papers moved for were laid April 16, 1814. In reply to the resolution, the Secretary of State pleaded that he had not been able, from other business, to engage in a research into history, and could only observe—

"That all the nations of Europe naturalize foreigners.

"That they all employ in their service the subjects of each other, and frequently against their native countries, even when not regularly naturalized.

"That they all allow their own subjects to emigrate to foreign countries.

"That although examples may be found of the punishment of their native subjects taken in arms against them, the examples are few, and have either been marked by peculiar circumstances, taking them out of the controverted principle, or have proceeded from the passions or policy of the moment."

Negotiations for the Treaty of Ghent, 1813–14.

American "State Papers," Vol. iii. p. 701.

In the autumn of 1813 Russia had made an offer to mediate between Great Britain and the United States. This offer was accepted by the United States, but refused by England, who, however, consented to negotiate directly.

Mr. John Quincy Adams, Mr. Bayard, Mr. H. Clay, Mr. Russell, and Mr. Gallatin were appointed Commissioners on the part of the United States, and Lord Gambier, Mr. Goulbourn, and Mr. Adams on that of Great Britain.

On the 23d of April 1814 a convention for the suspension of hostilities with France was signed at Paris.

Drafts to Lord Gambier, &c.; July to December 1814. MS.

The British Commissioners were instructed to negotiate on the following points:—

1. The questions mainly affecting our maritime rights and strength, and especially the undoubted right of the Sovereign of these realms to claim and enforce in war the allegiance and service of his subjects.
2. The protection of the Indian allied tribes.
3. The boundary question.
4. The fisheries.

No. 1 to Lord Gambier; July 28, 1814.

On the first of these points they were informed that "the British Government can never recede "from the principle of holding their own subjects "to their duty of allegiance. You will endeavour "to ascertain whether the American Government "is disposed prospectively to desist from their "extravagant pretensions under this head, in "which case something might possibly be devised "to relieve their difficulties as to the past by "adopting a system of reasonable indulgence "towards individuals who may have actually and "*bonâ fide* settled amongst them under the faith "of their acts of naturalization. This might be "effected by stipulation without bringing the "question of right to issue on either side.

"The right of search and of withdrawing our "seamen from on board American merchant ships "can never be given up, even for a time," &c. &c. "The difficulties, however, of finding a satisfactory "expedient may perhaps render it more desirable "to waive this discussion altogether, if other "points can be adjusted. To this the British "Government will have no objection, considering "the question to be practically at rest by the "return of peace."

American "State Papers," Vol. iii. p. 695.

Mr. Monroe, in the instructions to the American Commissioners of the 15th of April 1814, urges the importance of coming to some understanding with regard to impressments.

He points out that an Act of Congress had been passed in the previous year, forbidding the employment of British subjects in the American naval or mercantile marine, unless they could produce certificates of naturalization, showing that they had resided five years without intermission within the United States, and suggests that one of two alternatives should be adopted—either that an agreement should be come to, that the two countries should not naturalize each other's seamen; or, that if they did naturalize them, all seamen not naturalized should be excluded from their marine.

"If the alternative is adopted, that all native British subjects are to be hereafter excluded from our service, it is important that the stipulation providing for it should operate so as not to affect those

who have been already naturalized. By our law all the rights of natives are given to naturalized citizens. It is contended by some that these complete rights do not extend beyond the limits of the United States; that, by naturalizing a foreigner, no State can absolve him from the obligation which he owes to his former Government, and that he becomes a citizen in a qualified sense only. This doctrine, if true in any case, is less applicable to the United States than to any other Power. Expatriation seems to be a natural right, and, by the original character of our institutions, founded by compact on principle, and particularly by the unqualified investment of the adopted citizens with the full rights of the native, all that the United States could do to place him on the same footing has been done. In point of interest, the object is of little importance to either party. The number to be affected by the stipulation is inconsiderable."

Mr. Monroe then presses on the attention of the American Commissioner the claim that the American flag should protect those who sail under it.

"The British Government, aware of the truth of this doctrine, has endeavoured to avoid its consequences in the late declaration of the Prince Regent. It has not contended that British cruisers have a right to pursue and search our vessels for British seamen. It asserts only that they have a right to search them for other objects, and being on board for a lawful cause and finding British seamen there, that they have a right to impress and bring them away under the claim of allegiance.

"It might naturally be expected that Great Britain would have given, by her conduct, some support to her pretensions; that if she had not disclaimed altogether the principle of naturalization, she would, at least, have excluded from her service foreign seamen. Her conduct, however, has been altogether at variance with her precepts. She has given great facility to naturalization in all instances where it would advance her interest, and peculiar encouragement is given to foreign seamen. She naturalizes by special Act of Parliament; she naturalizes all persons who reside a certain term of years in British colonies, all those who are born of British subjects in foreign dominions, and all seamen who have served a certain short term in the British service, and would doubtless protect all such British subjects, if required by them to do so. Her Governors of neighbouring provinces are, at this time, compelling emigrants thither from the United States to bear arms against the United States."

America, Domestic Various, MS. January to December 1814.

On the 24th of July 1814 a Proclamation was issued by the Prince Regent, recalling and prohibiting natural-born subjects of his Majesty from serving in the ships and armies of the United States.

After charging all such persons at once to quit the enemy's service, the Proclamation proceeds:—

"And whereas it has been further represented to us, that divers of our natural-born subjects as aforesaid have been induced to accept letters of Naturalization or Certificates of Citizenship from the said United States of America, vainly supposing that by such Letters or Certificates they are discharged from that duty and allegiance which, as our natural-born subjects, they owe to us: Now we do hereby warn all such our natural-born subjects, that no such Letters of Naturalization or Certificates of Citizenship do, or can in any manner discharge our natural-born subjects of the allegiance, or in any degree alter the duty which they owe to us, their natural Sovereign:" A pardon is then offered to those who have so acted under error on immediately withdrawing from the service of the United States, and notice given that any who shall persist in remaining in that service will subject themselves to be proceeded against with the utmost rigour; and, "Moreover, that all such our "subjects, as aforesaid, who have voluntarily "entered, or shall enter, or voluntarily continue to "serve, on board of any such ships of war, or in "the land forces of the said United States of "America, at enmity with us, are, and will be "guilty of high treason.

America, Domestic, Various, MS. July 1814.

A paper on the subject of Impressment (drawn up apparently by the Admiralty Advocate), containing suggestions for instructions to the British Commissioners, was submitted to Sir W. Scott, in July 1814.

The general principles therein laid down are incorporated in the despatch to the Commissioners previously quoted. The other suggestions were,—1st, that a neutral vessel found with British seamen on board should be brought in for inquiry in a Prize Court, in the same manner as vessels carrying contraband; and, 2ndly, That in case of a seaman being impressed from on board any neutral vessel, the particulars of the case should, in each instance, be at once communicated to the nearest Admiral, Consul, or other official authority of the neutral Government for investigation, and compensation given if the seaman was proved not to be a British subject.

To the first of these suggestions Sir W. Scott, for reasons given in a note written by him on the paper, most strongly objected. He thought, however, that some understanding might be arrived at on the second.

No proposal was made for dealing with the case of naturalized Americans.

American "State Papers," Vol. iii. pp. 707, 708.

The Commissioners met at Ghent on the 8th of August 1814, when the British Commissioners proposed as the first point on which discussion was likely to take place, and on which they were instructed:—

"The forcible seizure of mariners from on board merchant vessels on the high seas, and in connexion with it, the right of the King of Great Britain to the allegiance of all his native subjects."

The British Commissioners at the same time intimated "that the British Government did not "propose this point as one which they were par- "ticularly desirous of discussing; but that, as it "had occupied so prominent a place in the dispute "between the two countries, it necessarily attracted "notice, and was considered as a subject which "would come under discussion."

The conference was then directed to other matters, and the subject was not renewed until the 24th of August, when the Commissioners of the United States stated that "the causes of the war "between the United States and Great Britain "having disappeared by the maritime pacifications "of Europe, the Government of the United States "did not desire to continue it in defence of abstract "principles, which have, for the present, ceased "to have any practical effect. The undersigned "have been accordingly instructed to agree to its "termination, both parties restoring whatever ter- "ritory they may have taken, and both reserving all "their rights in relation to their respective seamen. "To make the peace between the two nations solid "and permanent, the undersigned were also "instructed, and have been prepared to enter into "the most amicable discussion of all those points. ". . . It is, therefore, with extreme regret "that the undersigned have seen that other views "are entertained by the British Government, and "that new and unexpected pretensions are raised, "which . . . will only be a fit subject of "deliberation when it becomes necessary to decide "upon the expediency of an absolute surrender of "the national independence."

American "State Papers," Vol. iii. p. 725.

On the 21st of October the British Commissioners made the following communication with

respect to the forcible seizure of mariners from on board merchant vessels on the high seas, and the right of the King of Great Britain to the allegiance of his native subjects: "and with respect to the "maritime rights of the British Empire, the un- "dersigned conceive that, after the pretensions "asserted by the Government of the United States, "a more satisfactory proof of the conciliatory "spirit of His Majesty's Government cannot be "given than by not requiring any stipulation on. "those subjects which, though most important in "themselves, no longer, in consequence of the "maritime pacification of Europe, produce the "same practical results."

From Lord Gambier, MS. August to December 1814.

The American Commissioners, however, although the subject had thus been put aside without discussion, reverted to it in their note of the 10th of November, submitting a draft of a Treaty.

"The only other subjects which had been presented by the undersigned as suitable for discussion are those respecting seamen, blockades, and indemnities.

"Keeping in view the declarations made by Lord Castlereagh in his note of the 29th of August 1812 to Mr. Russell, and in his letter of the 4th of November 1813 to Mr. Monroe, the undersigned propose only a temporary article, intended without affecting the rights or pretensions of either country, to attempt to accomplish by means less liable to vexation, the object for which impressment has hitherto been thought necessary by great Britain. The proposed agreement being purely conditional, and limited in duration, each party will be bound only so far and so long as the other shall fulfil its conditions; and at the end of the term fixed for the duration of the article, or whenever either party may fail to perform his engagement, the rights of both will be as valid and entire as they were before the agreement."

The article was the 11th in the draft treaty.

"Article XI. Each party shall effectually exclude from its naval and commercial service all seamen, seafaring or other persons, subjects or citizens of the other party not naturalized by the respective Governments of the two parties before the day of

"Seamen or other persons subjects of either party who shall desert from public or private ships or vessels shall, when found within the jurisdiction of the other party be surrendered, provided they be demanded within from the time of their desertion.

"No person whatever shall, upon the high seas, and without the jurisdiction of either party, be demanded or taken out of any ship or vessel belonging to subjects or citizens of one of the parties, by the public or private armed ships or vessels belonging to or in the service of the other unless such person be at the time in the actual employment of an enemy of such other party.

"This article shall continue in force for the term of years. Nothing in this article contained shall be construed thereafter to affect or impair the rights of either party."

This article was struck out of the draft by the British Commissioners, who, in their note of the 26th of November, remark, "with respect to "Articles XI. and XII. (regarding blockades), Her "Majesty's Government has strongly manifested its "sincere disposition to the speedy restoration of "peace by agreeing under all the present circum- "stances to conclude the treaty without any stipu- "lation on the points to which those articles relate. "No advantage can arise from entering into dis- "cussion, upon a successful result of which the "American Plenipotentiaries have stated more "than once, that they will not make the conclu- "sion of the peace at all depend."

Nevertheless, the American Commissioners reproduced this XIth Article in their second draft of a treaty. It was then again returned to them marked "inadmissible," and on the 30th of November they consented to omit it. They say:—

"They will also waive the residue of that (the XIIIth) Article and the XIth Article, it being understood that the rights of both Powers on the subject of seamen . . . shall not be affected or impaired by the omission in the treaty of any specification with respect to those two subjects.

"In forebearing to insist upon the discussion of subjects deeply involving interests important to their country, and upon which the undersigned view the proposal offered by them for consideration as founded upon principles the most moderate and conciliatory, they give the strongest evidence of the anxious wish of their Government, that the negotiation should be brought to a happy issue."

The Treaty of Peace was accordingly signed on the 24th of December 1814, without any provisions being inserted in it respecting either impressment or blockade, nor is any reference made to those subjects in the President's message of the 18th of February 1815, communicating the treaty to Congress.

Hertslet's "State Papers" Vol. ii, pp. 355, 357.

The IIId Article of the treaty provides for the mutual restoration of prisoners.

Restoration of Hostages.

On the 16th of July, a Convention for the exchange of prisoners had been concluded, which contained a stipulation that the 23 British soldiers put into confinement as hostages by the United States, and the 46 American commissioned and non-commissioned officers put into confinement in retaliation for the confinement of these 23 soldiers, should be immediately released and exchanged in the same manner as other prisioners of war.

American "State Papers," Vol. iii. p. 728.

On the 12th of August 1814, the American Commissary-General of prisoners, writing to Colonel Barclay, states that all the British hostages had been placed on the footing of ordinary prisoners, and gives as the reason that the American Government had been informed by their agent in London, that the seamen sent to England for trial had been similarly treated.

No further cases of retaliation seem to have occurred, nor were any of the seamen put on their trial for treason.

It is alleged that, in consequence of the Americans omitting to supply any means of conveyance across Lake Erie, many of the released hostages were detained there so long that they were attacked by lake fever, and several of them died.

James "History of the Military Occurrences of the War," Vol. i. p. 184.

Case of the "Ann."

During the war of 1812–14, a case was brought before the Court of Admiralty in which the claim of a British subject, naturalized in America, to retain the privileges of a British subject under the Order in Council of 1812, providing for the restitution of British ships sailing under the American flag, was rejected by Sir W. Scott, who decided that a British-born subject may, by his employment and residence in a foreign country, acquire a new national character for *commercial purposes*.

As this case is frequently referred to by writers on the subject of naturalization, a copy of the Report (2 Dobson p. 221, Robinson's Admiralty Reports, Vol. VIII.), is appended to this Memorandum.

Addenda C.

Mr. Rush's Negotiations, 1818.

In 1818 another attempt was made to settle the Impressment controversy.

Residence at e Court of Lon- n." By Mr. ush. 1833. age 359.

essage to the ouse of Repre- ntatives, Feb- ary 15, 1823: 'ith the Corre- ondence rela- ng to the Ne- otiation of the onvention of ctober 20, 1823. nclosure in Mr. tratford Can- ing's No. 27. larch 4, 1823.)

A full account of the negotiations is given by Mr. Rush, who was the United States Minister in England from 1817 to 1825, in his "Residence at the Court of London."

Mr. Rush delivered to Lord Castlereagh two propositions which, taken together, embodied an offer by the United States to exclude, by all the means in their power, British seamen, native-born or naturalized, from their service. As an equivalent they demanded that impressment from their vessels should be totally relinquished. The stipulation for excluding seamen to be reciprocal. The exclusion to extend to the public and private marine of both nations.

This offer of exclusion was at first rejected, but afterwards considered. Two conditions were then annexed to it by Lord Castlereagh: one, that any Treaty containing the mutual stipulations should be revocable on short notice by either party. The other condition was, that the British boarding officer entering American vessels at sea for purposes agreed to be lawful in time of war, and finding British seamen, or men suspected to be such, should be allowed to make a *proces-verbal* of the fact, to be presented to the notice of the American Government, but the officer to be prohibited from taking away the men.

At the third conference, the British Plenipotentiaries submitted a project of six articles designed for the regulation, by a separate Treaty, of the whole subject.

Article I. stipulated for the reciprocal exclusion of natural-born subjects and citizens of either party from the marine of the other, "*Provided always "that nothing contained in this Article shall be "understood to apply to such natural-born subjects "or citizens of either Power as may have been "naturalized by their respective laws, previous "to the signature of the present Treaty.*

"Art. 2. For the better ascertaining the number of persons on either side that may fall within the exception contained in the preceding Article, the High Contracting Paaties engage to deliver, each to the other, within 12 months from the ratification of the present treaty, a list of all persons falling within the said exception, specifying the places of their birth, with the date of their becoming naturalized. And it is further agreed that none other than the persons whose names shall be included in the lists, shall be deemed to fall within the said exception."

Art. 3. The Contracting Parties reserved power to authorize, by proclamation, their subjects and citizens to serve in the marine of the other country.

Art. 4. During the continuance of the Treaty, neither party to impress from the vessels of the other on the high seas: Provided always, that nothing contained in this article shall be construed to apply to the vessels of either power which may be within the ports or within the maritime jurisdiction of the other; and also provided, that nothing herein contained shall be construed to impair or affect the established right of search as authorized in time of war by the law of nations.

Art. 5. The treaty to endure for 10 years, but terminable at six months' notice.

Art. 6. It is agreed that nothing contained in the preceding articles shall be understood to affect the rights and privileges on which the high contracting parties have heretofore acted, except so far as the same shall have been modified by the said Articles. On the termination and abrogation of the Treaty, or in the event of war between the two Parties, the said Parties to stand with respect to each other, as to the said rights and privileges, as if no such Treaty had ever been made.

The American Plenipotentiaries proposed several amendments, two of which proved fatal to the projected Articles.

In Article 2 they objected to the list of naturalized citizens; and, as a substitute, proposed that "no naturalized subject or citizen of either Power "whose name should not be included in the list "should be deemed to fall within the exception, "*unless he produced proof of his having been duly "naturalized prior to the exchange of ratifications "of the Treaty.*"

Mr. Rush adduced as reasons for being unable to accede to the proposal of keeping a list, that previously to 1789, persons were naturalized by the States, and the form of naturalization not being uniform no record could in many instances be obtained. No discrimination of the birth-place of aliens was recorded. There was no means of making the States' Courts supply information for such a list, and even if it were obtained it would not designate seamen nor the minor children of naturalized persons, of whom no register was kept; in short, the scheme was, he alleged, impracticable, and the consequence of consenting to it would have been that aliens naturalized before the Treaty, and entitled to all the rights of citizenship, would, by an *ex post facto* measure, have been excluded from following their pursuit of seamanship.

The Plenipotentiaries further objected to the term in the first Article,—"signature of the present Treaty," and proposed to substitute "ratification."

The British Government would not give way on either of these points, and the negotiation was consequently abandoned.

Mr. Rush adds, "This subject falling through, "others of a maritime nature were withdrawn. It "had been agreed that none were to be proceeded "with, if we failed on impressment. We offered "Articles on blockade contraband, trading with the "Colonies of a belligerent, for the regulation of "proceedings in prize cases, and the conduct of "privateers and letters of marque. Britain had "joined in offers on most of them, omitting the "third. Their discussion was carried on to some "extent, but given over when we discovered that "we could not arrange the point on which all "depended."

Lord Ashburton's Mission.

The long peace which followed the overthrow of Napoleon, and the subsequent establishment of a voluntary system for the manning of the navy, prevented any occasions arising on which questions regarding naturalization and allegiance could be brought into dispute between Great Britain and the United States, from the exercise of impressment on the high seas.

The United States, however, did not fail to watch jealously any assertion of British authority which might seem to revive the obnoxious claim to visit and search their vessels, and at once raised objections when the proposal was made in 1841 for a joint agreement by the maritime Powers authorizing their respective cruizers to visit suspected slavers within certain latitudes.

Lord Ashburton's special mission to the United States followed in 1842.

Lord Ashburton was authorized to negotiate for the settlement of all existing differences between the two countries.

On the 8th of August 1842 Mr. Webster addressed a long note to Lord Ashburton, calling his attention to the importance of coming to some definite understanding respecting impressment.

Parliamentary Papers relative to Lord Ashburton's Special Mission in 1842. Presented 1843, page 59.

After showing that all efforts to come to such an understanding during the last 50 years had failed, he proceeds:—

"England asserts the right of impressing British subjects in time of war, out of neutral merchant vessels, and of deciding by her visiting officers who, among the crews of such merchant vessels, are

British subjects. She asserts this as a legal exercise of the prerogative of the Crown, which prerogative is alleged to be founded on the English law of the perpetual and indissoluble allegiance of the subject, and his obligation under all circumstances, and for his whole life, to render military service to the Crown whenever required. . . . . The claim asserts an extra-territorial authority for the law of British prerogative; and assumes to exercise this extra-territorial authority to the manifest injury and annoyance of the citizens and subjects of other States on board their own vessels on the high seas.

"Every merchant vessel on the seas is rightfully considered as a part of the territory of the country to which it belongs. . . . English soil, English territory, English jurisdiction, is the appropriate sphere for the operation of English law. The ocean is the sphere of the law of nations, and by that law every merchant vessel on the seas is under the protection of the laws of her own nation," &c.

He then argues, that "if this notion of perpetual allegiance," was the law of the world, and was usually practised like the right of search for enemies' goods in time of war, it might be admissible, but that it is an English law, and can only be exercised of right within English jurisdiction.

He next refers to the great number of emigrants from Great Britain to the United States, "a greater "or less number of whom becoming in time naturalized citizens, enter into the merchant service "under the flag of their adopted country," and urges that nothing could be more unjust than for England to seek out these persons in time of war, and compel them to take arms for a country which has ceased to be their own country.

For these and other reasons, such as the great inconvenience to which neutral merchants are subjected by the practice, Mr. Webster declares, on behalf of the American Government, "that the "impressment of seamen from American vessels "cannot hereafter be allowed to take place. That "practice is founded on principles which it does "not recognize, and is invariably attended by "consequences so unjust, so injurious, and of such "formidable magnitude, as cannot be submitted "to. . . . . In every regularly documented "American merchant vessel, the crew who navi-"gate it will find their protection in the flag which "is over them."

Lord Ashburton replied, August 9, that his instructions were limited to existing subjects of difference, "and no differences have, or could have, "arisen of late years with respect to impressment, "because the practice has, since the peace, wholly "ceased, and cannot, consistently with existing "laws and regulations for manning Her Majesty's "Navy, be under present circumstances renewed. ". . . . I am well aware that the laws of our "two countries maintain opposite principles respecting allegiance to the Sovereign. America, re-"ceiving every year by thousands the emigrants "of Europe, maintains the doctrine suitable to her "condition, of the right of transferring allegiance "at will. The laws of Great Britain have at all "times maintained the opposite doctrine. The "duties of allegiance are held to be indefeasible, "and it is believed that this doctrine, under "various modifications, prevails in most, if not "in all, the civilised States of Europe. . . We "may safely leave this part of the subject without "indulging in abstract speculations, having no ma-"terial practical application to matters in discussion "between us."

It does not appear that anything further was done upon this overture from the American Government, and the subject of impressment thenceforth ceased to be a matter of discussion or dispute between the two countries.

Cases in Ireland in 1848.

The next occasion on which the question of disputed allegiance was raised was at the time of the disturbances in Ireland in 1848.

Her Majesty's Government having been informed that a plot had been entered into in America for sending over detachments of men to co-operate with the Irish malcontents, orders were given in August, 1848, to arrest every American or returned emigrant landing in Ireland. In September the order was modified to the arrest of suspicious persons and the search of American baggage. Hertslet's "State Papers," Vol. xlvii. p. 1222, *et seq.*

Under these orders a Mr. Bergen, a native American, and a Mr. Ryan, an Irishman naturalized in America, were arrested and detained.

Mr. Bancroft, then United States' Minister in London, was instructed to interfere on their behalf, which he did, and was informed that they had been arrested as being concerned in treasonable practices under the Act 11 & 12 Vict. cap. 35.

Lord Palmerston added that Mr. Ryan had been shown to be a British subject.

In reporting his proceedings to the President, Mr. Bancroft calls attention to this statement, and as an assertion in Mr. Ryan's case of the British doctrine of perpetual allegiance.

"Two questions," Mr. Bancroft says, "then "arise: Does a naturalized citizen owe allegiance "to any country but that of his adoption? and "does the return of a naturalized citizen, for tran-"sient purposes, to his native country bring back "upon him the obligation of allegiance to that "country?" Ibid. p. 1235.

Mr. Buchanan replies, October 23: "Treason "cannot be committed by a citizen of the United "States against a foreign Government; and we "are bound by every principle of faith and national "honour to maintain the doctrine firmly in favour "of our naturalized as our native citizens." Ibid. p. 1236.

Five days afterwards Mr. Buchanan acknowledges that he was "too hasty in stating that "treason could not be committed by a citizen of "the United States against a foreign Govern-"ment."

He then shows that aliens are liable in the United States, as well as in Great Britain, to trial for treasonable offences committed within the country's jurisdiction.

He concludes the despatch—"Whenever the "occasion may require it, you will resist the "British doctrine of perpetual allegiance, and "maintain the American principle, that British "native-born subjects, after they have been naturalized under our laws, are, to all intents and "purposes, as much American citizens, and entitled "to the same degree of protection, as though they "had been born in the United States."

On the 17th of November, Mr. Bergen and Mr. Ryan were liberated on condition of their leaving the kingdom.

Mr. Bancroft, however, considered himself bound to carry out the President's instructions, although the necessity for doing so had now ceased, and on the 26th of January addressed a representation to Lord Palmerston, remonstrating against any distinction being at any time made between naturalized and native Americans. He argued that by permitting emigration, England recognized the right of expatriation, and that to continue to claim the allegiance of those who had left her shores and taken up their abode in a foreign country, was to endeavour to plant alien colonies within that country, and to exercise the prerogative of royalty within a republic. United States "Congress Papers," Executive Documents, 1859-60, Vol. ii. p. 161.

Mr. Bancroft's letter concludes as follows:—

"It is quite time that the two nations should come to an understanding on this subject. If the

United Kingdom really wishes to retain as subjects all the natives of this realm, let the United Kingdom forbid the emigration of its sons. But if their emigration is permitted, and even stimulated, the land which accepts the anxious responsibility of receiving them must take full power of regulating their political condition."

Lord Palmerston's reply of the 16th of August, 1849, is of importance as containing an authoritative declaration of the position occupied by Her Majesty's Government on this question, and is of special interest with reference to the present state of affairs in Ireland.

It must be remembered that when the arrests, out of which the discussion arose, were made, the Habeas Corpus Act was suspended in Ireland.

" *Lord Palmerston to Mr. Bancroft.*

" Foreign Office, August 16, 1849.

" The Undersigned, Her Majesty's Principal Secretary of State for Foreign Affairs, has the honour to acknowledge the receipt of the note which Mr. Bancroft, Envoy Extraordinary and Minister Plenipotentiary of the United States of America at this Court, addressed to him on the 26th of January last, referring to the imprisonment in Ireland of some American citizens, who were arrested in that country in August 1848, under the Act 11 and 12 Vict. cap. 35, and remonstrating against the consequences of the doctrine which Mr. Bancroft assumes to be maintained in this country in regard to the allegiance due to the Queen from Her Majesty's natural-born subjects.

" In reply, the undersigned begs to state, that he apprehends that the remonstrance contained in Mr. Bancroft's note has originated in a mistaken notion as to the doctrine held by Her Majesty's Government upon this matter ; because Mr. Bancroft states that one consequence of the British doctrine of natural allegiance is, that Great Britain denies to the United States the right of regulating the condition of emigrants from Great Britain in such manner 'as may most conduce to the well-'being of the emigrants and the safety of the '[American] commonweaith.' Now, although by the law of England natural allegiance is a tie which cannot be severed or altered by anything but the 'united concurrence of the legislature,' and although it is true (as observed by Mr. Justice Story, an eminent American authority,) that 'every nation has 'hitherto assumed it as clear, that its laws extend to 'and bind natural-born subjects at all times and in 'all places,' yet Her Majesty's Government did not dissent from the opinion of the same learned Judge, that 'in speaking of the right of a state to bind its 'own native subjects everywhere, we speak only of 'its own claim and exercise of sovereignty over 'them, and not of its rights to compel or require 'obedience to such laws, on the part of other 'nations;' and Her Majesty's Government concur with Mr. Justice Story, in maintaining that '*every 'nation has an exclusive right to regulate persons 'and things within its own territory according to 'its own sovereign will and polity.*'

" The undersigned considers the above exposition of public law to be perfectly correct, and it appears to him to meet the objections to the doctrine of Her Majesty's Government which have been raised in Mr. Bancroft's note.

" With reference to those observations of Mr. Bancroft, from which it would appear that he assumes that Her Majesty's Government is disposed to doubt whether the poorer classes of emigrants who have come from Great Britain to the United States have a natural right to expatriate themselves, the undersigned begs to observe that it has never been denied by the British Government that those persons leave this country by virtue of that right, which is asserted by Mr. Bancroft to be the foundation of all liberty, namely, 'the right of every reasonable being to seek a new country;' and it is well known that by the laws of Great Britain no restraint can, except in very special cases, be placed upon the perfect liberty of every British subject to leave the realm, when and for whatever period of time he chooses. It does not appear, however, that the passage quoted by Mr. Bancroft from Cicero* sanctions expatriation, in the sense of a voluntary abjuration of natural allegiance, without the assent of the Sovereign power ; nor does an emigrant's departure from Great Britain debar him from returning thereto, at any subsequent time, as a natural-born subject. So long as the emigrant remains in the United States, or in any other country, he is amenable to the laws of the country in which he resides ; and it cannot therefore be said as suggested in Mr. Bancroft's note, that the British Crown, by permitting its subjects to emigrate to the United States, is sending among the United States not only people to be provided for by sharing in the opportunities for industry, but 'subjects,' who may get arms and still serve Her Majesty, or that England is planting garrisons in all the territories of the Union.

" The undersigned has also to observe that Mr. Bancroft has referred generally to the orders issued in Ireland last year for the arrest of suspected persons, and has alluded to the distinction drawn by Her Majesty's Government between native and naturalized American citizens ; and, although Mr. Bancroft's argument does not bear specifically upon that point, the undersigned begs leave to repeat what he has stated in his previous correspondence with Mr. Bancroft respecting this matter, namely : that natural-born subjects of Great Britain, who may have become naturalized in a foreign country, but who return to the United Kingdon, are as amenable as any other of Her Majesty's subjects to any laws which may be in force, either of a permanent or of a temporary nature; and the maxim, '*ignorantia legis non excusat,*' must apply to them as well as to those who may be permaneutly resident within the United Kingdom.

" The undersigned begs, in conclusion, further to remark, that the Stat. 13 Geo. II. c. 7, to which Mr. Bancroft has adverted, has no bearing upon the *status* of a native of Great Britain naturalized in the United States. That statute applies only to persons not being subjects of Great Britain, who settled in America before the declaration of American independence. And it never has been contended by Great Britain that that statute would affect in the slightest degree the '*status*' of the foreign settler as a subject of the country of his origin, if he should think proper to return to such country.

" The undersigned has the honour, &c.

" PALMERSTON.

" George Bancroft, Esq.,
" &c. &c. &c."

This closed the correspondence, and the controversy again lay dormant until the

CIVIL WAR IN THE UNITED STATES, 1861–65.

Conscription in Northern and Southern States.

The outbreak of the Civil War changed the relative position of the disputants.

Hitherto it had been always the United States who had been pleading the cause of the emigrant. It was now England's turn to be called upon to interfere on his behalf.

The British Consulates were crowded by applicants hastening to register themselves as British subjects, and to assert their claims to British Protection ; and even those who had taken the preliminary proceeding for a renunciation of their allegiance clamoured for the shelter of the flag which they had been preparing to desert.

* "Ne quis invitus civitate mutetur: neve in civitate maneat invitus," &c.

It would be impossible to give a *résumé* of all the cases that occurred, but an attempt will be made to include in this Memorandum most of those in which questions of allegiance were dealt with.

On the 13th of April 1861 Fort Sumter surrendered, and on the 15th the President issued his Proclamation, calling out 75,000 men of the Militia.

Previously to this, Messrs. Pearson and Cox had applied to Lord Lyons respecting their liability, as British subjects, to serve in the Missouri and Virginia Militia.

To Lord Lyons, No. 76; April 4, 1861.

Lord Lyons was instructed "that there is no "rule or principle of international law which "prohibits the Government of any country from "requiring aliens, resident within its territories, "to serve in the Militia or Police of the country "or to contribute to the support of such establish-"ments.

"It would appear that in this country the question whether an alien could be compelled to serve in the Militia has never been authoritatively decided."

If, however, the Militia were to be embodied for active service, and no alternative of providing substitutes were permitted, "the position of "British subjects would appear to deserve very "favourable consideration, and to call for every "exertion being made in their favour on the part "of Her Majesty's Government."

To Lord Lyons, No. 349; October 7, 1861.

In July, Lord Lyons again applied for instructions in this head, and was informed, that although Her Majesty's Government "might well be content "to leave British subjects voluntarily domiciled in "a foreign country, liable to all the obligations "ordinarily incident to such foreign domicil; in-"cluding, when imposed by the municipal law of "such country, service in the Militia or National "Guard, or Local Police, for the maintenance of "internal peace and order, or even, to a limited "extent, for the defence of the territory from "foreign invasion; it is not reasonable to expect "that her Majesty's Government," should passively allow British subjects to be compelled to serve in the armies in a Civil War, where, besides the ordinary incidents of battle, they might be exposed to be treated as rebels and traitors in a quarrel in which, as aliens, they would have no concern; and that, if such enforced enlistment were persisted in, Her Majesty's Government would be obliged to concert with other neutral Powers for the protection of their respective subjects.

Lord Lyons, No. 379; July 29, 1861.

It appears, however, that "in no case, either in "the Northern or Southern States, had the dis-"charge of a British subject, enlisted against his "will, been refused or delayed on proper repre-"sentation being made."

Refusal of American Passports to intended Citizens.

Lord Lyons, No. 448; August 26, 1861.

A regulation having been made in August by the United States Government that foreigners who wished to leave the country must be provided with passports, Lord Lyons inquired of the United States Secretary of State whether persons who had announced their intention to become naturalized were included in this regulation, and was told officially by Mr. Hunter, in reply, that "until the "final act of naturalization such a person is to all "intents and purposes a subject or citizen of his "native country."

Mr. Carlisle, the legal adviser of the Legation, was also consulted, and gave it as his opinion that "such persons remain aliens until the complete "final act, owing none of the duties and entitled "to none of the peculiar protections of allegiance.."

Under these circumstances, Lord Lyons was directed "to grant passports to the persons in "question as a general rule, it being of course "understood that the granting of a passport was a "matter for his Lordship's discretion, and not one "of strict legal right."

Suspension of Habeas Corpus Act in Northern States.

Parliamentary Papers. "North America," No. 1, 1862.

A correspondence now commenced as to the right of the President to suspend the Habeas Corpus Act without the sanction of Congress, and Lord Lyons was instructed to remonstrate against the arbitrary arrests of British subjects, but no question of allegiance was raised.

Mr. Seward, on the 11th of October, denied the right of Her Majesty's Government to protest, and added that "in every case subjects of Her Majesty "residing in the United States, and under their "protection, are treated during the present troubles "in the same manner, and with no greater or less "rigour, than American citizens."

Claim to British Protection of Minor Children of Naturalized Americans.

November 4, 1861.

In October a claim to British protection was set up by three persons who had been arrested at Baltimore on the ground that they were minors, natural-born British subjects, whose fathers had been naturalized in the United States.

A similar claim was urged on behalf of a Mr. James Hoy, a merchant of New York.

The United States Government declared that such persons were American citizens, and Mr. Carlisle reported that, by the statute law of the United States, minors in this position were regarded as American citizens, and obtained and enjoyed in the United States all the rights and benefits incident to that character.

Her Majesty's Government decided that minors who were born in Her Majesty's dominions, but whose fathers had become naturalized American citizens, ought during their minority to be considered and treated as between the two Governments, not as British subjects, but as American citizens, and that they must continue to be so considered if, after attaining their majority, they had continued to remain domiciled in the United States, and had not taken any active steps to absolve themselves from their allegiance to that country.

Status in Confederate States of Persons naturalized in the United States.

To Lord Lyons, No. 259; June 7 1862.

Early in 1862 Mr. Coppell, Her Majesty's Consul at New Orleans, requested instructions as to the answer which he should return to persons applying to him for information as to the status within the Confederate States of those who had been naturalized within the United States.

Lord Lyons was directed to inform Mr. Coppell and any other of Her Majesty's Consuls who might require information on the matter:

1. That a natural-born British subject, who had been naturalized in the United States would not be recognized by Her Majesty's Government within the United States as a British subject, but if he returned to British territory his native allegiance would revert.

2. In the event of the independence of the Confederate States being established, Her Majesty's Government would not interfere on behalf of such naturalized Americans, and their status must be left to be determined by the Government of those States. Naturalized citizens would have a right to claim from the United States to be treated with regard to a transfer of allegiance in the same manner as native citizens. Until, however, the independence of the Confederate States was recognized, the United States would be justified in enforcing against all persons resident therein the obligations of the oath of allegiance which they had taken.

3. In the event of the Confederate States becoming independent, Her Majesty's Government would not be bound, nor would the Confederate States, to recognize such persons as British subjects, nor would their return to Great Britain, and renunciation there of their United States allegiance make any difference in this respect.

Oath of Allegiance at New Orleans.

. Stuart's, No. 1862.

General Butler having assumed the Government of New Orleans, compelled all resident aliens, who had been domiciled within the United States for more than five years, to take an oath of allegiance, and all aliens claiming any of the ordinary legal rights of residence (with the single exception of "protection from personal violence") to take an oath of neutrality, binding upon them, wherever they might be, so long as their Government was at peace with the United States.

Mr. Stuart, ..., August 1862.

These orders having been revoked as regards foreigners, and those who had been forced to take the oaths having been "dispensed from its obligations," Mr. Stuart was not instructed to remonstrate unless an attempt should be made to re-impose them.

Conscription in Northern States.—Liability of Intended Citizens, Voters, and Sons of Naturalized Citizens.

nited States' Statutes at rge," Vol. xii. 597.

On the 17th of July an Act of Congress was passed, calling out the Militia.

Its operation was confined to Citizens of the United States. "The enrolment of Militia shall "in all cases include all able-bodied male citizens "between the ages of 18 and 45."

rliamentary ..., "North ..erica," No. 1. 63, p. 10.

On the 5th of August a draft of 300,000 men was called out, and, on the 8th, orders were issued forbidding persons liable to the draft from leaving the country, and great numbers of persons were arrested. At Mr. Stuart's request instructions were given not to detain alien travellers.

id. p. 13.

North ..." No. 1. 63; pp. 25, 26.

Much inconvenience being apprehended from the divergence of practice in the Northern States with regard to the exemption of aliens from the Draft, Mr. Anderson of the Foreign Office, at that time attached to Her Majesty's Legation, was directed by Mr. Stuart to go to the several States and endeavour to arrange with the Governors for the adoption of some system to secure the immunity of British subjects.

Mr. Anderson succeeded in establishing an understanding that notarial or County Court affidavits should be accepted as evidence of nationality, and thereby overcame the principal difficulty which arose in dealing practically with the matter.

He found, however, that in Ohio the State Governor considered persons who had declared their intention of becoming United States citizens to be citizens within the meaning of the Act of Congress.

Moreover, it was generally asserted that the exercise of the elective franchise debarred British subjects from claiming exemption.

Mr. Anderson, in his communications with the Governors, contended that "if an alien had exer- "cised any of the exclusive privileges of a citizen, "he had rendered himself liable to the obligations "of citizenship; if he had exercised only those "privileges which an alien is entitled to exercise, "he was still entitled to the immunities of alien- "ship."

There was some difference of opinion on this point. The Governor of Indiana was anxious to claim all voters, while the Governor of Illinois concurred in the views thus expressed, and believed they would be adopted in all the Western States.

Another point on which there appeared to be a diversity of opinion was with regard to the *status* of the sons of naturalized citizens.

"1. Those born in the country. Respecting these there is no difficulty.

"2. Those not in the country at the time of the naturalization of their parents. These, I understand, are not claimed by the United States Government.

"3. Those in the country at the time of the naturalization of their parents. When under age, it is claimed that they follow the nationality of their parents, and this, it appears, is also the law of Great Britain."

(On these points see the case of Hoy and others, *ante*.)

The question with regard to persons who had "declared their intention," was set at rest by the publication of the following letter from Mr. Seward to Mr. Stuart:—

"Department of State, Washington,
"Sir, August 20, 1862.

"Having informally understood from you that British subjects who had merely declared their intention to become citizens of the United States had expressed apprehensions that they might be drafted into the Militia, under the late requisition of the War Department, I have the honour to acquaint you, for their information, that none but citizens are liable to Militia duty in this country, and that this Department has never regarded an alien, who may have merely declared his intention to become a citizen, as entitled to a passport, and consequently has always withheld from persons of that character any such certificate of citizenship.

"I have, &c.
"(Signed) W. H. Seward.

"The Hon. W. Stuart,
"Her Britannic Majesty's
"Chargé d'Affaires, &c."

Southern Conscription.—Domicil.

To Mr. Stuart, No. 144; October 10, 1862.

In October, Mr. Consul Coppell made some further inquiries as to the course which he should pursue in certain cases arising out of disputed points of international law relative to property and domicile, and Mr. Stuart was furnished with the following instructions:—"That a domicil estab- "lished by length of residence only, without "naturalization or any other formal act whereby "the domiciled person has, so to speak, incorpo- "rated himself into the state in which he resides, "does not 'for the time convert him into a subject "'of the domicil in all respects save the allegiance "'he owes his native Sovereign.' Such a domi- "ciled person is not a *civis*, but a temporary "subject *subditus temporarius* of the State in "which he is resident. He cannot lawfully be "compelled to serve in the military forces of that "State against any other State, or be compelled "to enrol himself in the militia of the State: "though it would be his duty to co-operate with "native citizens when called upon to do so by the "proper authorities, in keeping the peace and "preserving good order in the particular place in "which he resides, as, for instance, against thieves "or pirates."

In accordance with the instruction thus conveyed to Mr. Stuart, Lord Russell addressed a Circular Despatch to Her Majesty's Consuls in the Southern States on the 11th of October 1862, directing them to remonstrate strongly against the forced enlistment of British subjects, pointing out that "British "subjects domiciled only by residence in the so- "called Confederate States cannot be forcibly "enlisted in the military service of those States "by virtue of an *ex post facto* law, when no muni- "cipal law existed at the time of the establishment "of their domicile, rendering them liable to such "service.

Parliamentary Papers, "North America," No. 13, 1864, p. 34.

"It may be competent to a State in which a domiciled foreigner may reside to pass such an *ex post facto* law, if at the same time option is offered to foreigners affected by it to quit after a reasonable period the territory, if they object to serve in the armies of the State: but without this option such a law would violate the principles of international law; and, even with such an option, the comity hitherto observed between independent States would not be very scrupulously observed."

Lord Russell at the same time desired the Consuls to urge the anomaly of British subjects being forced to engage in a war which their own Sovereign had forbidden them under heavy penalties to take part in.

Mr. Shaver's Case.

A case which had occurred in 1861, of the arrest of a British subject, Mr. Shaver, led to a rather curious correspondence with the United States Government on the question of domicil, and it may be useful to notice it in connexion with the pretensions of the Confederates to enlist domiciled aliens.

"North America," No. 7. 1862.

Mr. Shaver was a travelling agent of the Grand Trunk Railway, whose wife and family resided in Canada. He was arrested in the United States, and taken to Fort Warren, where the oath of allegiance was tendered to him, which he refused to take, and he was eventually released on taking an oath of neutrality.

The United States Government refused all compensation (though it was apparently admitted that there was no charge against Mr. Shaver) and raised the point of his domicil.

Mr. Shaver's claim is one of those which are still waiting for adjustment.

Mr. Sellers' Case.

Mr. Sellers, a British subject, who had announced his intention to become naturalized, applied on the 7th of October 1862, to be informed whether he could claim the protection of Her Majesty's Government.

He was told, October 20, that as he had so acted without consulting Her Majesty's Government, he must "not expect that, until a case shall arise, in "which their interference may be requested, Her "Majesty's Government will give any opinion of "the view which they may take of such a case."

Forced Military Labour.

To Mr. Stuart, No. 190; November 15, 1862.

In November complaints were made of British subjects being forced to work in the trenches in the military operations in the Western States, and Mr. Stuart was informed that, as a general principle of international law, neutral aliens ought not to be compelled to perform any military service, but that allowance must be made for the conduct of authorities in cities under martial law, and in daily peril of attack from the enemy.

Status of Widows.

The state of affairs at New Orleans made British protection eagerly sought after, and Mr. Coppell had several applications addressed to him by widows who laid claim to it.

To Mr. Stuart, No. 189; November 15, 1862.

Mr. Stuart was informed that, in the case of American-born widows of British subjects, if the American law was at variance with that of this country (conferring upon the wives of British subjects the privileges of natural-born British subjects), and the United States desired to put the American law in force, the American law must prevail, and that American-born widows being resident in America would not be entitled to the certificate of being British subjects.

In the cases of British-born subjects, the widows of American or foreign husbands, Her Majesty's Government were of opinion that if, after the dissolution of their coverture, they should elect to claim the benefit of their British character, they would be at liberty to do so, and must be treated and protected as British subjects.

Southern Conscription.

To Lord Lyons, No. 293; November 27, 1862.

The passing of a new Conscript Act in the so-called Confederate States having caused fresh complaints from British subjects of ill-treatment under its provisions, Lord Lyons was informed on the 27th of November that Her Majesty's Government considered "it was competent to the so-styled "Confederate Government to include in the con-"scription British subjects permanently resident "in those States, if they refuse the option duly "tendered to them of leaving the country within "a reasonable time, and with reasonable opportu-"nities of compliance, but not otherwise.

"It is, of course, to be understood that foreigners permanently residing, but not naturalized in a State, are entitled to the option of leaving that State in the event of new laws being passed in it which affect their status and alter the obligation which they contracted at the time when they became domiciled in it."

Liability of Voters to Conscription.

Besides the difficulties arising out of the status of "intended" citizens, a further question was raised as to the right to British protection of British subjects, not naturalized, who had voted at the State Elections or otherwise exercised the privileges of citizenship.

From Mr. Stuart, No. 99; July 25, 1862.

In July 1862, Mr. Stuart had issued a circular to Her Majesty's Consuls directing them "to ascer-"tain in each instance of an application for a "certificate of British nationality, whether the "applicant has ever voted at elections in the "United States, or has in any other way exercised "any of the exclusive privileges of a citizen, as, "should it be proved that he has done so, he "would thereby forfeit his claim to protection, "even though he should not have formally re-"nounced his allegiance to Her Majesty the "Queen."

Mr. Stuart, No. 123; August 3, 1862.

At a subsequent interview with Mr. Seward Mr. Stuart told him, in reply to an observation he had made, that Her Majesty's Government had no desire to protect such persons.

Numerous representations having been addressed to Mr. Stuart by persons who had voted in States where electors could vote as *State* citizens without being *national* citizens, and who pleaded that they did not come within the terms of the Act of Congress which confined the draft to *citizens*, Mr. Stuart applied to Mr. Seward to be informed of the views of the State Department.

Mr. Seward replied in the following letter:—

"Department of State, Washington,

"Sir, October 24, 1862.

United States' Executive Documents 1863-64, vol. i. p. 456.

"I have the honour to acknowledge the receipt of your note of yesterday, and, so far as it relates to the liability of aliens who may have exercised the right of suffrage to military duty in this country, to state, in reply, that no doubt is entertained upon that point by this Department. Aliens who exercise that right are considered as citizens of the States where they reside, and as such are within the purview of the law, which requires all such citizens between the ages of 18 and 45, with certain specific exemptions, as liable to be drafted into the militia. A person may be a citizen of a State, and, as such, entitled to vote therein without being a citizen of the United States.

"I am, &c.

"(Signed) William H. Seward.

"Hon. W. Stuart,

"&c. &c. &c."

Ibid. p. 468.

In November 1862, Lord Lyons forwarded a petition from certain native-born British subjects in Wisconsin, alleging that, although they had voted at elections, they had done so under the State law as aliens, and had not thereby forfeited their British nationality.

Ibid. p. 474.

Mr. Seward replied that so far as the executive authority of the United States was concerned, no foreigner who had not been naturalized, or who had not exercised the right of suffrage, had hitherto been required to serve in the militia.

Lord Lyons, No. 536; December 22, 1862.

In December 1862 Lord Lyons reported that he had been informed by M. Mercier (the French Minister) that some time ago he had written a

circular " to the French consuls, in which he said " that Frenchmen who had voted illegally in this " country had no doubt rendered themselves liable " to legal penalties here, but that they had not " forfeited their French nationality, or their right " as aliens to be exempt from compulsory military " service . . . In elucidation of this point " M. Mercier especially referred to the laws of " some of the States which admit aliens to the " exercise of the elective franchise."

It appears that Mr. Seward, to whom M. Mercier communicated this circular, declined to express any opinion upon it, alleging that he should prefer to deal with individual cases if any should arise.

To Lord Lyons, No. 79; February 12, 1863.

The matter was now referred by Lord Lyons for the consideration of the Home Government, and eventually it was decided to instruct Lord Lyons to abide by the decision of the American Law Courts, and to advise all persons who had voted or exercised the privileges of citizenship, and who claimed exemption from military service, to resort to those Courts for the establishment of their claim.

Attorney-General Bates' Opinion.

With reference to this subject, Lord Lyons forwarded to Lord Russell a copy of an opinion recently delivered by Mr. Attorney-General Bates.

This opinion was delivered upon a question put to Mr. Bates, whether coloured men could be citizens of the United States.

Mr. Bates, in opposition to what had hitherto been the generally received doctrine, decided that they could; and, in order to arrive at this conclusion, entered at some length into a disquisition on " Citizenship."

Lord Lyons, No. 11; January 5, 1863.

As this opinion may be interesting with regard to the general question of allegiance, and is not readily accessible for consultation in this country, extracts of so much of it as relate to the practical operation of the United States' laws are annexed (Addenda E).

Intended Citizens included in Northern Conscription, 1863.

The pressure of the conscription had been severely felt by the native Americans in 1862, who looked with jealousy on the exemption from it obtained by their British neighbours, who, having declared their intention to become citizens for the advantages of citizenship, now managed by pleading alienship to evade its obligations.

The exigencies of the war also demanded all the resources of the country to meet the heavy losses in battle; and on the 3rd of March 1863 an Act of Congress was passed authorizing a further enrolment of the militia, specially including " intended " citizens.

The 1st clause of this Act is as follows:—

United States " Statutes at Large," vol. xii. p. 731.

" Be it enacted, &c., that all able-bodied male citizens of the United States, and persons of foreign birth who shall have declared on oath their intention to become citizens under and in pursuance of the laws thereof, between the ages of 20 and 45 years, except as herein-after excepted, are hereby declared to constitute the national forces, and shall be liable to perform military duty in the service of the United States, when called out by the President for that purpose."

Although the powers conferred upon the United States' Government by this Act were not put in force for some time after its having been passed, numerous applications were received by Lord Lyons from persons who were apprehensive of being forcibly enlisted under its provisions, and on the 3rd of April he was instructed to state to Mr. Seward that Her Majesty's Government considered that British subjects who had simply declared on oath their intention to become at a future time citizens of the United States, and who had not as yet exercised the right of suffrage or any other political franchise in consequence of such declaration, ought to be allowed a reasonable period *after* the passing of the Act in question to exercise their option whether they would leave the United States, or continue resident therein upon the condition of liability to military service under this Conscription Act.

To Lord Lyons, No. 173; April 3, 1863.

President's Proclamation allowing Sixty-five days for intended Citizens to leave the States.

Lord Lyons having addressed a representation to the United States' Government in the sense of this instruction, the President at his instance issued a Proclamation on the 8th of May, reciting the first clause of the Act, and proceeding as follows:—

Lord Lyons, No. 415; May 11, 1863.

" And whereas it is claimed by and in behalf of persons of foreign birth within the ages specified in the said Act who have heretofore declared on oath their intentions to become citizens under and in pursuance of the laws of the United States, and who have not exercised the right of suffrage or any other political franchise under the laws of the United States, or of any of the States thereof, are not absolutely concluded* by their aforesaid declaration of intention from renouncing their purpose to become citizens, and that, on the contrary, such persons, under treaties or the law of nations, retain a right to renounce that purpose and to forego the privileges of citizenship and residence within the United States, under the obligations imposed by the aforesaid Act of Congress:

" Now, therefore, to avoid all misapprehensions concerning the liability of persons concerned to perform the service required by such enactment and to give it full effect, I do hereby order and proclaim that no plea of alienage will be received or allowed to exempt from the obligations imposed by the aforesaid Act of Congress any person of foreign birth who shall have declared on oath his intention to become a citizen of the United States under the laws thereof, and who shall be found within the United States at any time during the continuance of the present insurrection and rebellion, at or after the expiration of the period of sixty-five days from the date of this Proclamation, nor shall any such plea of alienage be allowed in favour of any such person who has so, as aforesaid, declared his intention to become a citizen of the United States, and shall have exercised at any time the right of suffrage, or any other political franchise, within the United States, under the laws thereof, or under the laws of any of the several States."

This Proclamation was considered to afford a reasonable period to allow for the departure of " intended " citizens, and the question of their liability to military service was thus practically set at rest; and Her Majesty's Government subsequently refused to interfere on behalf of those " intended " citizens who had not taken advantage of the opportunity thus afforded to them of leaving the country.

To Lord Lyons, No. 337; June 6, 1863.

To Lord Lyons, No. 485; August 31, 1863.

Mr. Scott's Case—Ownership of Land.

In July 1863 a Mr. Scott applied to Her Majesty's Consul at New York for protection.

To Lord Lyons, No. 445; August 10, 1863.

It appeared from his own account that this gentleman had declared his intention to become a citizen of the United States at the time of the " Trent" affair when war between the two countries was imminent, and that if such a war had actually broken out it was his intention to adhere to the United States' Government against his own Sovereign.

Under these circumstances Lord Lyons was informed that Her Majesty's Government could not interfere on Mr. Scott's behalf.

* *Sic.* in original.

To Lord Lyons, No. 455; August 17, 1863.

In this despatch Lord Lyons was also told that it was not unreasonable for a nation to require military service from those who had become owners of land by virtue of their declared intention to become its citizens.

Status of Sons of Naturalized Citizens.

Two cases now arose at Baltimore and Philadelphia.

The first case was that of a son born in England but of a British father, subsequently naturalized in the United States, which son had attained his majority according to the *lex loci*, but had not exercised any of the rights of a citizen.

It was decided that, having regard to the principles of international law that a minor child follows the domicil of the father, and to the facts that in this case the father was naturalized by the law of the United States, and that the child after attaining majority had continued his domicil in the United States and was considered as naturalized by the law of the United States, the son must be considered as a naturalized American citizen and not entitled to claim, *as against the Government of the United States*, the protection of Her Majesty's Government.

The second case was that of a son attaining his majority in the United States, born therein of a British father, living in the United States, but not naturalized, neither father nor son having made any declaration of intention to become citizens.

Having regard to the law of England as to persons born in Her Majesty's dominions, Lord Lyons was instructed that Her Majesty's Government could not insist, as against the United States' Government, that such a person should be considered by them as a British subject and exempt from the liabilities incident to the status of a United States' citizen.

Cases of Captain Sherwin, Messrs. Matchett and Hamilton.

Case of Captain Sherwin's arrest. MS. volume.

Captain Sherwin (a natural-born British subject) having been imprisoned on a charge that he had been aiding and abetting the Confederates by taking on board his ship certain officers of the enemy, the United States' Government, among other reasons for Captain Sherwin's imprisonment, pleaded that he was a United States' citizen, and that his nationality was proved by his having commanded a United States' ship, which only United States' citizens could do.

To Lord Lyons, No. 612; December 7, 1863.

It turned out that this allegation was not correct, but the case is mentioned to show the principle maintained by the United States in this instance.

Mr. Matchett, a natural-born British subject, who had not been naturalized, having been arrested at Wilmington, applied for redress.

To Mr. Hamilton; December 3, 1863.

It was shown that he had voted at elections, and Her Majesty's Government refused to do anything for him.

Mr. Hamilton, an Irish gentleman who had been naturalized in the United States, and who had returned to Ireland, being about to go back to the United States, requested to know whether he could resume his British nationality previously to doing so, and was told that Her Majesty's Government could not promise to afford him protection against any obligations which the laws of the United States might impose upon persons who had been naturalized in that country.

Confederate Conscription.—Expulsion of British Consuls.

An Act of the Confederate Congress passed in April 1862, provided that "all white men who are "residents of the Confederate States between the "ages of 18 and 35 should be liable to be called "out and enrolled in the Confederate army."

This led to numerous remonstrances on the part of Her Majesty's Consuls against the forced enlistment of British subjects.

Acting under the instructions of October 1862, (already referred to) they urged that option ought to be given to aliens to quit the country, and that although aliens might be fairly expected to perform police or militia duly, they ought not to be employed on active warlike service.

The correspondence continued until October 1863, when the Confederate Government refused to receive any further communications from Her Majesty's Consuls, and ordered them to quit the country.

As the arbitrary measures of the Confederate Government were the result of a "necessity which knows no law," and can have no practical bearing on the discussion of questions at the present day, it seems unnecessary to do more than refer to the Parliamentary papers, North America, No. 13, 1864, and North America No. 14, 1864, for any further information which may be required on this part of the subject.

1864.

The general principles by which Her Majesty's Government had determined to be guided in affording protection to British subjects in the United States were by this time practically settled; and, during the remainder of the war in 1864 and 1865, although there were numerous cases in which those principles were appealed to, there were but few in which any novel application of them was called for.

It may be convenient to notice some of these cases cursorily, without entering into details, which would involve a repetition of arguments and instructions already cited in previous similar instances.

Forced Confederate Conscripts taken Prisoners by United States.

In January 1864 Her Majesty's Government had brought before them the case of British subjects serving by compulsion in the Confederate armies, and taken prisoners by the United States' forces.

To Lord Lyons, No. 36; January 29, 1864.

Lord Lyons was instructed that an application for their release could not be put on the ground of strict right, nor could Her Majesty's Government consent to be a party to such persons being discharged on taking an oath of allegiance to the United States, but that there could be no objection to their being called upon to take an oath of neutrality.

Cases of Hansard, Crutchett, and Gray.

To Mr. Hansard, January 20, 1864.

Mr. Joseph Hansard, a British subject, who had been for twenty-five years a resident in Georgia, having applied to Lord Russell for protection, was told that if he chose to return to the United States he must do so at his own risk.

To Mr. Crutchett; January 21, 1864.

Mr. Crutchett, a British subject, married and settled at Washington, having applied to Her Majesty's Government to procure redress for injuries inflicted on his property by the United States' forces, was informed that he must have recourse to the same remedies as any other resident in the United States.

To Lord Lyons, No. 138; March 24, 1868.

Mr. Gray, a British subject, having been taken in a blockade-runner, was tried by court-martial and condemned to two years' imprisonment.

As he had been for many years a resident in the Southern States, and had taken an active part on behalf of the Confederates, Her Majesty's Government declined to interfere.

Conscription Act, 1864.

Lord Lyons, No. 137; February 29, 1864.

On the 24th of February 1864 an Act of Congress was passed for a further military enrolment.

This Act contains the following provisions:

Section 6.—"Boards of enrolment shall enrol . . . all aliens who shall declare their intention to become citizens."

Section 18.—"*And be it further enacted*, That no person of foreign birth shall, on account of alienage, be exempted from enrolment or draft under the provisions of this Act or the Act of which it is an amendment, who has at any time assumed the rights of a citizen by voting at any election held under authority of the laws of any state or territory, or of the United States, or who has held any office under such laws or any of them; but the fact that any such person has voted or held, or shall hold any office as aforesaid, shall be taken as conclusive evidence that he is not entitled to exemption from military service on account of alienage."

Her Majesty's Government did not consider it necessary to give Lord Lyons any instructions with regard to this Act.

Status of Sons of Americans born in British Territory.

To Lord Lyons, No. 200; April 27, 1864.

In the case of a person named Charles Cole it was decided that the children of American citizens born in British territory, but being in American territory could not claim the protection of Her Majesty's Government, to exempt them from American military service.

Prisoners captured in Blockade Runners.

Parliamentary Papers, "North America," No. 17, 1864, p. 56.

On the 9th of May certain instructions were issued by the United States Secretary of the Navy, respecting persons taken in blockade-runners, which provide that "when there is no reason to doubt "that those who claim to be foreign subjects are "in reality such, they will be required to state "under oath that they have never been naturalized "in this country, have never exercised the privi- "leges of a citizen thereof, by voting or otherwise, "and have never been in the pay or employment "of the insurgent or so-called Confederate Govern- "ment."

Residents in Places under Martial Law.

To Lord Lyons, No. 363; August 5, 1864.

In July a question was raised as to the position of British subjects residing at Memphis, then under martial law; and Lord Lyons was instructed to inform them that Great Britain could not interfere with the operation of that law in a foreign State, and that British subjects who wished to secure British protection must discontinue their residence in places under such military control.

Enrolment in New Orleans Police.

Lord Lyons, No. 614; September 1864.

A general order was issued at New Orleans on the 30th July 1864, directing "neutral foreigners, not being subject to compulsory military service," to be enrolled as a local police; but Her Majesty's Government did not see any reason to interfere.

Case of Heslop, Boyle, Miss Hill, Jenkins, and Dr. Benson.

To Mr. Burnley, No. 507; November 10, 1864.

Mr. Heslop, a British subject holding landed property in Virginia, and who had been arrested at Baltimore, having requested British protection, Mr. Burnley, then Chargé d'Affaires, was informed, that as the circumstances of the case showed Mr. Heslop's active connexion with the Confederates it was not a case for interference.

To Mr. Burnley, No. 508; November 10, 1864.

Ibid. No. 509; November 10, 1864.

To Mr. Jenkins December 13, 1864.

A similar decision was arrived at in regard to David Boyle, and to a Miss Hill, arrested at New Orleans.

A Mr. Jenkins, a British subject, resident in Texas, was told that Her Majesty's Government could not protect him against the conscription if he persisted in remaining in the Confederate States.

To Mr. Burnley, No. 106; March 22, 1865.

A Dr. Benson, a Canadian, applied for protection against being tried by court-martial.

As it appeared that he was domiciled in Kentucky and was an army contractor, Her Majesty's Government left him to the operation of the American law.

Proclamation of Penalties on Aliens concerned in Blockade Running.

To Sir F. Bruce, No. 141; April 8, 1865.

In March 1865 the President issued a Proclamation imposing the penalty of confinement as prisoners of war upon domiciled aliens and non-resident foreigners, who had been or should have been engaged in violating the blockade, and making the continuance of any person (who might afterwards be decided by martial law to fall within this category) for twelve days in the United States a ground for his detention in military custody until the end of the war.

Lord Lyons was directed to remonstrate strongly against British subjects being thus imprisoned.

It does not appear that the Proclamation was enforced.

Mr. Foden's Case.

Mr. Foden; March 11, 1865.

Mr. Foden, a British-born subject, the son of a naturalized American, was refused British protection in April 1865, in accordance with the principle already adopted by Her Majesty's Government as was an Irishman, Mr. Noonan, a naturalized American, and a Mr. Hutton, who alleged that he had come to England in order to resume his British nationality.

To Mr. Noonan; April 21, 1865.

Mr. Hutton; September 7, 1865.

End of the War.

The Civil War ended, as officially announced by a Proclamation of the President, on the 10th of May 1865.

Besides the cases mentioned, a long correspondence took place between the British Government and the Government of the United States, respecting the treatment of British subjects captured in blockade-runners; but as that correspondence concerned the rights and duties of neutrals rather than any questions of nationality or allegiance, it has not been considered necessary to include it.

Throughout this part of the Paper reference has been made, for the sake of brevity, principally to the instructions given to Her Majesty's Representative at Washington; but those instructions were all or nearly all communicated to the American Government, who, as will have been seen, were greatly influenced by them in their legislation with regard to the conscription of aliens, &c.; and it is hoped that such a summary will be sufficient to show the general tenor of the correspondence.*

Fenian Arrests.

The suspension of the Habeas Corpus Act in Ireland in February 1866 brought the controversy back again into its former groove, and the United States became again the complainants as protectors of their naturalized citizens.

Inclosure in Mr. Ford's No. 44; November 18, 1867.

The principal correspondence is contained in the Papers relating to Foreign Affairs accompanying the President's Message to the Second Session of the Thirty-ninth Congress (1867).

"Papers relating to Foreign Affairs," Part i., p. 69.

The first effect of the suspension of the Habeas Corpus Act "was an appeal to the Acting Consul "at Dublin, Mr. West, from a number not only of "those actually arrested, but also of others feeling "themselves liable at any moment to be taken with

* I have to acknowledge the assistance I have derived from the Index to the Law Officers' Reports, 1861–66, prepared by the Sub-Librarian. Such an Index is of the greatest service in tracing any particular subject through this most voluminous correspondence.

"equal suddenness, for protection as being naturalized citizens of the United States."

"Papers relating to Foreign Affairs," Part i., p. 37.

Mr. Adams advised the Consuls "to secure a "proper share of protection for innocent persons, "who are citizens of the United States, without "attempting to interfere on behalf of those who "have justly subjected themselves to suspicion "of complicity with treasonable projects."

Ibid. p. 69.

Mr. Adams, in reporting to Mr. Seward the passing of the Act of Parliament, in February 1866, observes, "One of the gravest difficulties presented "to me in this proceeding grows out of the conflicting views of allegiance entertained in the two "countries. Here the Courts adhere to the old "doctrine generally held in Europe, that it is "indefeasible. We, on the other hand, maintain "the absolute right of expatriation. . . . . "There is some reason to believe that many of "these people now under arrest are really more or "less implicated in the organization. . . They "are also astute enough to be capable of contriving "means of raising a complication between the two "nations, out of the questions that may follow "from any abuse of the extraordinary means of "repression now resorted to here."

Ibid. p. 74.

On the 2nd of March 1866 Mr. Adams writes: "No answer has yet been given by the authorities "to the requests for reasons to justify their "confinement. Neither has any distinction been "attempted between native Americans and naturalized Irishmen. . . Since the above was written, "I have received from Mr. West* a letter, inclosing "the final answer of the authorities in regard to "naturalized citizens, which goes the whole length "of claiming the allegiance." And March 8th— "It is thus far made clear that the Government "claims the right of dealing as it pleases with "native Irishmen, no regard whatever being paid "to the fact of their naturalization in the United "States."

Mr. Seward furnished Mr. Adams with instructions on the 10th of March.

Ibid. p. 78.

After speaking of Fenianism as an Irish and not an American movement, he says, "It may be expected that some of our Irish-born naturalized "citizens who are now sojourning or travelling in "Ireland will be arrested. . . . Americans "whether native-born or naturalized, owe submission to the same laws in Great Britain as British "subjects, while residing there and enjoying the "protection of that Government. We applied the converse of this principle to British subjects who "were sojourning or travelling in the United "States during the late rebellion."

Ibid. p. 83.

Shortly afterwards (March 15) Mr. Adams had an interview with Lord Clarendon, at which he told him that only a small number of cases had ocurred in which satisfactory evidence of naturalization had been produced by the complainants, and that, in all the admitted cases, if the Government had in its hands the proofs of complicity with treasonable designs, he should feel obliged, on being informed of them, to desist from further interference, and that his appeals to the Government "would be confined to those cases in which there "was mere suspicion, or at most feeble evidence, "of actual evil and intent."

In such cases he suggested that the Government might allow the persons arrested to be set free on condition of their leaving the country.

It appears that in March a report was received by the United States' Government from Mr. Consul West, that he had been allowed to visit native Americans in prison, but not naturalized citizens, although he was permitted to write to the latter.

Ibid. p. 86.

Ibid. p 136.

Mr. Seward desired Mr. Adams to remonstrate against such a distinction being made, and he accordingly did so on the 12th of April.

The affair was settled by the distinction being waived.

Mr. Seward, in a despatch of the 31st of March, says:— "Papers relating to Foreign Affairs," Part i., p. 95.

"First. I continue under the conviction that the United States cannot be expected to modify the views which they have heretofore expressed.

"Second. That any parties who may wish to disturb the peace of Great Britain, either at home or in the Provinces, might be expected to build high hopes largely upon any difficulties which should incidentally arise between that country and the United States, upon, first, the Naturalization question, and, second, upon questions of trade between the United States and the British American Provinces, including among those questions the subject of the Fisheries.

"Third. Delay in coming to a reasonable and friendly understanding in regard to such incidental matters would probably be unpropitious."

Ibid. p. 104.

On the 14th of April, John Cavesford, whose case Mr. Adams had been directed to support, was released on condition of leaving the country, as was also a naturalized citizen, John Healey, under similar circumstances. Ibid. p. 103.

On the 21st of April Mr. Seward forwarded to Mr. Adams a petition from Mr. Clark, of New York, in favour of his son-in-law, Colonel Burke, a naturalized citizen.

Ibid. p. 109.

On the 28th of April Mr. Adams was desired to intervene on behalf of Colonel M. Kirwan, a naturalized citizen.

Ibid. p. 125.

At an interview on the 29th of May, Lord Clarendon informed Mr. Adams that instructions had been given to remove all unnecessary distinctions between United States' native and naturalized prisoners, though of course the point of allegiance could not be conceded, and that the Government were desirous to get rid of those who had been imprisoned as quickly as they could consistently with the public safety.

Ibid. p. 134.

Mr. Seward, on the 9th of June, instructed Mr. Adams "to suggest to Lord Clarendon the "expediency of the exercise of clemency to the "extent at least, of releasing all of the American "citizens, native or naturalized, who are in "confinement, upon the condition of their returning to the United States."

Ibid. p. 137.

On the 16th of June Mr. Adams was directed to interfere on behalf of Thomas Blackwell and T. I. Hynes, naturalized citizens.

Ibid. p. 153.

On the 7th of July Burke was liberated.

Ibid. p. 168.

On the 23rd of July Mr. Adams' attention was called to the cases of T. O'Connell and M. Hasson. On the 2nd of August Mr. Adams reports that releases were being steadily granted, and that of those who had been arrested there was little doubt in his own mind that nearly all were more or less privy to the "Fenian organization, and came out to further its designs;" and on the 23rd of August "no person proved to be a native or a naturalized "citizen of the United States now remains in "Dublin under the Act for suspending the *habeas* "*corpus*:" and on the 29th of September 1866, "There is now no case before this Legation of a "proved American citizen being in custody in "Ireland on suspicion of being concerned in "treasonable practices there."

Ibid. p. 175.

Ibid. p. 204.

This concludes the correspondence of 1866 so far as arrests for Fenianism in Ireland are concerned.

Imprisonment of Fenians in Canada.

In June 1866 the Fenian raid on Canada occurred, and several of the raiders were made prisoners, among whom were many naturalized citizens.

* Mr. West's correspondence is not published.

Diplomatic Correspondence," part i., p. 237.

On the 11th of June Mr. Seward addressed a representation to Sir F. Bruce, respecting a rumour that prisoners had been taken on the United States' territory and conveyed to Canada, and that Canadian Agents had threatened that these prisoners, together with any stragglers who might be found within the Canadian lines would be immediately executed without legal trial.

Mr. Seward adds that the United States' "Government could not look without serious "concern upon the practice of any unnecessary "severity, and especially upon the exercise of "retaliation or other illegal proceeding, upon the "persons of such of the offenders as have fallen, "or shall hereafter fall, into the hands of the "Canadian authorities. I respectfully invite your "attention to this subject in a confident expecta- "tion that no proceedings that shall not be autho- "rized by and be in conformity with law will be "taken against persons of that class, and in the "hope that even the customary administration of

Diplomatic Correspondence," part i., p. 239.

"the law will be tempered with special forbear- "ance and clemency."

On the 21st of June, Mr. Seward forwarded to Sir F. Bruce a petition from the wife of Patrick

Ibid. p. 241.

O'Malia, a naturalized Irishman, and recommended it to the "clemency of Her Majesty's authorities."

Ibid. p. 246.

On the 30th, Mr. Seward called attention to the case of the Rev. J. McMahon (apparently a native American).

Ibid. p. 249.

On the 16th of July, Mr. Seward wrote in behalf of James Diamond and Patrick O'Mally (both naturalized).

On the 26th, Mr. Seward forwarded to Sir F. Bruce an extract of a despatch from the United States' Consul at Toronto, respecting the arrest of Ellis, Dillon, and Carney. The Consul states that there are several other parties, claiming to be "American citizens, in prison here, for whom I "have transmitted certain evidence of their inno- "cence of any complicity with the Fenian raid. "The proof submitted to the Government, however, "is not full and complete, and I am waiting

Ibid. p. 167.

"further evidence to enable me to press their "claims for discharge or immediate trial."

On the 23rd of July, the House of Representatives passed the following Resolutions:

"*Resolved*, that the House of Representatives respectfully request the President of the United States to urge upon the Canadian authorities, and also the British Government, the release of the Fenian prisoners recently captured in Canada.

"*Resolved*, that this House respectfully request the President to cause the prosecutions instituted in the United States' Courts against the Fenians to be discontinued if compatible with the public interests."

On the 26th, the President communicated to the House the note which had been addressed to Sir F. Bruce on the 11th, mentioning at the same time that the rumours therein referred to had been proved to be erroneous, and that the representations of the United States' Government had been received by the British Government in a friendly spirit.

Ibid. p. 260.

The President added that the second Resolution should be taken into consideration.

A correspondence then ensued between Mr. Seward and Sir F. Bruce, respecting the capital sentence passed in Canada on the Rev. J. McMahon and Robert B. Lynch, two of the principal raiders.

Mr. Seward requested Sir F. Bruce to cause copies of the Judgments and Depositions to be given to the United States' Consul, and that the execution of the sentences might be deferred.

Sir F. Bruce replied that the matter had been referred for the decision of the Home Government, and on the 27th of November informed him that the sentences had been commuted.

The series of published documents terminate with this despatch.

Cases of Burke and McCafferty.

Mr. Adams; May 25, 1867.

On the 25th of May 1867 Mr. Adams addressed a note to Lord Stanley interceding for an Irishman, Burke, and a native American, McCafferty, who had been sentenced to death for complicity in the Tallaght affair.

Mr. Adams remarks, "No evidence has been "received at this Legation satisfactorily to show "that the prisoner Burke has ever been naturalized "as a citizen of the United States."

To Mr. Adams; May 26, 1867.

Her Majesty's Government had, however, come to the determination previously to the receipt of Mr. Adams' letter, to recommend to the Queen that the sentence of death should not be carried out, and Mr. Adams was informed accordingly on the 26th of May.

Refusal of Mixed Jury.—Warren and Costello.

At the trial of John Warren, one of the leaders of the "Jacmel" expedition, before Chief Baron Pigott and Mr. Justice Keogh, at Dublin, on the 30th of October 1867, Counsel applied to the Court for a mixed Jury, on the plea that, although born in Ireland, Warren was an alien, having been formally naturalized in the United States.

The application was refused, the Chief Baron ruling that "according to the law of England, a law "which has been administered without any vari- "ation or doubt from the earliest times—he who "once is under the allegiance of the English "Sovereign remains so for ever."

As this authoritative declaration of the present law has been frequently referred to subsequently, an extract from the Crown Report of the trial, containing the Chief Baron's ruling, is annexed in the Addenda.

Addenda F.

On the 7th of November 1867 a similar application was refused in the case of Augustine Costello, by Mr. Justice Keogh.

Proceedings in Congress.

Mr. Ford, No. 64; December 4, 1867.

On the 25th of November, Mr. Robinson, a naturalized Irishman, member for New York, moved a resolution in the House of Representatives, that the Committee for Foreign Affairs be instructed to inquire into Mr. Adams' conduct, with regard to the protection of naturalized citizens in Great Britain, that Mr. Adams be recalled, and that all correspondence for the last two years between the English and American Governments be at once submitted to the House.

Mr. Robinson made a speech, in which he quoted an opinion of Judge Sherman, of Connecticut, to the effect that the American and English law of allegiance was the same:—

"Mr. Justice Story in giving the opinion of the Supreme Court of the United States says, on page 246, 'that the general doctrine is, that no person 'can by any act of their own, without the consent 'of the Goverment, put off their allegiance and 'become aliens.' I consider this as the law of the United States; and whether it be considered as grounded on national rights or as a rule of policy, it is a just and necessary rule of law."

Mr. Robinson concluded—

"And now, Sir, what do we demand from our Goverment or from England? Nothing that is unreasonable. I do not claim that naturalized citizens may invade England, and there commit crimes with impunity. What we do demand may be summed up in three sentences:—

"1. No American citizen travelling in Great Britain or elsewhere, on business or pleasure, shall be imprisoned without proper charges or sworn in-

formation being made against him, and upon these charges or information, even under the suspension of *habeas corpus*, a fair and speedy trial shall be secured to him.

"2. That no American thus travelling shall be ordered to quit the country where he may be, or be escorted to ships going thence, or be placed in any position compelling or inducing him to accept that degrading alternative."

"3. That the benefit of English law shall be fully accorded to all American citizens, whether native or adopted, the same as to aliens or strangers from other countries."

Mr. Banks moved the previous question on referring the resolutions, and it was referred accordingly.

On the 2nd of December Mr. Robinson brought on another resolution in similar terms respecting the conduct of Mr. West, the United States' Consul at Dublin. He was supported on this occasion by Mr. Judd, of Illinois, who spoke of the conscription of naturalized Americans in the Prussian army.

This motion was also referred to the Foreign Affairs Committee.

On the 20th of December, Mr. Price, of Iowa, read to the House a petition from W. J. Nagle, a native American, imprisoned on account of the "Jacmel" landing, and moved a resolution that

" The representatives of the people of the United
" States do hereby declare it to be our determination
" to submit to no such oppression of our citizens by
" any Power, and that we will, with as little delay
" as possible, adopt such measures as will make it
" safe for an American citizen free from crimes to
" travel in any part of the civilized world."

"Resolved, That the Committee of Foreign Affairs be, and it is hereby instructed, to give this matter immediate attention, and report to this House, by will or otherwise, such measures as in the judgment of the said Committee will be best calculated to accomplish the object desired."

On the same day Mr. Robinson read a petition on behalf of Warren and Nagle, and moved a resolution that the President be requested to take immediate steps on their behalf.

This was objected to by Mr. Benjamin, and apparently fell through.

Mr. Ford, No. 8; December 24, 1867.

On the 19th of December a debate took place in the Senate on the occasion of the presentation by Mr. Sherman, of Ohio, of a Memorial from Cincinnati, praying that Congress may take measures to secure the rights of Americans abroad.

The Memorial was referred to the Committee on Foreign Relations.

Special reference was made in the course of the debate to the case of Warren.

On the same day resolutions were presented in the House of Representatives by Mr. Eggeston, of Ohio, and referred to the Committee on Foreign Affairs, protesting against the treatment of adopted American citizens by foreign nations.

Mr. Ford, No. 14; January 14, 1868.

On the 9th of January two resolutions were passed unanimously in the House of Representatives, one requesting the President to intercede with the Queen of England for the release of the Canadian prisoners, McMahon and Lynch; and the other requesting the President to intercede with a view of obtaining the release of Warren and Nagle, and any other American citizens who have been arrested in Ireland or elsewhere, and who are now imprisoned without sufficient grounds to charge them with the commission of any offence against the laws of Great Britain.

Mr. Thornton, No. 7; February 3, 1868.

On the 27th of January the Committee of the House of Representatives sent in their Report.

This Report (Appendix VIII.) contains the usual arguments respecting the theory of perpetual allegiance, maintains that by permitting emigration foreign countries tacitly consent to expatriation, and endeavours to explain away the conflict of doctrine between the Executive and Judiciary referred to in the President's last Message.* (On this latter point see Mr. Cushing's opinion.

Annexed to the Report was the following Bill:

"*A Bill concerning the rights of American citizens in foreign States.*

" Section 1. Be it enacted, &c., That all naturalized citizens of the United States while in foreign States shall be entitled to and shall receive from this Government the same protection of persons and property that is accorded to native-born citizens in like situation and circumstances. And the President is empowered to employ all the resources of the Government in just efforts to secure the recognition by other Governments of the principles of public law which have been insisted upon and maintained by the Government of the United States in regard to the rights of naturalized citizens: Provided always, that no citizen of the United States who is guilty of crime against the laws of any foreign State committed within its jurisdiction, or of desertion from actual service in the army or navy of such State, or who shall have acquired naturalization by misrepresentation or fraud in regard to residence or otherwise, or who by treason or other crime against the United States shall have forfeited, or who shall have renounced his rights as a citizen, or who shall establish a continuous residence beyond the limits of the United States for a term exceeding five years, shall be entitled to the protection contemplated by this Act.

" Sec. 2. And be it further enacted, That whenever it shall be duly made known to the President that any naturalized citizen of the United States has been arrested and is detained by any foreign Government in contravention of the intent and purposes of this Act, upon the allegation that naturalization in the United States does not operate to dissolve his allegiance to his native Sovereign, or if any citizen shall have been so arrested and detained whose release upon demand shall have been unreasonably delayed or refused, the President shall be, and hereby is empowered to order the arrest and to detain in custody any subject or citizen of such foreign Government who may be found within the jurisdiction of the United States; and the President shall, without unreasonable delay, give information to Congress of any such proceedings under this Act.

" Sec. 3. And be it further enacted, That if any naturalized citizen of the United States shall return to his native country with intent to resume his domicil therein, or if any citizen shall leave the United States with the intention of permanent residence in any foreign State, or shall fail to make annual return of his property in the United States for taxation to the assessor of internal revenue of the district of the United States in which such citizen last resided, or shall engage as an army or navy belligerent in any foreign war or service, such citizen shall not be entitled to the interposition of the Government in his behalf under the Provisions of this Act.

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* " The attention of Congress is respectfully called to a singular and embarrassing conflict of laws. The Executive Department of this Government has hitherto uniformly held, as it now holds, that naturalization in conformity with the constitution and laws of the United States absolves the recipient from his native allegiance. The Courts of Great Britain hold that allegiance to the British Crown is indefeasible, and is not absolved by our laws of naturalization. British judges cite courts and law authorities of the United States in support of that theory against the position held by the Executive authority of the United States. This conflict perplexes the public mind concerning the rights of naturalized citizens, and impairs the national authority abroad. I called attention to this subject in my last annual message, and now again respectfully appeal to Congress to declare the national will unmistakeably upon this important question."

"Sec. 4. And be it further enacted, That the term 'domicil' in the preceding section shall be construed to mean a continuous residence of more than five years in the native country of the naturalized citizen, or establishing himself in any business which denotes an intention to resume a permanent residence."

This Bill was subsequently introduced by General Banks, the President of the Committee of Foreign Affairs.

Mr. Wilson, of Iowa, at once objected to the first section, and gave notice that he should move to strike out the second clause, because "the Govern-" ment of the United States has never insisted " upon and maintained the doctrine of the right of " expatriation."

General Banks, in explaining the intentions of the Bill, said, "It does not relate to special ques-" tions which have been presented, and will be " continued to be presented to the house by its " members as well as to the Executive Department " of the Government in regard to the arrest of " American citizens in Great Britain or elsewhere; " inasmuch as we have not received official infor-" mation on that subject some time since called " for, the Committee have not passed judgment " upon it."

In reply to a question from Mr. Maynard, whether the Bill would apply to persons who had declared their intention to become citizens, General Banks stated that the Committee "do not propose to define naturalization."

Mr. Ward, of New York, pointed out that the words "the President is empowered to employ all " the resources of the Government in just efforts, " &c.," would enable him to declare war without consulting Congress.

Mr. Woodward proposed to insert a clause providing for the expatriation of Americans becoming domiciled abroad, on the ground that "when we " are asking foreign Governments to make pro-" vision in our behalf for the expatriation of their " citizens, it is quite indispensable that we should " begin by providing for the expatriation of our " own citizens."

General Banks interrupted Mr. Woodward, saying that such an enactment would debar any naturalized citizen of the United States up to that date from claiming United States' protection. "It is impos-" sible to legislate upon this subject and give now " the right of expatriation without by that very " act enabling foreign Governments to say that up " to this date our citizens had no right to expatriate " themselves."

Mr. Woodward rejoined that "the difficulty " suggested by the gentleman is imaginary, but if " it is not, a proviso saving the rights of all " naturalized citizens from the effects of this " legislation would obviate the objection."

Mr. Wilson, of Iowa, followed, and recommended caution combined with firmness in dealing with this question. "We are not now dealing with a mere " question of elections, nor playing a pleasing game " for the votes of naturalized citizens." He objected also to the first section of the Bill, as not declaring sufficiently plainly the intentions of the Government, and reiterated his argument that although the doctrine of indefeasible allegiance was unreasonable and unjust, "this Government has not insisted on " and maintained an opposite doctrine. There is " not to be found among all our Statutes a single " affirmative challenge to this old feudalism of " England. The implied negation sought to be " drawn from our naturalization laws has no sub-" stantial foundation upon which to rest; for " England has a system of naturalization also. " Our Judicial Department of Government has in " no case asserted a different rule; and the Execu-" tive Department has not advanced beyond an " attempt, by negotiation, to induce foreign States " to consent to the adoption of a new rule of public " or international law in this regard."

Mr. Pile also urged the adoption of a "distinct " statutory declaration of the right of any citizen " of this or any other Government to remove from " the territory and renounce his allegiance to the " Government where he was born," and proposed an amendment to that effect, together with another amendment, empowering the President to resort to suspension of commercial relations and blockade, before proceeding to reprisals in cases of illegal arrest of native or naturalized Americans in foreign countries.

The debate was then adjourned; and on the 6th of February, Mr. Chanler made a speech, advocating the assembly of an International Congress to consider the whole question of expatriation and allegiance. "Daily Globe," February 7, 1868.

Mr. Boyer then proposed as a substitute for the Bill recommended by the Committee, a Resolution declaring that all naturalized citizens are entitled to the same protection in foreign countries as native citizens, and calling for a Report from the President whether any citizens, native or naturalized, are imprisoned in foreign countries, in contravention of their rights to such protection.

Mr. Jenckes, of Rhode Island, also proposed a substitute for General Banks' Bill; and that Bill, with the proposed substitutes and amendments, was then relegated back for the further consideration of the Foreign Affairs Committee.

On the 11th of March the Bill was reported to the House of Representatives by the Foreign Affairs Committee in an amended shape, and, after much discussion on the reprisal clause, passed on the 21st of April, by a majority of 101 to 5, as follows:— "Daily Globe," March 11, 1868. "Daily Globe," April 21, 1868.

"*A Bill concerning the rights of American Citizens in Foreign States.*

"Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness, for the protection of which the Government of the United States was established; and whereas in the recognition of this principle this Government has freely received emigrants from all nations and invested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign States, owing allegiance to the Governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and finally disavowed; therefore,

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled: That any declaration, instruction, opinion, order, or decision of any officers of this Government which denies, restricts, impairs, or questions the right of expatriation, is hereby declared inconsistent with the fundamental principles of this Government.

"Sec. 2. And be it further enacted, That all naturalized citizens of the United States while in foreign States shall be entitled to, and shall receive from this Government, the same protection of persons and property that is accorded to native-born citizens in like situation and circumstances.

"Sec. 3. And be it further enacted, That whenever it shall be duly made known to the President that any citizen of the United States has been arrested and is detained by any foreign Government in contravention of the intent and purposes of this Act, upon the allegation that naturalization in the United States does not operate to dissolve his allegiance to his native sovereign; or if any citizen shall have been arrested and detained, whose release upon demand shall have been unreasonably delayed or refused, the President shall be, and hereby is, empowered to suspend, in part or wholly, commercial

relations with the said Government, or, in case no other remedy is available, order the arrest, and to detain in custody any subject or citizen of such foreign Government who may be found within the jurisdiction of the United States, except Ambassadors or other public Ministers and their domestics and domestic servants, and who has not declared his intention to become a citizen of the United States, and the President shall without delay give information to Congress of any such proceedings under this Act."

On the 23rd of June, in the Senate, Mr. Sumner, from the Committee on Foreign Relations, reported the Bill to the house, with an amendment, striking out that portion of the third section which provided for retaliatory measures in case of illegal imprisonment of American citizens, and inserting a new provision, so as to make the section read:

"And be it further enacted, That whenever it shall be duly made known to the President that any citizen of the United States has been arrested and is detained by any foreign Government, in contravention of the intent and purposes of this Act, upon the allegation that naturalization in the United States does not operate to dissolve his allegiance to his native sovereign; or if any citizen shall have been arrested and detained whose release upon demand shall have been unreasonably delayed or refused, it shall be the duty of the President forthwith to report to Congress all the circumstances of any such arrest or detention, and any proceedings for the release of the citizen so arrested and detained, that Congress may take prompt action to secure to every citizen of the United States his just rights."

Mr. Thornton, No. 251, July 27, 1868.

Mr. Conness proposed to restore the clause as it stood in the Bill passed by the Lower House; but after many debates the reprisal clause was finally rejected and the bill considerably modified. It was passed in the Senate, by a majority of 39 to 7, on the 25th of July and returned to the House of Representatives who concurred in the amendments.

The following is a copy of the Act as passed by both houses:—

"Whereas the right of expatriation is a natural and inherent right of all people, indispensable to the enjoyment of the rights of life, liberty, and the pursuit of happiness; and whereas in the recognition of this principle this Government has freely received emigrants from all nations and vested them with the rights of citizenship; and whereas it is claimed that such American citizens, with their descendants, are subjects of foreign States, owing allegiance to the Governments thereof; and whereas it is necessary to the maintenance of public peace that this claim of foreign allegiance should be promptly and fully disavowed: therefore,

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any declaration, instruction, opinion, order, or decision of any officers of this Government which denies, restricts, impairs, or questions the right of expatriation is hereby declared inconsistent with the fundamental principles of this Government.

"Sec. 2. And be it further enacted, That all naturalized citizens of the United States, while in foreign States, shall be entitled to and shall receive from this Government the same protection of persons and property that is accorded to native-born citizens in like situation and circumstances.

"Sec. 3. And be it further enacted, That whenever it shall be made known to the President that any citizen of the United States has been unjustly deprived of his liberty by or under the authority of any foreign Government, it shall be the duty of the President forthwith to demand of that Government the reasons for such imprisonment, and if it appears to be wrongful and in violation of the rights of American citizenship, the President shall forthwith demand the release of such citizen; and if the release so demanded is unreasonably delayed or refused, it shall be the duty of the President to use such means, not amounting to acts of war, as he may think necessary and proper to obtain or effectuate such release; and all the facts and proceedings relative thereto shall, as soon as practicable, be communicated by the President to Congress."

PART V.—Correspondence between the United States and other Countries.

PRUSSIA.

The principal correspondence has been with Prussia.

This correspondence is commenced in the United States' Senate Documents, 1859–60 (1st Session, 36th Congress) vol. ii., containing the papers laid before the Senate in compliance with a resolution of that House of the 2nd of February, requesting information respecting the compulsory enlistment of American citizens in the army of Prussia.

The first paper of importance is a letter from Mr. Wheaton (the well-known jurist, who was at that time United States' Minister at Berlin) to Johann Knocke, a naturalized American, born in Prussia, who claimed exemption from military service on his return to that country.

"United States' Senate Documents, 1859–60," vol. ii. p. 6.

"Sir, Berlin, July 24, 1840.

"I have received your application, stating that you are a native-born subject of His Majesty the King of Prussia; that you emigrated to the United States in the year 1834, being then 21 years old, where you became naturalized as a citizen: that you have since returned to your native country, where you have been required to perform military duty, and desiring my official interference for your relief.

"In reply, I have to state that it is not in my power to interfere in the manner you desire. Had you remained in the United States, or visited any other foreign country (except Prussia), on your lawful business, you would have been protected by the American authorities, at home and abroad, in the enjoyment of all your rights and privileges as a naturalized citizen of the United States. But, having returned to the country of your birth, *your native domicil and natural character* revert (so long as you remain in the Prussian dominions), and you are bound in all respects to obey the laws exactly as if you had never emigrated.

"I am, &c.

"(Signed) Henry Wheaton.

"Mr. Johann P. Knocke."

The correspondence now passes to the year 1851, when Mr. Barnard was United States' Minister at Berlin.

The first case is that of H. V. de Sandt, a Prussian by birth, who, after declaring his intention to

become a United States citizen, had returned to Prussia, and whom the authorities at Cleves had ordered to leave that country.

In reply to a representation from Mr. Barnard, M. le Coq explained on behalf of the Prussian Government that Sandt had left with the object of evading military service; that the proofs of his naturalization in the United States were incomplete, and that the Order of the Cleves authorities would not be revoked.

'United States' Senate Documents, 1859–60," vol. ii. p. 9.

Upon this, Mr. Barnard wrote to Sandt (June 17, 1851):—

Ibid. p. 13.

"When you ceased to be a citizen of Prussia by your permit of emigration, and became a resident in the United States, the laws and Government of that country became your protection so long as that residence continued. When, however, you quitted your residence there before perfecting your naturalization and again took up your abode in Prussia, for your own purposes, your position was a peculiar one, and required from you a peculiar and very discreet line of conduct. It was impossible for the American Legation here to claim you as an American citizen."

Several other cases occurred in 1851–52, which it seems unnecessary to give a detailed account of:—

Ibid. p. 14. Mr. Brand arrested at Coblenz on the ground of being an Emigration Agent;

Mr. Dale, an American, imprisoned at Aix-la-Chapelle for having an informal passport;

Ibid. p. 18. Mr. Behne summoned to military service;

Ibid. p. 23. Dr. Gutowski, a Pole, of Posen, naturalized in the United States, who had returned to Prussia.

Ibid. p. 13. Mr. Barnard informed Dr. Gutowski (August 3, 1852,) that, "having voluntarily returned to the "country of your birth, where you have purchased "a farm and taken up your residence, the Prussian "Government has a right to regard you as its "subject, and so treat you in all respects."

Mr. B. Meyer, a native of Padeborn, fined 50 dollars on returning to Prussia, for having evaded military service by emigrating without a licence.

Ibid. p. 41. It appears from a despatch from Mr. Barnard to Mr. Webster that the Prussian Government were always at this time on the look-out for the German Democratic Propaganda and its Agents, and that naturalized German citizens gave rise to suspicion by the ostentatious manner in which they flaunted their Americanism in the face of the authorities; Mr. Born, one of the most respectable of these persons, having demanded 20,000 rix-dollars for a detention of six or eight hours.

Ibid. p. 44. On the 29th October 1852 Mr. Barnard called the attention of Baron Manteuffel to the case of John Joseph Kracke, who had been forced into the army for three years' service.

Ibid. p. 53. On the 14th of January 1853 Mr. Everett furnished Mr. Barnard with instructions, of which the following is an extract:—

"The doctrine of inalienable allegiance is, no doubt, attended with great practical difficulties. It has been affirmed by the Supreme Court of the United States, and by more than one of the State Courts; but the naturalization laws of the United States certainly assume that a person can, by his own acts divest himself of the allegiance under which he was born and contract a new allegiance to a foreign power. But, until this new allegiance is contracted, he must be considered as bound by his allegiance to the Government under which he was born, and subject to its laws; and this undoubted principle seems to have its direct application in the present cases. . . . If, then, a Prussian subject, born and living under this state of the law (of military service) chooses to emigrate to a foreign country without obtaining the 'certificate' which alone can discharge him from the obligation of military service, he does so at his own risk. . . . For these reasons, and without entering into any discussion of the question of perpetual allegiance, the President is of opinion, that if a subject of Prussia lying under a legal obligation in that country to perform a certain amount of military duty, leaves his native land, and without performing that duty or obtaining the prescribed 'certificate of emigration,' comes to the United States and is naturalized, and afterwards, for any purposes whatever, goes back to Prussia, it is not competent for the United States to protect him from the operation of the Prussian law."

The doctrine thus laid down by Mr. Everett was communicated by Mr. Barnard to Baron Manteuffel on the 15th of February 1853:—

"The Government of the United States considers that the laws of Prussia, which require a certain amount of military service of its subjects, and which prescribe the conditions in reference to this military service on which emigration is permitted, are a matter of domestic policy, in which no foreign Government has a right to interfere. It considers also that, if a Prussian subject, born and living under this state of the law, emigrates to a foreign country without a compliance with those conditions, which alone can discharge him from the obligation of military service, he does so at his own personal risk. Going abroad under the burden of a duty still due to his native Sovereign, his unauthorized emigration is in the nature of an escape from that duty and from the laws which prescribe and enforce it, and he remains liable, in spite of any contract he may enter into in the meantime of new allegiance to a foreign Power, to have these laws executed against him whenever he returns within the territorial limits and jurisdiction of his native country."

"United States' Senate Documents, 1859–60," vol. ii. p. 57.

Baron Manteuffel, in his reply of the 28th of February, says: "As, however, the Government "of the United States considers that it is not for "its interest to make the admission of an emigrant, "as citizen, dependent on the exhibition of a "document proving that he had dissolved the ties "by which he was attached to his old country, it "is much to be feared that difficulties will still "occasionally rise.

Ibid. p. 1364.

"Rarely will the Prussian Government refuse the subsidiary issue of an emigration permit to individuals who, in their infancy, were taken from His Majesty's territory by their parents, except in cases when there had been a judgment of a Prussian Court against the applicant.

"At the close of your note of the 15th instant, you still quote Section 23 of the Law of the 21st of December 1842. I permit myself to request you will notice, Sir, that the term of 10 years fixed for the return to Prussia of a subject of His Majesty, only runs from the 1st of January 1843; and that if said paragraph authorizes the Government to consider an uninterrupted absence of more than 10 years as importing the loss of the quality of a Prussian subject, it does not, nevertheless, dispense the absentee from duties which he ought to discharge while he was a Prussian."

Several more conscription cases are given in the Senate documents, but the next document of importance is a dispatch from Mr. Wright (who had succeeded Mr. Barnard), dated September 28, 1858, in which he states, "No American Consul or "Minister can shield from impressment a United "States' citizen born in Prussia. Is it possible "that there is no remedy for this state of things? "My opinion is that, if a decided and firm stand "be taken by our Government during the present "peculiar position of affairs in Prussia, it will "lead to good results. It is certainly worthy of a "trial."

Mr. Wright having furnished the United States' Government with information which he had procured from the Prussian Government respecting

the laws of enlistment and expatriation (see Laws of Prussia) continued to urge the necessity of steps being taken to protect the interests of United States' naturalized citizens; and on the 8th of July 1859 Mr. Cass furnished him with instructions asserting the right of the United States to carry to much greater lengths than they had hitherto done the doctrine of the immunity from native allegiance and its duties conferred by foreign naturalization.

"United States' Senate Documents, 1859–60," vol. ii., p. 133.

"The right of expatriation cannot at this day be doubted or denied in the United States. The idea has been repudiated ever since the origin of our Government, that a man is bound to remain for ever in the country of his birth, and that he has no right to exercise his free will and consult his own happiness by selecting a new home. The most eminent writers on public law recognized the right of expatriation. This can only be contested by those who, in the nineteenth century, are still devoted to the ancient feudal law with all its oppression. The doctrine of perpetual allegiance is a relic of barbarism, which has been gradually disappearing from Christendom during the last century."

Mr. Cass then argues that the United States expressly recognize the right of expatriation by requiring applicants for naturalization to take an oath renouncing their native allegiance :—

"The moment a foreigner becomes naturalized, his allegiance to his native country is severed for ever. He experiences a new political birth. A broad and impassable line separates him from his native country. He is no more responsible for anything he may say or do, or omit to say or do, after assuming his new character than if he had been born in the United States. Should he return to his native country he returns as an American citizen, and in no other character. In order to entitle his original Government to punish him for an offence, this must have been committed while he was a subject and owed allegiance to that Government. The offence must have been complete before his expatriation. It much have been of such a character that he might have been tried and punished for it at the moment of his departure. A future liability to serve in the army will not be sufficient, because before the time can arrive for such service he has changed his allegiance, and become a citizen of the United States. . . . . In my letter to Mr. Hofer of the 14th ultimo I confine the foreign jurisdiction, in regard to our naturalized citizens, to such of them as 'were in the army or actually called into it' at the time they left Prussia, that is, to the case of actual desertion or a refusal to enter the army after having been regularly drafted and called into it by the Government to which at the time they owed allegiance."

There is another despatch from Mr. Cass to Mr. Wright, of the 12th of May 1859, in the same sense, in which he remonstrates against a declaration of Baron Manteuffel "that from the existing laws "of Prussia no former subject of the King, what-"ever his condition may be, has the right of "claiming his re-admission into Prussia," as inconsistent with the rights of United States' citizens under treaty with Prussia.

Ibid. p. 241.

"Under our Treaty with Prussia there can be no doubt that American citizens who owe no service to Prussia and have broken no Prussian law, have a right to visit and reside in Prussian territories without being in any way molested by the Government."

The note from Baron Manteuffel here referred to is not published.

Parliamentary Paper, "North America, No. 2, 1862."

United States' Papers relating to Foreign Affairs, 1861–62.

There is no further mention of the conscription of naturalized Americans in Prussia in the published correspondence until May 6, 1862, when Mr. Seward writes to Mr. Judd that the question must be postponed until the United States and Prussia have been relieved from present anxieties.

This despatch was called forth by the release from the army, as an act of comity, of two naturalized Americans, for which Mr. Seward instructs Mr. Judd to thank the Prussian Government.

In March 1863 Mr. Seward wrote to Mr. Judd: "Instances have occurred where Europeans who "have become naturalized citizens of the United "States have left the country when their services "were required, and returned to Europe to avoid "needful military duty here, and then have in-"voked the protection of the United States to "screen them from military duty there. Hence-"forth you will make no further applications in "these military cases without specific instructions."

United States' Papers relating to Foreign Affairs, 1862–63, vol. ii. p. 1029.

Nor does anything on the subject appear in the papers relating to Foreign Affairs for 1864–65.

"United States' Executive Documents," 3rd Sess., 38th Congress, vol. iv.

Mr. Judd revived the controversy by calling Mr. Seward's attention, on the 9th of August 1865, to the position of naturalized Americans, many of whom, having acquired the rights of United States' citizenship under Act of Congress by service in the United States' army, had returned to Prussia at the conclusion of the civil war, and were now threatened with compulsory conscription.

"United States' Diplomatic Correspondence, 1865," vol. iii p. 60.

Mr. Wright was re-appointed Minister in September 1865, and shortly afterwards recommenced an agitation on behalf of naturalized Americans.

He reported to Mr. Seward that during that year at least 500 naturalized Americans had returned to Prussia, liable to military duty according to Prussian law; but that the Prussian authorities did not succeed in placing in the army one in a hundred.

Ibid. p. 64.

As an instance he forwarded to Mr. Seward a copy of a note from Baron Thile, stating that one Breiger, a naturalized American, had been condemned to a fine of 50 thalers, or one month's imprisonment, for having left the country with intention of avoiding military duty; but that the Prussian Government would allow him to make a short stay in Prussia, on submitting to the judgment and paying costs.

In November Mr. Wright had an interview with Count Bismarck, who said that "it would be almost "impossible to change by legislation the Prussian "laws in view of the prejudice among the German "peasants, that as all Prussians are subject to "military duty, the returning adopted citizens "would be exempt," and added "that the subject "could only be adjusted by some treaty arrange-"ment with the United States."

Ibid. p. 66.

As a basis for such an arrangement Count Bismarck suggested "exemption to all Prussian "subjects returning to their native land who had "left before their seventeenth year, and exemption "also to all other persons who were not in the "army or notified to enter at the time of leaving, "and who shall have been out of the country for "years."

Count Bismarck further suggested that such a Treaty might be brought about by a Prussian proposal for a re-consideration of the Extradition Treaty of 1838 especially with regard to deserters; upon which the United States might make a counter proposal for a Convention on the subject of their naturalized citizens.

On the 2nd of December Mr. Seward furnished Mr. Wright with the following instructions :—

Ibid. p. 68.

"Considerations of ease and policy prevailed with "this Department to allow the subject to rest "during the continuance of the war. We became "even less anxious upon the subject when it "was seen that worthless naturalized citizens fled "before the requirement of military service by "their adopted Government here, and not only took "refuge from such service in their native land, "but impertinently demanded that the United "States should interpose to procure their ex-"emption from military service exacted here.

"Those circumstances, however, have passed away "and the question presents itself in its original "form. The United States have accepted and "established a Government upon the principle of "the rights of men who have committed no crime "to choose the State in which they will live, and to "incorporate themselves as members of that State, "and to enjoy henceforth its privileges and bene- "fits, among which is included protection. This "principle is recommended by sentiments of "humanity and abstract justice. It is a principle "which we cannot waive. It is not believed that "the military service which can be procured by "any foreign State in denial of this principle can "be important or even useful to that State. The "President desires that you will present the "subject to the serious consideration of Count "Bismarck. In doing so, you will assure him. . "that we shall be ready to receive and consider "with candour any opinions upon the subject that "the Prussian Government may think fit to com- "municate, and any suggestions . . . relative "to the Extradition Laws of the two countries."

'United States' Diplomatic Correspondence, 1866," p. 2.

On the 16th of December Mr. Wright transmitted to Mr. Seward a Memorandum with which he had been furnished by Baron Thile, showing the amendments which the Prussian Government considered might be made in the Extradition Treaty and adding,

"Advantages respecting the legislation on the nationality of Prussian subjects which could eventually be conceded to Prussian subjects who are or wish to become citizens of America:

"1. It would be granted that, after an absence of 10 years from Prussia, not only the rights, but also the duties and obligations of a Prussian subject towards his native country cease to prevail. This is a principle which till now has been followed by Prussian authorities only in some isolated cases, but which has not been generalized nor is law in the country.

"2. The Article 110 of the Prussian code says: Whosoever leaves Prussia with a view to avoid his enlistment in the Royal army will be punished, either by a fine of 50 or 100 thalers, or by imprisonment from one month to one year.

Ibid. p. 4. "An exemption from this general rule might be introduced in favour of such individuals who leave Prussia before the age of seventeen years."

Ibid. p. 6. On the 15th of January 1866 the sentence on Breiger was annulled.

Ibid. p. 10. In February Mr. Seward sent to Mr. Wright two letters from naturalized Americans in the Prussian army, and directed him to request their release as an act of favour.

At an interview in March, Count Bismarck suggested, as a compromise, that seven years should be the term of absence to constitute expatriation, instead of 10, "and remarked upon the impossi- "bility of Prussia changing her laws on the sub- "ject of military duty. To abolish these laws, he "said, would be plainly impracticable for a country "situated like Prussia; while to relax their strin- "gency in favour of American emigrants beyond "the concessions (as he termed them, alluding to "his protocol proposals) would not only amount to "the practical abrogation of said statutes in case "of all that had emigrated to the United States, "or intended to do so in the future, but would be "actually offering a sort of emigration premium to Ibid. p. 12. "all able-bodied men who had attained the age "when they might be called out for active service "in the army."

Mr. Wright urged upon Mr. Seward to accept Count Bismarck's proposal.

Mr. Seward replied, April 9, 1866, that he would be happy to discuss the matter with Count Bismarck, but it must be in direct communication with the Prussian Government, and not at second-hand; that he could not give a formal answer to an argument presented not in writing, but orally, and made known only by Mr. Wright's report.

The Austro-Prussian war gave rise to a great number of conscription cases. In most instances the offenders were either pardoned or let off with a fine. "United States' Diplomatic Correspondence, 1866," p. 47.

On the 24th of September 1866 Mr. Wright reports, "There is some doubt whether the amnesty "will embrace the cases of our adopted citizens "who have been fined, during their absence, for "neglect of military duty. Baron Roon, Minister "of War, will be adverse to our view of its con- "struction. Count Bismarck will, if possible, Ibid. p. 46. "extend its provisions to all such cases."

On the same date Mr. Seward instructed Mr. Wright to "suggest to Count Bismarck the inquiry, "whether it would not be deemed consistent now "with the dignity and greatness of Prussia to re- "cognize the principle of naturalization as a natural "and inherent right of manhood. In reflecting "upon the subject, I am not able to believe that "Prussia, any more than the United States, can "or need to rely upon compulsory military service "by subjects who have incorporated themselves as "members of foreign States.

"Secondly, I know of no circumstances which "would tend to place Prussia on an elevation so "high among the modern nations as the adoption "of that principle which lies at the basis of the "American Republic."

This closes the published correspondence with Prussia on this subject. Lord A. Loftus, No. 108; February 22, 1868.

On the 22nd of February 1868 a Treaty was signed at Berlin between the North German Confederation and the United States of America, consisting of six Articles, of which the following are the most important:—

1. Every subject of the North German Confederation naturalized in the United States of America, and having resided there during five years, shall be considered by the North German Confederation as an American subject, and treated as such. Every American citizen naturalized in the North German Confederation as an American subject, and having resided there five years, shall be considered by the Government of the United States of America as a German subject, and treated as such.

2. Every naturalized subject of either State, who may return to the land of his birth, cannot be prosecuted for any criminal offences unless they shall have been committed by him previously to his expatriation.

4. Every naturalized subject, who, having no intention of returning to the country of his adoption, resides continuously during two years in his former country, is presumed to have renounced his naturalization.

For this and other similar treaties, see p. 149.

GERMAN STATES.

As the minor German States are now for the most part incorporated in the North German Confederation, it will probably be sufficient to refer to the correspondence without giving a summary of it:—

Oldenburg, Senate Documents, 1st Session, 36th Congress, vol. ii. pp. 129, 221; Hanover, ditto, p. 143; Frankfort, pp. 231, 235; Hamburg, p. 171. It appears from these latter papers that a system existed by which a citizen of Hamburg who wished to expatriate himself was required to procure a discharge ("austritt") from the "nexus," a law bureau appointed for the purpose.

This discharge was only given on proof being afforded that the applicant had fulfilled his military

obligations. (Letter from Syndic of Hamburg, June 18, 1850.)

Bremen, ditto, pp. 191, 195, 211. In a despatch to Mr. Schleiden, of the 9th of April 1859, Mr. Cass thus explains himself: "It is undoubtedly "true that this Government has acquiesced in the "opinion expressed by Mr. Wheaton that, when a "citizen who has been liable to military duty "leaves his own country without permission and "without having performed this duty, and is "naturalized in another country, he may be held "to discharge his liability whenever he is found "again in his native State. This opinion, how-"ever, is regarded by this Government as apply-"ing not to cases of inchoate liability, but to cases "only where the liability has been complete."

This correspondence turned upon the question of the right of Bremen to surrender to another German State a naturalized American owing military duty to such State. The United States contended that such a surrender could not be acquiesced in; and Bremen maintained that there was a double duty to do it,—1st, in virtue of the existing arrangements on the subject with the other States; and 2nd, because a defaulter from military service in another State was a defaulter from the Federal Army of which the Bremen contingent formed a part.

AUSTRIA.

The laws of Austria regarding expatriation seem to have been sufficient to prevent any questions arising with regard to the conscription of naturalized Americans in the Austrian army; at all events no correspondence on the subject is published in the United States' Congress Papers.

There are, however, two cases in which the rights of subjects of the Austrian Empire naturalized in the United States have been discussed.

"Hertslet's State Papers," Vol. xliv. p. 925-1042. Dana's Edition of "Wheaton," Note p. 146.

The first and best known is that of Martin Kotza.

Martin Kozta, a Hungarian was one of the refugees of 1848–9. He went to Turkey, where he was arrested and imprisoned at Kutahieh, but released on condition of leaving the country.

He came to the United States and made the usual declaration of intention to become naturalized.

He then returned to Turkey in 1853, and went to Smyrna, on commercial business, where he obtained from the United States' Consul a teskereh (or travelling pass), stating that he was entitled to American protection.

On the 21st of June 1853 Kozta was seized by some persons in the pay of the Austrian Consulate and taken out into the harbour in a boat; they then threw him into the sea, and he was picked up by a boat from the Austrian man-of-war "Hussar."

The United States' Consul went on board to remonstrate, but the Captain of the "Hussar" persisted in retaining Kozta.

"State Papers," vol. xliv. p. 935.

On being informed of the circumstances, the United States' Chargé d'Affaires at Constantinople requested the Captain of the United States' ship of war "St. Louis" to demand Kozta's release, and, if necessary, to have recourse to force.

The "St. Louis" then went down to Smyrna, and the Captain, in pursuance of his instructions, stated to the Commander of the "Hussar" that unless Kozta was at once delivered to him he should take him by force of arms.

As such a conflict would have led to the destruction of the greater part of the shipping, and probably of the town, the French Consul offered his mediation, and Kozta was then given over to his care to be kept until the decision of the respective Governments was ascertained.

The matter was eventually compromised by an arrangement being come to between the Austrian Internuncio and the United States' Minister at Constantinople that Kozta should be shipped off back to the United States, the Austrians reserving the right to proceed against him in case he returned to Turkey.

"Le Gouvernement Impérial se réserve cependant de procéder contre cet individu conformément à ses droits, dès qu'il serait surpris une autre fois sur le territoire Ottoman." "State Papers," vol. xliv. p. 1015.

It is to be remarked that the Turkish Government had protested against the invasion of their territorial jurisdiction by the Austrian Consul and Captain. Ibid. p. 971.

On the 29th of August 1853 the Austrian Chargé d'Affaires at Washington presented a formal remonstrance to the United States Government, protesting against the claim of the United States to afford protection to Kozta, and urging them to disavow the conduct of their Agents and to grant reparation for the insult offered to the Austria flag. Ibid. p. 972.

Mr. Marcy replied on the 26th of September 1853. Ibid. p. 984.

In this note, which is of great length, Mr. Marcy gives a full account of the affair, and maintains the propriety of the course adopted by the United States' Minister, Consul, and Captain, pointing out that, independently of the question whether Kozta was or was not entitled to American protection, the Austrians could have no right to seize him upon Turkish soil.

The following are some of the principal passages in which Mr. Marcy deals with the right of Kozta to United States' protection:—

"There is great diversity and much confusion of opinion as to the nature and obligations of allegiance. By some it is held to be an indestructible political tie, and though resulting from the mere accident of birth, yet for ever binding the subject to the Sovereign; by others it is considered a political connexion in the nature of a civil contract, indissoluble by mutual consent, but not so at the option of either party. The sounder and more prevalent doctrine, however, is, that the citizen or subject, having faithfully performed the past and present duties resulting from this relation to the Sovereign Power, may at any time release himself from the obligation of allegiance, freely quit the land of his birth and adoption, seek through all countries a home, or select anywhere that which offers him the fairest prospect of happiness for himself and his posterity. . . . The proposition that Kozta at Smyrna was not an Austrian subject can be sustained on another ground. By a decree of the Emperor of Austria of the 24th of March 1832, Austrian subjects leaving the dominions of the Emperor without permission of the magistrate, and a release of Austrian citizenship, and with an intention never to return, become 'unlawful emigrants,' and lose all their civil and political rights at home." Ibid. p. 987.

"Mr. Hulsemann, as the undersigned believes, falls into a great error, an error fatal to some of his most important conclusions, by assuming that a nation can properly extend its protection only to native-born or naturalized citizens. This is not the doctrine of international law, nor is the practice of nations circumscribed within such narrow limits. This law does not, as has been before remarked, complicate questions of this nature by respect for municipal codes. In relation to this subject it has clear and distinct rules of its own. It gives the national character of the country, not only to native-born and naturalized citizens, but to all residents in it who are there with, or even without, an intention to become citizens, provided they have a domicil therein. Foreigners may, and often do, acquire a domicil in a country, even though they have entered it with the avowed intention not to become naturalized citizens, but to return to "State Papers," vol. xliv. p. 996.

their native land at some remote and uncertain period, and whenever they acquire a domicil, international law at once impresses upon them the national character of the country of that domicil. It is a maxim of international law that domicil confers a national character; it does not allow anyone who has a domicil to decline the national character thus conferred; it forces it upon him often very much against his will, and to his great detriment. International law looks only to the national character in determining what country has the right to protect. If a person goes from this country abroad, with the nationality of the United States, this law enjoins upon other nations to respect him, in regard to protection, as an American citizen. It concedes to every country the right to protect any and all who may be clothed with its nationality."

Mr. Marcy then quotes several authorities to show what constitutes domicil:—

State Papers," ol. xliv. p. 998.

"As the national character, according to the law of nations, depends upon the domicil, it remains as long as the domicil is retained, and is changed with it. Kozta was therefore vested with the nationality of an American citizen at Smyrna, if he, in contemplation of law, had a domicil in the United States." . . "There may be a reluctance in some quarters to adopt the views herein presented relative to the doctrine of domicil and consequent nationality, lest the practical assertion of it might in some instances give a right of protection to those who do not deserve it. Fears are entertained that this doctrine offers a facility for acquiring a national character which will lead to alarming abuses; that under the shadow of it political agitators, intent upon disturbing the repose of their own or other countries might come to the United States with a view to acquire a claim to their protection, and then to return to their former scenes of action, to carry on, under a changed national character, their ulterior designs with greater security and better success. This apprehension is believed to be wholly unfounded. The first distinct act done by them towards the accomplishment of these designs would disclose their fraudulent purpose in coming to and seeking a domicil in this country. Such a development would effectually disprove the fact that they acquired a domicil here and with it our nationality."

Ibid. p. 1000.

Simon Tousig.

This case further elucidates and explains the doctrine of domicil advocated by the United States in the affair of Martin Kozta.

Tousig, a subject of Austria, had acquired a domicil in the United States, but was not naturalized, and voluntarily returned to Austria with a passport from the American Department of State. He was arrested on charge of offences committed before leaving Austria. He appealed to the United States Minister for protection, who laid the case before the State Department. Mr. Marcy replied on the 10th of January 1854:—

Lawrence's Appendix to "Wheaton," Ed. 1863, p. 929. Cong. Doc., 33rd Congress, 1st Sess. H. R. Ex. Doc. No. 41.*

"I have carefully examined your despatches relating to the case of Simon Tousig, and regret to find that it is one which will not authorize a more effective interference than that which you have already made in his behalf. It is true he left this country with a passport issued from this Department; but as he was neither a native-born nor naturalized citizen, he was not entitled to it. It is only to citizens that passports are issued.

"Assuming all that could possibly belong to Tousig's case—that he had a domicil here, and was actually clothed with the nationality of the United States—there is a feature in it which distinguishes it from that of Kozta. Tousig voluntarily returned to Austria and placed himself within the reach of her municipal laws. He went by his free act under their jurisdiction, and thereby subjected himself to them. If he had incurred penalties or assumed duties while under these laws, he might have expected they would have been enforced against him, and should have known that the new political relation he had acquired, if indeed he had acquired any, could not operate as a release from these penalties. Having been once subject to the municipal laws of Austria, and while under her jurisdiction violated those laws, his withdrawal from that jurisdiction, and acquiring a different national character, would not exempt him from their operation whenever he again choose to place himself under them."

* This volume is unfortunately missing from the Foreign Office Library.

BAVARIA.

Mr. Attorney-General Black, in the case of Amthor, a Bavarian, naturalized in the United States, who returned to Bavaria, gave an opinion,† in 1857, admitting the right to renounce the citizenship of naturalization and resume that of birth, by an actual and *bonâ fide* return with family and property and a change of permanent domicil. Mr. Black said that no mode of renunciation was prescribed; but, as the right was admitted, if the fact and intent coincided and were sufficient to satisfy the Government of the United States, and Bavaria treated Amthor as a citizen, he could not claim the rights of a citizen of the United States or invoke its protection.

Dana's "Wheaton," sec. 5. p. 144.

† There is no copy of this in the Foreign Office Library.

FRANCE.

The first of the papers in this correspondence presents another phase of the American doctrine.

"Department of State, Washington,

"SIR, June 1, 1852.

"I HAVE to acknowledge the receipt of your letter to Mr. Reddall, of the 28th ultimo, inquiring whether M. Victor B. Delpierre, a native of France, but a naturalized citizen of the United States, can expect the protection of this Government in that country when proceeding thither with a passport from this Department. In reply, I have to inform you that if, as is understood to be the fact, the Government of France does not acknowledge the right of natives of that country to renounce their allegiance, it may lawfully claim their services when found within French jurisdiction.

Senate Documents, 1859-60 vol. ii. p. 55.

"I am, &c.

"J. B. Nines, Esq., DANIEL WEBSTER.
"New York."

Lucian Alibert.

This case has already been referred to in M. Treitt's Report. Ibid. p. 176.

Alibert was a native of Digne, Basses Alpes. He went to the United States in 1838 at the age of 18, and, after going through the usual formalities, was naturalized in 1846. In 1852 he returned to France and was arrested while on a visit to Dignes as an "insoumis" of 1839, and pleaded his naturalization as exempting him from service. The United States Consul at Marseilles applied to the General commanding the district, who informed him that Alibert's claim was founded in right, if his naturalization was really dated in 1846, as his naturalization would incapacitate him from serving in the French army and the date of it would prove that more than three years had elapsed since the offence was committed (that being the period of limitation required by the Penal Code), and that he could not consequently be proceeded against for insubordination. Nevertheless Alibert was brought before a "Conseil de Guerre" at Marseilles, and condemned to a month's imprisonment.

The cause was then brought by appeal before a superior Military Court at Toulon and the sen-

tence quashed, thereby establishing Alibert's immunity from conscription.

Michel Zeiter.

Senate Documents, 1859—60, vol. ii. p. 198.

In 1859 Mr. Cass directed the United States Minister at Paris to procure information on the French Law of naturalization, &c., and at the same time instructed him as follows: "This Government maintains the right of expatriation and naturalization, and maintains also that if a foreign-born citizen, naturalized here, returns to his native country, he is not liable to military duty, except such as was actually due and which he had been called upon to perform before his emigration. In any communication you may have with the Minister for Foreign Affairs you will make known to him these views of the United States."

Lawrence's Appendix to "Wheaton," p. 928.

Accordingly, when the case of Michel Zeiter arose in 1860, Mr. Faulkner made a communication in this sense to M. Thouvenel: "Our doctrine is that the naturalized emigrant cannot be held responsible upon his return to his native country for any military duty, the performance of which has not been actually demanded of him prior to his emigration. A prospective liability to service in the army is not sufficient. The obligation of contingent duties depending upon time, sortition, or events thereafter to occur, is not recognized. To subject him to such responsibility, it should be a case of actual desertion or refusal to enter the army, after having been actually drafted into the service of the Government to which he, at the time, owed allegiance."

The case of Michel Zeiter is so fully explained in M. Treitt's Report and in the copy of the Judgment of the Provincial Court in Addenda F., that it is unnecessary to say anything more about it here.

President Buchanan referred to these cases in his Message to Congress of the 3rd of December 1860:—

"With France, our ancient and powerful ally, our relations continue to be of the most friendly character. A decision has recently been made by a French judicial tribunal, with the approbation of the Imperial government, which cannot fail to foster the sentiments of mutual regard that have so long existed between the two countries. Under the French law, no person can serve in the armies of France, unless he be a French citizen. The law of France recognizing the natural right of expatriation, it follows as a necessary consequence, that a Frenchman by the fact of having become a citizen of the United States has changed his allegiance, and has lost his native character. He cannot therefore be compelled to serve in the French armies, in case he should return to his native country. These principles were announced in 1852 by the French Minister of War; and in two late cases have been confirmed by the French judiciary. In these, two natives of France have been discharged from the French army, because they had become American citizens. To employ the language of our present Minister to France, who has rendered good service on this occasion, 'I do not think our French naturalized fellow-citizens will hereafter experience much annoyance on this subject.' I venture to predict that the time is not far distant when the other Continental Powers will adopt the same wise and just policy which has done so much honour to the enlightened government of the Emperor. In any event, our government is bound to protect the rights of our naturalized citizens everywhere, to the same extent as though they had drawn their first breath in this country. We can recognize no distinction between our native and naturalized citizens."

United States' Diplomatic Correspondence, 1866, Part I. p. 291.

The next published correspondence is in 1866 respecting the cases of MM. Schneider, Cochener, Todry, and Pierre.

These persons were all naturalized in the United States, and had returned to France with American passports.

The cases were all alike. The men were severally arrested as "insoumis" on their arrival within their native communes, and detained for some time in prison, with more or less rough usage, until the local tribunals decided on their claims for exemption.

They were all eventually discharged.

The United States' Minister at Paris, Mr. Bigelow, remonstrated in strong terms against these proceedings, and M. Drouyn de Lhuys in each case replied that the complainants must prove their claims to exemption in the usual manner, citing the case of Zeiter to show the impartiality with which such applications was dealt with. If François Pierre had been an American by birth, or a citizen of the United States under other circumstances, his passport would certainly have protected him from prosecution for the offence in question; but when a person "returns to his native country with foreign naturalization papers, it is not just to lay aside his nativity and admit his new nationality as protecting him by retroactive effect, contrary to every principle of law, against former acts, and particularly against offences of which he was guilty, a Frenchman, as in the present case. His presence in his native country obliges him to explain his case by the laws of the land, and as long as he has not done that, he is considered to have preserved his primitive citizenship."

United States' Senate Documents, vol. ii. p. 302.

M. Drouyn de Lhuys, however, suggested at an interview on the 28th of April 1866, that naturalized Americans should be directed to proceed at once on returning to France to the *mairie* where their names were enrolled, and to claim exemption from the conscription, and get their names removed from the list.

Ibid. p. 299.

Mr. Seward, on the 7th of May 1866, instructed Mr. Bigelow to urge on the French Government that an American passport should be considered sufficient proof of nationality, and that if a person representing himself to be an alien were conscribed, the military tribunals should decide summarily on his claims to exemption; and if they decided against him, the matter should be at once submitted to the Government for diplomatic discussion.

Ibid. p. 304.

SPAIN.

President's Message, December 23, 1851. Executive Documents, 1 Sess., 32nd Congress, vol. iii. No. 10.

In communicating to Congress the papers respecting the imprisonment, in Cuba, of Mr. John S. Thrasher, a native American, domiciled in that island, who had been condemned to eight years imprisonment for assisting Lopez' expedition, Mr. Webster stated, "The first general question then is, as to his right to exemption from Spanish law and authority on the ground of his being a native-born citizen of the United States.

"The general rule of the public law is that every person of full age has a right to change his domicil; and it follows, that when he removes to another place, with the intention to make that place his permanent residence, or his residence for an indefinite period, it becomes instantly his place of domicil; and this is so, notwithstanding he may entertain a floating intention of returning to his original residence or citizenship at some future period. . . . . .

"In questions on this subject, the chief point to be considered is the *animus manendi*, or intention of continued residence; and this must be decided by reasonable rules, and the general principles of evidence.

"If it sufficiently appear that the intention of removing was to make a permanent settlement, or a residence for an indefinite time, the right of domicil is acquired by a residence even of a few days. . . . . .

"It is undoubtedly true that an American citizen who goes into a foreign country, although he owes

local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of his own Government; and if without the violation of any municipal law, he should be treated unjustly, he would have a right to claim that protection. . . . But his situation is completely changed when, by his own act, he has made himself the subject of a foreign Power. . . . . .

"But, independently of a residence with intention to continue such residence; independently of any domiciliation; independently of the taking of any oath of allegiance or of renouncing any former allegiance; it is well known that, by the public law, an alien, or a stranger born, for so long a time as he continues within the dominions of a foreign Government, owes obedience to the laws of that Government, and may be punished for treason or other crimes, as a native-born subject might be unless his case is varied by some treaty stipulations; but this duty of obedience to the laws, arising from local and temporary allegiance, ceases, of course, the moment he transfers himself back to his original country. . . . . Our citizens who resort to countries where trial by jury is not known, and who may there be charged with crime, frequently imagine, when the laws of those countries are administered in the forms customary therein, that they are deprived of rights to which they are entitled, and therefore may expect the interference of their own Government. . . . . They have chosen to settle themselves in a country where jury trials are not known, where the privilege of the writ of *habeas corpus* is unheard of, and where judicial proceedings in criminal cases are brief and summary. Having made this election they must abide its consequences.

"No man can carry the ægis of his national American liberty into a foreign country, and expect to hold it up for his exemption from the dominion and authority of the laws, and the sovereign power of that country, unless he be authorized so to do by the virtue of treaty stipulations."

Halleck's "International Law," chap. xxix. p. 698.

In the case of Ignacio Tolen, a native of Spain, but naturalized in the United States, Mr. Webster (June 25, 1852,) said, "If that Government (Spain) "recognizes the right of its subjects to denationalize themselves and assimilate with the citizens "of other countries, the usual passport will be a "sufficient safeguard to you; but if allegiance to "the Crown of Spain may not legally be renounced "by its subjects, you must expect to be liable to the "obligations of a Spanish subject, if you voluntarily "place yourself within the jurisdiction of that "Government."

Senate Documents, 1859–60, vol. ii, p. 224.

In 1860 a case occurred at Havana, of Sabino de Liaño, a native of Spain naturalized in the United States, being arrested as a conscript.

In reply to the representations of the United States' Consul, the Captain-General informed him that by a Royal Decree of the 17th of November 1852, "the foreigner obtaining naturalization in "Spain, as well as the Spaniard obtaining it "within the territory of another Power, without "the knowledge and authorization of his respective Government, shall not exempt himself from "the obligations which were consequent to his "primitive nationality, although the subject of "Spain may in other respects lose the quality of "Spaniard, conformably to what is prescribed in "Article 1 of the Constitution of the Monarchy."

United States' Senate Documents, vol. ii. p. 228.

Eventually, the proceedings taken against Mr. Liaño were suspended, and a bond which he had entered into to provide a substitute cancelled by the Governor-General.

DENMARK.

Ibid. p. 203.

A Dane named Boie Smidt, who had visited the United States and declared his intention of naturalizing, having on his return to Copenhagen, in September 1859, been arrested and impressed into the Danish navy, the United States' Minister demanded his release.

United States' Senate Documents, vol. ii. p. 204.

The Danish Government replied, that "if it "should turn out, upon an investigation, that the "said Mr. Smidt, when he signified his intention "to be naturalized in the United States, was, "under the laws of the country, bound afterwards "to perform his military service in his native "country," the laws then in force would not admit of his release.

Ibid. p. 205.

The United States' Minister rejoined that "it is "a settled doctrine of the Government which I "have the honour here to represent, as I understand it, that a naturalized citizen of the United "States, from and after the date of his naturalization both at home and abroad, is placed on the "very same footing with a native citizen, with "the exception that none but a native citizen can "occupy the office of President or Vice-President "of the United States; and the Government will "be disposed to extend to the one class of citizens the same protection which justly belongs to "the other at all times and in all places."

Mr. Smidt got tired of performing military duty in a fortress while his case was being discussed, and procured a substitute.

The United States' Minister than asked either for the discharge of the substitute or the refund of the money paid by Mr. Smidt for engaging him.

It does not appear how the matter ended.

RUSSIA.

Executive Documents of the House of Representatives, 1864–65, vol. iii. part iii. p. 301.

In July 1864 the Russian Minister at Washington informed Mr. Seward that, "according to "existing laws of Russia, every foreigner who "becomes a subject of Russia, and at a later time "renounces this character, is obliged to pay before "his departure the equivalent for the taxes for "three years, and some other imposts, to obtain "the right to export his property.

"The Imperial Government has stated to me that under a new regulation the subjects and citizens of powers by whom the dues above-mentioned are not enforced, will be exonerated therefrom."

Mr. Seward replied that no such impost was levied in the United States.

Diplomatic Correspondence, 1866, part i. p. 391.

On the 31st of January 1866 Mr. Seward directed Mr. C. M. Clay, the United States' Minister at St. Petersburg, to do what he could, should it be deemed advisable to procure the release of a Russian Pole, Benjamin Goldberg, a naturalized citizen of the United States, who was said to have been arrested and forced into the Russian army.

No further papers respecting this case are published.

Ibid. p. 416.

On the 14th of July 1866 Mr. Clay reports:—

"I am informed that Stanislaus Pongoski, a Russian Pole and naturalized citizen of the United States, has been proved to have become our fellow-citizen without leave of the Emperor of Russia, and by the Article 367 of the Penal Code he has been deprived of all the rights of Russian citizenship and banished for ever from the Russian empire, and this sentence has been put into execution. I don't see that we can complain, as it settles the question of denaturalization virtually in our favour, and avoids unpleasant issues."

Mr. Seward, in reply, says that he is "glad to "see that the Russian Government has accepted "that important principle definitively. Certainly "there is no cause of complaint to the proceeding "on our part, provided that Pongoski does not "feel himself aggrieved.

"The case may perhaps demand careful examination if it shall turn out that the decree of perpetual exclusion thus pronounced against an admitted American citizen was based upon no other ground than his having voluntarily accepted that character under the Constitution and laws of the

United States. In the meantime we may presume that political or other offences entered into the merits of the decree."

COSTA RICA.

United States' Diplomatic Correspondence, 1866, vol. ii. p. 430.

In December 1865, Mr. Riotte reported to Mr. Seward that "young men from this Republic go to "the United States, remain there for a short time, "obtain, by means of hard swearing and an inexcusable levity on the part of the Court, letters of "naturalization, upon which they return for good "to their native country, or leave the United "States for other parts; and all this for the sole "purpose of making this citizenship a bar against "the enforcement of whatever obligation by their "native or any other Government. . . I think "it bad that Clerks of Courts, too, are authorized "to grant such papers, and that it is not made the "exclusive duty and privilege of Courts in open "session, which would certainly prevent a good "deal of false swearing. But the main difficulty "is, in our large cities two witnesses can be got, "at any moment, and very cheap, to swear to anything; that the persons hunting up such witnesses have, as a matter of course, made up their "minds beforehand to commit perjury; that there "is no officer bound to look after the interest of "the United States in such cases, and that the "Judges or Clerks, instead of requiring two good "substantial witnesses (they ought to know them "personally), seem to be satisfied with almost any "class of witnesses."

Messrs. Francisco and Juan Quezada, who had obtained naturalization under such circumstances, appealed to their American citizenship to protect them from the Costa Rica conscription.

Ibid, p. 431.

The Costa Rican authorities could not, "even "for a moment, admit that a Costa Rican naturalized in a foreign country continues that character after having returned to the country with "the implicit intention to live in it;" but agreed to consult Mr. Riotte.

Mr. Riotte refused to interfere, first, because Messrs. Quezada had become re-domiciled in Costa Rica, and, secondly, as he stated to them, "even "assuming, for argument's sake, that you were "still citizens of the United States, there is another "consideration which is not to be lost sight of in "deciding upon your second request. A Law of "Costa Rica (of December 2, 1850) imposes upon "every citizen the obligation to serve in the army. "You had not complied with that duty previous to "your adoption as American citizens: and it is the "enforcement of that very duty which has brought "out your claim to the United States' citizenship. "Now, I know well that the claim of an adopted "citizen's native country to the fulfilment of his "military duty towards that country, and the extent of that claim, was, and is at this moment, a "mooted question between the Government of the "United States and several European monarchies. "Until that question is decided, however, I can "scarcely fail if I adopt the view of one of our "greatest statesmen, when he answered an adopted "citizen in a case perfectly the same as yours:— "'But having returned to the country of your "'birth, your native domicil and national charac"'ter revert, and you are bound to obey the laws "'exactly as if you had not emigrated.'"

On the 16th of February 1866 Mr. Seward wrote to Mr. Riotte, "The proceedings you have adopted, "and the decision you have arrived at in the premises, are approved."

The irregular proceedings by which Costa Ricans and others obtain certificates of naturalization in the United States, without any intention of residing there, to which Mr. Riotte thus called attention, are referred to in the recent report of the Committee of Foreign Affairs of the House of Representatives.

PART VI.—Correspondence between Great Britain and other Countries.

It would be manifestly impossible to give an abstract in this memorandum of all the correspondence which has taken place between Great Britain and other countries, as the preliminary search through the official registers and MS. volumes, even if the inquiry were restricted to the last thirty years, would probably occupy several weeks, if not months.

There are, however, certain standard cases which are frequently referred to as precedents, and which are consequently more readily accessible.

An effort will be made to give a résumé of these, as well as to examine cursorily the correspondence of the last few years.

The principal subject of correspondence has been the claim to British protection of the sons and grandsons of British subjects both in foreign countries.

By the Act 4 Geo. II. cap. 21. (explaining 7 Anne, cap 5) all children of natural-born British subjects born out of the legiance of the Crown of England are "adjudged and taken to be, and all

Statutes at Large vol. v. p. 113.

"such children are hereby declared to be, natural, "born subjects of the Crown of Great Britain, to "all intents, constructions, and purposes whatsoever."

The Act 13 George III. cap. 21. extended the provisions of this statute to the *grandchildren* of native British subjects (*vide ante*, "Laws of Great Britain.")

On the other hand, as previously explained, the common law of England considers *all* persons born within British territory to be British subjects, without regard to their parentage.

A conflict hence arises between the principle of the British doctrine of native allegiance, and the statutory enactments extending that allegiance to the sons and grandsons of British subjects born within the legiance of other countries.

Such persons, finding that they are declared by statute to be subjects of the British Sovereign, naturally look to that Sovereign for protection in return.

The manner in which this claim is practically dealt with is shown by the following instructions to Consul Dale of the 20th December 1842, based upon an opinion delivered by Her Majesty's Advocate-General, and which forms the model on which all subsequent instructions to Her Majesty's Representatives or Consuls abroad upon this subject have been framed:—

"By the statute law of this country, all children born out of the allegiance of the King, whose fathers or grandfathers by the father's side were natural-born subjects, are themselves deemed to be natural-born subjects, and are therefore entitled to enjoy British rights and privileges while they are within British territory; but the effect of British statute law cannot extend so far as to take away from the Government of the country in which those persons may have been born, the right to claim them as natural-born subjects, at least, so long as they remain in that country.

"By the common law of England, all persons born within the King's allegiance, whether the children of British subjects or of foreigners, are deemed to be natural-born subjects of the Crown of England, and if the law of any foreign State be the same, by equally admitting to its rights as subjects, persons born within its own territory, that country has the right to exact the service of a

subject from such person, even if he be the child of a foreigner, at least whilst such child remains in the country of his birth.

"Therefore the children or grandchildren, by the father's side, of natural-born British subjects born in any other country than Monte Video are entitled to be protected in that country as natural-born subjects of the Crown of Great Britain. But as regards the children of British fathers born in Monte Video, such children cannot be protected against the operations of the laws affecting the subjects of that country, unless the laws of that country do not admit the child of a foreigner to the rights of a subject."

ARGENTINE REPUBLIC—BUENOS AYRES.

Hansard, vol. xix. p. 177.

The struggle between Monte Video (Argentine Republic) and Buenos Ayres led to a variety of questions respecting the position of British subjects in the countries bordering on the River Plate.

In reply to an inquiry from Mr. Ewart in the House of Commons on the 4th of April, 1845, Sir Robert Peel stated "It appeared that the general "law was this: That the son or grandson of a "British subject born abroad was also a British "subject. But he could not deny that children born "in a foreign State were not also subjects of that "State. Such was the law in this country; for "the children of foreigners born in Her Majesty's "dominions were British subjects. If the children "of British residents at Buenos Ayres were born "out of that State, the authorities there had no "right to make them Buenos Ayrean subjects. If, "however, the children of British subjects were "born at Buenos Ayres and continued to reside "there, they obtained the rights of citizenship in "that place; but with those rights they also had "imposed upon them the burdens and duties of "citizens, and were liable to the law of Buenos "Ayres."

MS. Volume Nationality Cases. Mr. Hood, No. 48; December 16, 1850. To Mr. Hood, No. 7; March 24, 1851.

In December, 1850, Mr. Hood, Her Majesty's Consul at Buenos Ayres, requested instructions respecting the renewal of certificates of British nationality to natives of Hanover, and to British subjects who, from their occupation or business, were compelled by the local enactments to wear the red waistcoat, hatband, and ribbon, distinctive of Buenos Ayrean nationality.

Lord Palmerston replied, "that if there is a "Hanoverian Minister or Consul at Buenos Ayres "he should, of course, take charge of Hanoverian "subjects; but if there is no such officer, then "Hanoverian subjects may still continue to remain "under British protection, but it does not appear "to me to be necessary that fresh certificates of "British nationality should be granted to such "Hanoverians.

"I have further to state to you that a subject of Her Majesty cannot divest himself of his allegiance by submitting to any local enactment compelling him to wear any particular uniform or badge in a foreign country in which he may think proper to reside, and that he does not thereby forfeit his right to be protected by his own Government."

Mr. Christie, No. 125; October 23, 1857.

In October 1857 Mr. Christie reported that the Argentine National Congress had passed a law enabling the sons of aliens born within Argentine territory to choose between Argentine citizenship, and that of their fathers.

Mr. Christie added that he had advised the Buenos Ayrean Government, who were forcing the sons of aliens into their service, to make a similar law.

At the close of 1857 a large number of British residents at Buenos Ayres having addressed a Memorial to the British Government complaining of the forced enlistment of the sons of foreigners in the local militia, Lord Palmerston wrote a despatch to Mr. Christie acknowledging that Her Majesty's Government could not claim such persons as British subjects; but, pointing out the various reasons which could be urged, both on grounds of policy and comity, against such a rigid exercise of military law.

To Mr. Christie, No. 1; January 4, 1858.

This despatch is too long for insertion here, but it well deserves attention in case of an occasion arising in which similar arguments might be called for.

The result of this representation was that the Government of Buenos Ayres issued a Decree on the 12th of April 1858. "The Government has "resolved to admit substitutes for all the acts of "the service of the National Guard on the part of "the sons of foreigners born in the country (and "who by our laws, are citizens of it,) who may wish "to have them, subject to the regulations which "may be necessary and conducive to the good ser-"vice of the same, it being understood that the "substitutes must be foreigners and that their "principals will remain subject to all responsibility "consequent on all culpable default in the service."

Mr. Christie, No. 13; April 15, 1858.

Some communications took place from 1854 to 1857 between the English and French Governments as to the rights of the sons of aliens born in Buenos Ayres to the protection of the country of their fathers' birth.

In November 1857, Count Walewski informed Lord Cowley that the French Consuls had been instructed to contend that the sons of Frenchmen so situated were entitled to French protection, but that he had carefully considered the whole subject, and "that he must confess he considered the claim "untenable. The claim had been originally put "forward under the 10th Article of the 1st Book "of the Code Napoléon, which declares 'que tout "'enfant né d'un Français en pays étranger est "'Français,' and had always been insisted on until "now. On the other hand, his Excellency found "that by the 17th Article of the same Book and "Code it is declared, 'que la qualité de Français "se perdra par tout établissement fait en pays "étranger sans esprit de retour.' There was there-"fore an apparent contradiction in the Code itself, "to remedy which the interference of the Legisla-"ture would probably be required."

Lord Cowley, No. 625; November 28, 1857.

At a subsequent interview, Lord Cowley urged Count Walewski to send to the French Consuls the same instructions as had been sent to Mr. Christie. The Count replied, "that at this moment he was "not in a position to send any instructions what-"ever upon the subject, for that he was still "under the pressure of the interpretation put by "former Governments on the law of France. In "stating to me, as he had done some time back, "that he considered the position until now taken "by France on this question to be untenable, he "had only given his own private opinion—an "opinion, indeed, which he had expressed officially "in Council; and he had asked me for the English "practice in cases of this nature with the inten-"tion of employing it as a further argument with "the Minister of Justice for the necessity of chang-"ing the terms of the French law. Until this, how-"ever, should be accomplished, he had no choice "but to insist, as had his predecessors, that all "children born of French subjects abroad are "to all intents and purposes French subjects also.

Lord Cowley, No. 1,745; December 29, 1857.

"Count Walewski, however, said that as the law would without doubt be altered, he had recommended the Buenos Ayres Government to let the matter rest for the present."

The French law never has been altered.

On the 3rd of March 1860 Mr. Thornton forwarded a copy of a Treaty concluded between Spain and the Argentine Confederation, containing, among other provisions, an Article stipulating that the sons of Argentines and Spaniards, born in those respective countries, should be allowed to choose the nationality they may prefer, and suggested that England might claim for the sons of her subjects

Mr. Thornton, No. 25; March 1860.

any exemption from military duty which this Treaty might confer on the sons of Spaniards.

To Mr. Thornton, No. 42; July 7, 1860.

Lord John Russell replied that it did not appear that any special privilege was secured to Spain by this Treaty, which merely adopted, as between the contracting parties, the existing law of each country as to nationality; and that even if any privileges had been given by this treaty to Spaniards, there was no most-favoured-nation clause on this particular point in the British Treaty of 1825, which entitled British subjects to claim the benefit of them.

To Mr. Thornton, No. 54; November 27, 1861.

On the 27th of November 1861 Lord Russell instructed Mr. Thornton that, if the sons of British subjects wished exemption from military service, they should exercise the option given to them by Argentine law, between Argentine and British nationality.

In 1862 Mr. Thornton raised the question whether, as the Argentine Provinces and the State of Buenos Ayres were recognized as separate belligerents, the sons of British subjects born within the provinces might not claim exemption from service in Buenos Ayres, and *vice versâ*.

To Mr. Thornton, No. 22; May 28, 1862.

Mr. Thornton was informed that, in the absence of any treaty stipulation, even aliens may under certain circumstances be rendered liable to military service in the country of their domicil, without any violation of international law, and that it must be remembered that the persons in question were not aliens in the Argentine Confederation.

Moreover, the law of September 29, 1857, seemed to extend to the sons of aliens, wheresoever born; and the provinces might therefore contend that those who had omitted to take advantage of its provisions had thereby constituted themselves Argentines by default.

Mr. Doria, No. 84; August 28, 1863, To Mr. Doria, No. 38; November 4, 1863.

In August 1863 Mr. Doria reported that it was proposed to pass a new law by which all persons born within the Argentine Confederation should be declared to be Argentine citizens, irrespective of the nationality of their parents.

Mr. Doria was approved for having protested against a retrospective application being given to this law, in regard to the children of British parents; as, although it appeared that there were no adult persons of this class who had availed themselves of the option given by the Law of 1857, to elect to be deemed British subjects, yet there might be others still in their minority whose time for making their election had not yet arrived.

At the same time, such a Law would not be *ultra vires* of the Argentine Confederation. It was quite competent to the Confederation to pass such a new Law, though, as an act of comity, it would be preferable to retain the previous one.

AUSTRIA.

Consul-General Dawkins, No. 117; August 26, 1848. To Consul-General Dawkins No. 36; November 28, 1848.

During the Venetian insurrection in 1848 the Provisional Government claimed a right to exact payment to a forced loan from certain British and Ionian subjects, on the ground that, by an Austrian Decree of the 15th of May 1833 they had acquired Austrian (and therefore Venetian) citizenship. (See "Laws of Austria," and Addenda H.)

This Decree provided that all foreigners who, at the date of its publication in those provinces, should have completed an uninterrupted residence of 10 years were allowed to free themselves from the Austrian citizenship acquired by such residence, on giving proof that they never had an intention of becoming Austrian citizens. Such proof was to be given within six months from the date of the Decree, in default of which it would no longer be admitted.

The Venetians maintained that under this law British subjects who had resided uninterruptedly for 10 years in Venice became Venetian citizens, unless they expressly renounced that citizenship.

Mr. Consul-General Dawkins remonstrated against the interpretation put upon this law, and his having done so was approved by Her Majesty's Government.

It appeared, however, that some of the persons thus pleading their quality of British subjects as exempting them from the forced loan had taken office under the Venetian Government.

Lord Palmerston instructed Mr. Dawkins that such persons were, by the 29th Article of the Austrian Civil Code, liable to be considered as subjects of the Venetian Government, and consequently not entitled to exemption. Lord Palmerston did not, however, disapprove of Mr. Dawkins having endeavoured to preserve them from the severe effect of the forced contribution imposed by the Provisional Government.

BELGIUM.

Lord Howard de Walden, No. 151; December 3, 1860, Lord Howard de Walden, No. 152; December 3, 1860. To Lord Howard de Walden, January 1861.

In December 1860 a case occurred at Brussels (that of M. Ignatius Téleki), in which various questions were put to Her Majesty's Government by Lord Howard de Walden, as to the status of naturalized British subjects.

Under the advice of the Law Officers the following instructions were furnished for his guidance:

"The first question is, whether a person who was naturalized as a British subject previously to the 24th of August 1850 is entitled to a permanent passport; and the answer to it is, that as the rule in regard to the limitation of time in passports granted to naturalized British subjects applies only to those naturalized subsequently to the above-mentioned date, there can be no question as to the right of a person naturalized previously to that date to receive, like any natural-born British subject, a passport not limited in regard to time."

"The second question is, whether a woman, either by birth a British subject, or a naturalized British subject, or an alien, is entitled, on being married abroad to a naturalized subject, to receive a passport in her new character of a married woman. The answer is, that if the woman is a natural-born British subject, she does not lose that character by marrying a naturalized British subject, and that consequently she is entitled to a fresh passport as a British subject in her married name; but if the woman is a naturalized British subject, or an alien, then, as the woman cannot in her married state travel under her maiden name, and as whatever may have been her nationality before marriage, she acquires upon marriage the nationality of her husband, she is entitled to be placed in regard to a passport on the same footing as her husband; and, consequently, in such a case, Her Majesty's Ministers or Consuls would be authorized to act exceptionally, and to grant to the woman an original passport, subject to the same conditions as the passport held by her husband, that is to say, to a passport not limited in point of time, if her husband's passport is not limited, or limited so as to correspond with the limit of time at which her husband's passport will expire, if her husband's passport is limited. But in no case must the wife's name be inserted in the passport held by the husband previously to the marriage; for no Minister or Consul is authorized under any circumstances to insert an additional name in a passport, whatever number of names such passport, when originally granted, was stated to include."

"Your Lordship asks three further questions:—

"1st. As regards the character of the children of a British naturalized subject born abroad; the answer is, that such children share the character of their father, and are to be considered as naturalized British subjects, so long at least as they are under age and living with their father.

"But this is, of course, subject to the local law which may rightly deal with children born in the country, whatever may be the circumstances of their father, as natural-born subjects of the country in which they were born.

"2nd. Whether naturalized subjects are entitled to be married at Her Majesty's Legations or Consulates. The answer is that they are so entitled.

"3rd. Whether naturalized subjects are to be presented at Court by Her Majesty's Diplomatic servants; and to this I reply that I see no ground on which a general rule excluding them from such presentations should be laid down; and I consider that Her Majesty's Representative may properly use in regard to the presentation of naturalized British subjects the same discretion as they are in the habit of using in regard to natural-born."

BRAZIL.

onsul Hesketh, o. 16; March , 1845.

In March 1845 Mr. Hesketh, Her Majesty's Consul at Rio de Janeiro, forwarded to Lord Aberdeen a copy of a Representation which he, in conjunction with the French and other Consuls, had addressed to the Brazilian Government, remonstrating against the interpretation given to the 6th Article of the Constitution of Brazil, namely, that excepting those foreigners who may be in Brazil in the service of their own States, the offspring of all other foreigners born in Brazil must necessarily be Brazilians.

o Consul Hesth, No. ; ugust 30, 1845.

Lord Aberdeen replied that "inasmuch as by the "law of the United Kingdom, all persons born "within the allegiance of the British Crown are "deemed to be British subjects, you would have "acted more prudently if you had refrained from "signing the Representation made to the Brazilian "Government respecting the nationality of the "children of foreigners born in Brazil."

onsul Ryan; anuary 17, 1849.

In 1849 Her Majesty's Consul at Peru asked whether the children of British subjects born in Portugal were to be considered as British subjects in Brazil, and was informed that children of British subjects born elsewhere than in Brazil, and whether in a British territory or in a foreign country, are to be regarded in the light of British subjects and to be entitled to protection as such.

r. Jerningham, o. 20; April 2, 53.

On the 2nd of April 1853 Mr. Jerningham reported that he had been in communication with the Brazilian Government respecting the forced conscription of the sons of British subjects born in Brazil, and that the Brazilian Minister had stated to him that it was proposed to bring forward a law in the Brazilian Chambers providing that up to the age of 21 years, sons born in Brazil of British residents should remain under the control of their parents, and that on attaining their majority they should be allowed to choose between British and Brazilian nationality.

Mr. Jerningham remarks in this despatch that the French claimed complete exemption for the sons of French subjects thus situated, and that though the Brazilian Government did not acknowledge the claim they did not attempt to force such Frenchmen into their army.

o Mr. Jerningam, No. 22; ly 8, 1853.

Lord Clarendon instructed Mr. Jerningham to say that Her Majesty's Government agreed to the proposed clause, but that they hoped that "either "by legislative enactments or by the course "hitherto adopted by the Brazilian Government, "no British subject will be called upon to perform "military service."

o Mr. Jerning- . No. 30; st 8, 1853. r. Jerningham, 55; September 53, 1853. Mr. Howard, 11 tober 31, 1853.

It appeared subsequently that there had been some misunderstanding between Mr. Jerningham and the Brazilian Minister, and that the proposed clause was intended to apply reciprocally to the subjects of those States the laws of which acknowledged the children of Brazilians born within their territories to be Brazilians, and would not, therefore, affect British subjects.

Lord Clarendon then directed Her Majesty's Minister to inquire whether the Brazilian Government really intended to carry out the principle of reciprocity, and to place children born of British subjects in Brazil on exactly the same footing with regard to military service as that in which the children of Brazilian subjects were placed in England; as the imposition on them of forced military service would be plainly inconsistent with such a principle, "for although a power does exist in this "country in certain contingencies, very unlikely "to occur, of resorting to the ballot for raising "militia (in which case, however, substitutes would "be allowed), yet in point of fact both the regular "army and the militia are recruited entirely by "volunteers, and there is therefore, practically, no "forced military service in England."

To Mr. Howard, No. 14; October 31, 1853.

At the close of 1853 there was a change of Ministry in Brazil, and in April 1854 Mr. Howard (who had succeeded Mr. Jerningham) called the attention of the new Government to this subject, but without receiving any reply.

Mr. Howard, No. 82; April 25, 1854.

He again pressed it on their attention in August, when the Foreign Secretary Senhor Limpo de Abreo, promised to look into the matter, but "gave no hope of an alteration in the laws of "nationality, saying that he thought they could "not constitutionally be interpreted in the manner "which the late Minister for Foreign Affairs, "Senhor Paulino, had in view; that such an "alteration would meet with considerable oppo- "sition in the Chambers, and that he himself "doubted its expediency."

Mr. Howard, No. 162; August 11, 1854.

Being urged to take some steps to bring the question to a conclusion in October 1854, Senhor de Abreo repeated that it presented great constitutional difficulties, and could not be solved without the concurrence of the Legislature.

Mr. Howard, No. 199; October 13, 1854.

This closed the correspondence.

It is to be observed that neither in 1852 nor 1854 do there appear to have been any particular cases reported in which the sons of British subjects were forced into the Brazilian service, and it may, therefore, be presumed that the Brazilian authorities continued to act upon an unofficial arrangement come to with Mr. Jerningham in 1853, by which such persons were practically exempted from the conscription.

Mr. Jerningham No. 20; April 2, 1853.

In December 1865 Mr. Spence, a member of the English bar, who had been born in Brazil, applied for the appointment of Law Adviser and Translator to Her Majesty's Mission at Rio de Janeiro.

Mr. Spence (in reply to an observation respecting the inconvenience which might be occasioned by a person whom the Brazilian Government could claim as their subject being employed in such a capacity), stated "that although there "can be no question, according to Article 6 of "the Brazilian Constitution, that from having "been born in Brazil, though of British parents, "I became a Brazilian subject, I respectfully "submit that from having (when called to "the bar in 1858) sworn allegiance to Her "Majesty, I lost my Brazilian nationality "according to Article 7 of the same Constitution. "It is true that the words of Article 7 are "'naturalization,' but the taking of the oath of "allegiance would, no doubt, be held equivalent "to naturalization. But even if that were not "o, the acceptance by a Brazilian subject (with- "out the licence of the Emperor) of any office "from a foreign Government would cause the loss "of Brazilian nationality, as may be seen on refe- "rence to clause 2 of Article 7 of the same Con- "stitution."

To Mr. Spence, December 20, 1865. Mr. Spence; December 26, 1865.

Mr. Spence forwarded translations of the Articles of the Constitution referred to:—

Who are Brazilian Citizens?

"Article 6.—1. Those born in Brazil, either free or freedmen, although the father be a foreigner, if not resident in the service of his nation.

"2. Children of a Brazilian father and the natural children of a Brazilian mother born in a foreign country who may come to have a domicil in this country.

"3. The children of a Brazilian father who may be in a foreign country in the service of the Emperor, although they do not acquire a domicil in Brazil.

"4. All those who, born in Portugal and her possessions, were resident in Brazil at the time when the Independence was proclaimed in the Provinces where they lived, and shall have expressly adhered to the said Independence, or impliedly by continuing their residence in Brazil.

"5. Foreigners naturalized, whatever may be their religion.

* * * * *

"*Those who are deprived of such rights.*"

"Article 7.—1. Those who have become naturalized in a foreign country.

"2. Those who, without the Emperor's licence, accept any employment, pension, or decoration, from any foreign Government.

"3. Those sentenced to banishment."

CHINA.

Difficulties having arisen with regard to the claims to British protection of British born subjects of Chinese origin within the Chinese empire, it has been arranged that they should wear a distinctive dress, and a government notification to that effect has accordingly been published at Hong Kong.

"THE following circular from His Excellency Sir Rutherford Alcock, K.C.B., with its enclosure, relative to British subjects of Chinese descent residing or being in Chinese territory, is published for general information.

"J. GARDINER AUSTIN,
"Colonial Secretary administering the
"Government.

"Government Offices,
"Hong Kong, Nov. 2, 1868."

"Circular No. 10.

"SIR, Pekin, October 7, 1868.

"PURSUANT to instructions from Her Majesty's Secretary of State for Foreign Affairs, I have issued the enclosed notification regulating the conditions under which persons of Chinese descent, who are British subjects, may reside or travel in China under British protection.

"You will observe that it is left entirely optional to such persons to claim the status of British subjects within the Chinese territories or not, as they may see fit. But in the event of their electing to sink their British nationality, and reside or travel as Chinese among Chinese, they cannot claim any exemption from the jurisdiction and laws of the country they adopt of their own free will, and after due notice of the consequences.

"You will give all due publicity and effect within your jurisdiction to the enclosed, in conformity with the provisions of the Queen's Order in Council of 1865.

"Your obedient servant,
"RUTHERFORD ALCOCK.

"To Her Majesty's Consul,
"&c., &c., &c.,
"Shanghai."

"Notification.

"WHEREAS many persons of Chinese descent, who are or claim to be British subjects, go to reside or travel in the dominions of the Emperor of China, and whereas serious difficulty exists in distinguishing such British subjects from natives amenable to Chinese laws only, and accordingly great practical inconvenience frequently results to the parties themselves and to the authorities of both countries; and whereas it is desirable, with a view to the maintenance of order and good government of British subjects of Chinese descent resorting to China, and for the maintenance of friendly relations between British subjects and Chinese subjects and authorities, that a remedy should be provided for such inconvenience: Therefore, by the authority and power vested in me by the 85th section of the China and Japan Order in Council, 1865, I do declare and order that all British subjects of Chinese descent shall, while residing or being in Chinese territory, discard the Chinese costume and adopt some other dress or costume whereby they may readily be distinguished from the native population. And I do further warn all British subjects of Chinese descent so residing or being in the Chinese dominions as aforesaid that in the event of their infringing or not observing this order and regulation, they shall not be entitled to claim British protection or interference on their behalf in any court of justice or elsewhere in the Chinese dominions.

"And I do further order that every British subject of Chinese descent who shall sue in any Chinese court of justice, or appear in public before the authorities of the empire, shall be and is hereby required to pay all due respect to the Chinese authorities according to the custom and usage of the country, save and except that such British subject shall not be bound or required to observe any custom or ceremony whereby he would admit that he is a subject of His Imperial Majesty.

"Given under my hand at Pekin this sixth day of October one thousand eight hundred and sixty-eight.

"RUTHERFORD ALCOCK,
"Her Britannic Majesty's Envoy Extraordinary, Minister Plenipotentiary, and Chief Superintendent of Trade."

COLOMBIA—NEW GRANADA.

A correspondence took place in 1847–8–9 respecting the laws affecting aliens in New Granada. This was renewed in 1855.

Mr. O'Leary, No. 11; March 31, 1847.

The principal subjects treated of were the law as to intestate estates and a decree which had been issued respecting claims for losses suffered during the civil war.

To Mr. O'Leary, No. 17; July 16, 1847.

*Mr. O'Leary, No. 25, 1848.

To Mr. O'Leary, No. 13, 1848.

*Mr. O'Leary, No. 49, 1848.

To Mr. O'Leary, No. 3, 1849.

*Mr. O'Leary, No. 26, 1855.

*Mr. O'Leary, No. 36, 1855.

*To Mr. O'Leary, No. 15, 1855.

[* These papers are missing from the volumes.]

In 1861 Mr. Griffith requested to be informed whether Mr. Bransby, a British subject, residing in New Granada, and who had accepted an appointment as interpreter in the New Granadian Civil Service, was to be considered a British subject.

Mr. Griffith, No. 80; September 2, 1861.

Mr. Griffith was instructed that Mr. Bransby had not, by accepting such employment, forfeited his allegiance, or ceased to be a British subject; and it was not suggested that he had formally renounced his British allegiance, or taken any oath of allegiance to the Republic of New Granada.

To Mr. Griffith, No. 68; November 16, 1861.

His rights, therefore, to protection as a British subject, in all matters not immediately connected with his employment as interpreter, were unimpaired, and excepting as to such matters he was as much entitled to British protection as he was before he accepted that employment.

In May 1862 Mr. Griffith reported that the United States' Minister had communicated to him confidentially the instructions which he had received from Mr. Seward respecting the protection to be afforded to United States' citizens domiciled in New Granada.

Mr. Griffith, No. 38; May 15, 1862.

These instructions were to the following effect:

Citizens temporarily visiting New Granada, but retaining their domicil in the United States were to be afforded protection against any impositions of the Government there for its support and maintenance.

Citizens of the United States, no matter how they acquired that title, who have gone to New Granada, become domiciliated there, and are pursuing

business or otherwise living there, without definite and manifest intentions of returning to the United States, are subject to all the laws of New Granada affecting property or material rights exactly the same as the citizens of New Granada.

Mr. Griffith adds that he has been informed that the New York Commission for the liquidation of United States' claims arising out of the collision at Panama in 1856, acting upon those principles, had ignored all the claims brought forward by United States' citizens who were domiciled on the Isthmus at the time of the collision.

Mr. Griffith, No. 46; June 20, 1862.

In June 1862 Mr. Griffith forwarded a copy of an official Decree declaring that foreigners domiciled "in the Republic are to be allowed to acquire real property in the same manner as natives."

This decree further provided that foreigners or "immigrants" should be naturalized from the moment they enter the Republic, and were to be entitled to all the rights, and be subjected to all the obligations, of native citizens. For the space of 20 years, however, they were to be exempted from military service, except in the case of foreign war, from all direct or extraordinary contributions, and from all public employment, save that which might be imposed on them in the municipal district where they happened to reside.

To Mr. Griffith, No. 29; September 30, 1862.

Mr. Griffith was instructed that "although such "a law was unusual, it was competent for a "country to make and enforce it, without furnishing any ground of complaint to foreign States. "The distinction drawn by it between commorant "and resident foreigners seemed, on the whole, "reasonable and just. The foreigner who, by the "relations of property, marriage, profession, or "business, and length of residence, had incorporated himself into a State, certainly owed a "qualified allegiance to it, and it would be entitled "to extend its protection to him with reference to "all other States but that of his origin or birth. "Such foreigners are truly and practically citizens "of the State which they have adopted, and cannot complain that they are liable to the obligations of native citizens, with whom they are "placed on an equality in every other respect."

Mr. O'Leary, No. 27; May 10, 1865.

On the 19th of April 1865 a law was passsed defining the condition of foreigners in the United States of Colombia.

Article 2 classifies foreigners into domiciled and transient residents.

3. Domiciled foreigners are those who establish themselves permanently, or publicly declare their intention of so establishing themselves, or have resided two years.

Temporary residents are exempted from military service or office.

Domiciled aliens are exempted from military service, forced loans, and all personal employment or office of a permanent character.

5. Repudiates any responsibility for damages suffered by aliens in time of war, they in such cases being placed on the same footing as natives.

6. Aliens interferring in civil or international contests to become subject to all the penalties and duties of Colombians.

7. This law not to interfere with Treaty stipulations.

Mr. O'Leary, on this law being communicated to him, immediately remonstrated against Article 5, the practical inutility of which had indeed been remarked on by the Colombian President, who had opposed its being passed.

To Mr. O'Leary, No. 11; March 21, 1847.

Mr. O'Leary's remonstrance was framed on the instructions forwarded to Her Majesty's Chargé d'Affaires when a similar law was enacted in 1847, and was approved by Her Majesty's Government.

To Mr. O'Leary, No. 28; July 28, 1865.

Mr. O'Leary, No. 65; October 20, 1865.

In October 1865 Mr. O'Leary requested to be informed whether the children, born in England, of Mr. Montoya, a native Colombian naturalized in England, were entitled to exemption from the Colombian military service as British subjects.

Mr. O'Leary added that, by the Colombian Constitution, the offspring of Colombian parents born abroad were to be considered as citizens "when domiciled in Colombia."

To Mr. O'Leary No. 6; December 21, 1865.

Mr. O'Leary was instructed that "this is a "question of Colombian Municipal Law; but upon "the statement contained in your despatch, it appears that the children of Señor Montoya, who is a "native Colombian, are domiciled in Colombia, and "that they are subject to the obligations of Colombian citizenship. The fact that Señor Montoya "is a naturalized British subject does not exempt "him from the operation of the law of the State of "his birth and natural allegiance while he resides "in that state."

DENMARK.

The case of Mr. Rainals, British Vice-Consul at Copenhagen, which led to a long correspondence in 1863, illustrates the operation of the Danish laws with regard to the claim of the Danish Crown to the allegiance of aliens domiciled in Denmark.

Sir A. Paget, No. 132; June 2, 1863.

The correspondence commenced with a demand made upon Mr. Rainals for the payment of a dog tax in 1860. Mr. Rainals pleaded exemption as an alien. The Danish Government declared that he was a Danish subject, but offered to remit the tax as an act of comity; but Mr. Rainals refused such a compromise, and insisted upon being acknowledged to be a British subject.

Upon this the Danish Government declared that their view of his nationality was borne out—

1. By the fact of his having sworn allegiance to the King of Denmark on obtaining a "borgerbrev" in 1848.

2. By his having been born in Denmark.

With regard to the "borgerbrev," it appeared that in 1848 Mr. Rainals had settled as a broker at Elsinore, and in order to obtain permission to carry on his profession had applied to the Mayor of that town for a "borgerbrev" or freedom of the city.

When this was issued to him, the Elsinore authorities alleged that he had signed the following paper.

"In the year 1848, on the 11th of May, appeared before the magistracy, Harry Thomas Alfred Rainals, born at Copenhagen, aged 31 years of age, and demanded to obtain borgherskab (rights of a burgher) as clearer and agent for payment of sound dues.

"As he has satisfactorily proved his earlier respectability, and, in accordance with evidence produced, has been appointed Consular Agent for the United States of North America, whereby he is free from serving in the Militia, nothing could be said against the said demand, and the said H. T. Rainals was, after having taken the usual burgher oath* [thus worded:—

'I promise and swear to be true and faithful to His Majesty our Most Gracious Hereditary Lord and King Frederick VII, to defend with my utmost power and ability his realm and land from harm, as well as to be dutiful and obedient to the Burgermaster and Council which are now in power and to those who come after them, and finally to act towards my fellow-citizens as it becomes and befits an honest man to do. So help me God and His Holy Word.']

furnished with the rights of a burgher (Borgherskab) as clearer and agent for payment of sound dues in Elsinore.

(Signed) "H. T. A. Rainals.
"Rogert."

Mr. Rainals asserted that he had never taken any oath such as is here inserted; that the copy of the entry given to him did not include the part between

* This oath has been since modified, *see* Sir A. Paget's Despatch, p. 116.

brackets; and that in order to take an oath he must have held up three fingers, which he distinctly recollected he had not done. He further showed that he had resigned his "borgerbrev" in 1859.

Sir A. Paget then requested the Danish Government to explain whether they considered the mere fact of obtaining a "borgerbrev" constituted a person a Danish subject.

The Foreign Secretary replied (May 28, 1863): "Quant à la question positive à savoir si un sujet Britannique en prêtant le serment de bourgeois devient sujet Danois, il est de fait qu'en prêtant le serment il se fixe dans ce pays, et en se fixant et en prenant domicile en Danemark il devient sujet Danois et entre dans tous les droits et tous les devoirs civils et sociaux d'un sujet Danois. Pour ce qui regarde les droits et les devoirs politiques, ceux-ci n'appartiennent qu'à ceux qui sont en possession de l'indigénat qui, s'il n'est pas acquis par le fait même de la naissance dans ce pay, ne peut être obtenu qu'en vertu d'une loi. Quant au côté négatif, à savoir, si un sujet Britannique en acquérant les droits et en se soumettant aux devoirs d'un sujet Danois perd sa qualité de sujet Britannique, c'est là une question dont la solution paraît dépendre le plus spécialement de la législation Britannique. Pour ce qui est de notre législation relativement à ce point, celle-ci ne s'oppose pas à ce que la coexistance de deux nationalités puisse être admise dans la personne du même individu; seulement, dans le principe, sa qualité de sujet étranger ne doit porter aucune atteinte à l'accomplissement des devoirs qui lui incombent comme sujet Danois."

With regard to his having been born in Denmark, Mr. Rainals cited an opinion given by the Attorney-General of Denmark on a recent occasion when a Bill respecting the naturalization of certain foreigners had been discussed in the Chambers.

A decree of January 15, 1776, provided that children of foreigners, born in Denmark, can claim the rights of Danish citizenship after a permanent residence in that country up to their eighteeth year.

The Attorney-General gave it as his opinion, though other lawyers differed on the subject, that by the terms of this Decree the children of aliens born in Denmark were capable of being admitted to the rights of natural-born Danish subjects; and Mr. Rainals accordingly argued that this was conclusive proof that they were not considered to be natural-born subjects. Moreover, one of the persons for whose naturalization the Act under discussion made provision was stated to have been born in Denmark.

Sir Augustus Paget now referred the question for the consideration of Lord Russell; and, after further information on the points of law raised in it had been procured from Copenhagen, Lord Russell, under the advice of the Queen's Advocate, instructed him that "it is not denied that Mr. Rainals "was born in Denmark, and the opinion of the "Danish laywers so far coincides with that expressed by M. Hall that the renunciation by Mr. "Rainals of his rights as a citizen of Elsinore does "not relieve him from the obligations of allegiance "to the Crown of Denmark.

To Sir A. Paget, No. 141; August 26, 1863.

"It is admitted that he obtained the 'borgerbrev,' and he must under these circumstances be deemed to have taken the usual preliminary oath.

"I infer also that he obtained this 'borgerbrev,' on the footing of a Danish subject and without the delay of five years which would have been necessary for a foreigner. It appears that, though by returning the 'borgerbrev,' he is replaced in his former position, he nevertheless remains subject to whatever obligations attach to a person born in Denmark and subsequently resident there."

Consul Rainals; June 9. 1864.

In 1864, a case occurred at St. Croix in which the Danish authorities claimed to administer to the estate of a deceased British subject who had taken out a "borgerbrev" in that island.

As the person in question had been domiciled at St. Croix at the time of his death, Her Majesty's Consul was not instructed to contest the interpretations put by the authorities on the effect of taking out such a burgher licence; but it was considered that some arrangement should be made with them, whereby the absent heirs and next of kin of a British subject so situated should be apprized by notice in the "London Gazette" of the intended distribution of such property by Danish Tribunals.

FRANCE.

The registers of the correspondence between England and France for the last five-and-twenty years have been searched; but they do not present many cases of interest.

Lord Cowley, No. 1,188; September 7, 1855.

Lord Cowley forwarded in 1855 a Report by M. Treitt on a question between the French and Brazilian Governments respecting the administration to the intestate estate of a naturalized Brazilian subject named Braga.

Señor Braga died at Paris, leaving a son, born in Brazil, of a Brazilian mother, and a second wife a Frenchwoman, with two sons born in France.

The Brazilian Consul first proceeded to administer to the estate on behalf of the eldest son, who was absent in Brazil, and then on behalf of the two younger sons, "enfants mineurs nés en France, "mais sujets Brésiliens aux termes de la loi Fran-"caise."

The widow opposed the Consul's interference in regard to the younger sons, and appealed to the "Tribunal Civil de Première Instance," which, by two summary judgments, confirmed the Consul's powers. The matter was then referred to the Brazilian Government, who instructed the Consul to abstain from taking any further proceedings on behalf of the minor children, as by a recent Brazilian Decree, the administration to the intestate property of aliens was vested in the local authorities and not in the Consul of the alien's country when the widow was a Brazilian, and the children born in Brazil.

This case rather concerns Brazilian than French Law; but it is worthy of remark, as illustrative of the French doctrine as to the nationality of the minor children of aliens born in France.

Baron de Malaret; August 21, 1856.

In August 1856, the French Chargé d'Affaires in London recommended to the favourable consideration of Her Majesty's Government a petition from the French residents in British Guiana, praying for exemption from the local militia.

To Count de Persigny; October 10, 1856.

The French Embassy was informed (October 10, 1856), that "to hold out to the French resi-"dents in British Guiana, in general terms, that "they are specially favoured, would, in the opinion "of Her Majesty's Government, place them in a "false position, and would raise expectations that "could not be fulfilled, inasmuch as they cannot be "exempted from militia service, which is the "particular favour that they solicit.

"As the French settlers appear to make this application from the fact that the Portuguese are exempted from militia service, I have the honour to acquaint your Excellency that this exemption is owing to certain provisions of a Treaty*, which

* The treaty referred to is the Treaty of Commerce and Navigation of July 3, 1842. Article I. "They shall be "exempt from forced loans or any other extraordinary con-"tributions not general or not by law established, and from "all military service by sea or by land."

Similar provisions are inserted in most treaties of this description, and are of essential service to protect British subjects from conscription. *See* Treaties with Russia, Italy, &c., and the recent Treaty with Colombia, February 16, 1866: Article XVI. "The subjects and citizens of each of "the contracting parties in the dominions and possessions "of the other shall be exempted from all compulsory mili-"tary service whatever, whether in the army, navy, or "national guard or militia." There is no such general treaty with France.

appear to Her Majesty's Government to be so manifestly inexpedient and objectionable in principle that they have now under consideration the propriety of opening negotiations for an alteration of that Treaty in this respect."

Colonial Office; December 23, 1857.

In December 1857, the Colonial Office forwarded copies of a correspondence with the Governor and Lieutenant-Governor of British Guiana on this subject, and asked whether any communication should be addressed to the French Government, or whether the claim of the French residents to exemption should be directly negatived.

To Colonial Office; January 11, 1858.

Lord Clarendon, in reply, stated that he considered that the note to the French Ambassador of the 10th of October, 1857, was "a sufficient "announcement of the intentions of Her Ma- "jesty's Government with regard to this ques- "tion."

Lord Cowley, No. 1,691; December 19, 1857.

To Lord Cowley, No. 1,813; December 31, 1857.

In December 1857, Lord Cowley requested to be informed whether a gentleman named Julien Colonna Walewski, born in London of Polish parents, was to be considered and protected as a British subject in France.

Law Officers; December 26, 1857.

Under the advice of the Law Officers, Lord Cowley was instructed that, under the circumstances stated, M. Walewski was entitled to be so considered.

The correspondence previously referred to ("Argentine Republic—Buenos Ayres,") arose about this time respecting the protection to be afforded to the children born of British and French parents in Buenos Ayres, in the course of which the French Government requested to be informed of the state of the British law with regard to the children of aliens born within British territory.

To Lord Cowley, No. 1,780; December 24, 1857.

In reply to the inquiries thus made by the French Government, Lord Clarendon directed Lord Cowley to state to them, "With reference to the questions "put to you by Count Walewski, as reported in "your despatch No. 1,625, I am not aware of any "Treaty between this country and a foreign state "which would give to children born of British "parents in those states the rights of British sub- "jects; and in reply to his Excellency's inquiry "as to what is the law of England in such matters, "I have to observe that the general law of Eng- "land in the matter is that all children of what- "soever parentage born in the Queen's dominions "are British subjects by birth, and are in England "entitled to the privileges and liable to the obli- "gations of that status.

"The children of British subjects, although born abroad, if their fathers or their grandfathers by the father's side were natural-born subjects, are by certain British statutes to be deemed natural-born subjects themselves to all intents and purposes *in England;* but neither these statutes nor the general principles of English or international law, or of reciprocity or comity so far as Great Britain is concerned, would justify her in maintaining that such persons are 'British subjects' within the true intent and meaning of a Treaty with a foreign nation in which their case is not specially provided for, or in contending that they are, whilst residing in such foreign country, exempt from the obligations incident to their status as natural-born subjects or citizens of such foreign country, of their actual birth and residence. Great Britain may confer upon them any privileges as far as her own territories are concerned, but no such privileges can avail as against or in derogation of their antecedent natural and legal obligations to the country of their birth."

Earl of Malmesbury to the Earl Cowley.

"Foreign Office,

"My Lord, March 13, 1858.

To Lord Cowley, No. 78; March 13, 1858.

"Your Excellency recently requested to be informed how the decisions could be reconciled which had been come to by Her Majesty's Government upon two cases of nationality which had been under their consideration.

"The first of the two cases was that of a gentleman named Julien Colonna Walewski, who had claimed from your Excellency to be considered a British subject on the ground that his father (a Polish immigrant) had gone to England in 1824, where he had married an English lady, and had resided in England up to the time of his death in 1854, during which period Mr. J. C. Walewski had been born in London. In this case it was the opinion of Her Majesty's Government that M. Walewski having been born in London was under the circumstances entitled to be considered a British subject in France.

"The second case had been raised with regard to the law of this country on the question of the nationality of children of British subjects born in foreign countries, as bearing upon the general question at issue with regard to compulsory enlistment by the Government of Buenos Ayres. The opinion given by Her Majesty's Government upon this case was that all children of whatever parentage born in the Queen's dominions, are British subjects by birth, and are in England entitled to the privileges and liable to the obligations of that status.

"Your Excellency pointed out with reference to these two decisions, that it appeared to you that according to the latter it is only in England that foreigners born in England enjoy the rights of British subjects; whereas according to the former, M. Walewski was to be treated as a British subject in France.

"I have now to inform your Excellency that Her Majesty's Government having carefully considered the difficulty suggested by you, do not see that there exists any contradiction between the two decisions.

"If M. Julien Colonna Walewski had been born in France, (although of British parents,) and had voluntarily returned to France, he would have been a British subject in England, but he would not have been entitled to British privileges or protection in France as against the country of his actual birth and domicil.

"And this, as it appears to Her Majesty's Government, is precisely the case of the children of British subjects who are born and resident in Buenos Ayres. They are British subjects in England, but this cannot prevent their being considered and treated as Buenos Ayreans in Buenos Ayres; but M. Walewski was born in England, and as such is a natural-born subject of Her Majesty, and the circumstance that his father was a Pole cannot disentitle him to British privileges in France.

"It is competent to any country to confer by general or special legislation the privileges of nationality upon those who are born out of its own territory, but it cannot confer such privileges upon such persons as against the country of their birth, when they voluntarily return to and reside therein. Those born in the territory of a nation are (as a general principle) liable when actually therein to the obligations incident to their status by birth. Great Britain considers and treats such persons as natural-born subjects, and cannot therefore deny the right of other nations (as Buenos Ayres) to do the same.

"But Great Britain cannot permit the nationality of the children of foreign parents born within her territory to be questioned. The expression, 'in England,' found by your Excellency in the decision given by Her Majesty's Government in the Buenos Ayres case, referred to the inquiry of Count Walewski, as reported by you, 'What is the law of England in such matters?'

"I am, &c.

(Signed) "Malmesbury."

To M. Julien, July 11, 1859.

In reply to an inquiry addressed to the Foreign Office in July 1859, Lord John Russell stated to M. Julien that, "independently of any disabling "clause which they may contain, British letters of

" naturalization do not give the holders of them " any right to British protection in the country of " their birth."

A case occurred in 1861 in which a M. Casaubon claimed protection from the British Embassy at Paris to procure his exemption from the conscription on the ground that he was born in the Mauritius.

Lord Cowley, No. 426. Lord Cowley, No. 364; March 20, 1861. To Lord Cowley, No. 347; March 20, 1861.

It appeared that his father was a Frenchman, and the French Government accordingly claimed him as a French subject.

Lord Cowley was instructed to request the French Government to state the reasons upon which " M. Casaubon had been subjected to the con- " scription notwithstanding his certificate of British " nationality, and the fact of his having been born " in the Queen's dominions, and having resided " there until he was of age."

The result of Lord Cowley's application to the French Government was not reported.

Lord Cowley, No. 194; February 4, 1861.

A question arose in February 1861 as to the right of a naturalized British subject Mr. Zwinger, a Swiss by birth, to be married at the British Embassy.

Queen's Advocate; February 27, 1861. To Lord Cowley, February 24, 1861.

Lord Cowley was instructed to allow the marriage in question to be solemnized at the British Embassy, taking care that the bride was previously informed that Mr. Zwinger may be considered legally as a Swiss citizen, as well as a naturalized British subject; and that the validity of the marriage might be open to doubt in Switzerland, France, and elsewhere out of England, and recommending her to be previously married in the French civil form.

GERMANY.—FRANKFORT.

Sir A. Malet, No. 81; June 2, 1863. To Mr. Corbett, No. 2; June 19, 1863.

Sir Alexander Malet having requested to be informed, in June 1863, whether a naturalized British subject is entitled to claim in the land of his birth British protection against any penalties which he may have incurred by the act of withdrawing himself from his native land, Lord Russell replied, " that a foreigner who has become a natu- " ralized British subject cannot claim British pro- " tection against the operation of the law of his " native country, so as to exempt himself from any " penalties which the law of his native country " may inflict upon him when he returns to it."

Sir A. Malet, No. 129; April 30, 1864. Sir A. Malet, No. 136; May 13, 1864. Sir A. Malet, No. 139; May 24, 1864. Sir A. Malet, No. 140; May 28, 1864. To Sir A. Malet, No. 36; May 9, 1864.

In April 1864 a Mr. Grimm applied to Sir A. Malet for protection as a British subject on the ground that he had received a " Denization " Act issued by a Judge of the Supreme Court of New South Wales in 1856, though he had been domiciled in Germany since 1859.

Mr. Grimm had been convicted of an assault on a railway guard in the Grand Duchy of Hesse, and he requested Sir A. Malet to get the sentence of imprisonment passed on him reversed.

Sir A. Malet was instructed that if the country of Mr. Grimm's birth was the same as the one whose court had tried and condemned him, Her Majesty's Minister ought not to interfere on his behalf, on the ground of the alleged Act of Denization; but if Mr. Grimm had been tried in the Court of a third country, *i.e.*, not the country of his original allegiance, then Sir A. Malet should use his good offices in whatever manner might be expedient and discreet.

It turned out that Mr. Grimm was a Prussian by birth, and Sir A. Malet accordingly entered into an official communication with the authorities, and Mr. Grimm's sentence appears to have been eventually commuted for a fine on his petitioning the Grand Duke.

HANSE TOWNS.

James Terry having applied to Colonel Hodges for exemption from service in the Civil Guard, in 1851, Lord Palmerston furnished Colonel Hodges with the following instructions:—

To Colonel Hodges; March 7, 1851.

"It appears that James Terry, the person whose case you quote, was born in Hamburgh, and must therefore be considered, while within the State of Hamburgh, as a Hamburgh subject; and it appears, moreover, that his father was admitted a citizen before the son attained his twelfth year, and that by the law of Hamburgh the son would on that account also be deemed a Hamburgh subject. Under those circumstances there can be no reason to question the liability of James Terry to serve in the Civic Guard, or in the Federal Contingent, precisely the same as any other native of Hamburgh.

" With respect to the general liability of British subjects resident in Hamburgh to perform either or both of these kinds of service, I have to authorise you to give way to the liability of British subjects to serve in the Civic Guard for the protection of the city in which they reside, if you should find it necessary to do so; but you should strenuously resist any pretension to require British-*born* subjects, whether admitted or not to the rights of citizenship, to serve in the Hamburgh contingent, because that contingent is not a force raised and embodied for the maintenance of order within the City and State of Hamburgh, nor even solely for the defence of the Hamburgh State, but is a portion of the army of Germany, and is organized for the purposes of foreign war, beyond and out of the Hamburgh territory, to be waged not merely for the Hamburgh interests, but possibly for the interests of any one of the other States of Germany; and the making of such a war would not depend upon the will and decision of the Government of Hamburgh, but upon the will and decision of the Central Diet.

" It thus might happen not only that British subjects might be brought without, and even against, their will, into conflict with the troops of States in amity or alliance with England, but that they might actually be compelled to take the field against the troops of their own country and Sovereign."

A similar case occurred in 1863.

Mr. Ward, No. 54; September 4, 1863. To Mr. Ward, No. 14; September 30, 1863.

Mr. Charles James Bosdet claimed exemption from military service as a British subject.

He was the eldest son of a Mr. Bosdet, a British subject, who caused himself to be made a citizen of Hamburgh in 1843, who had ever since resided there and was then residing there with all his family but his eldest son. Mr. C. J. Bosdet was born in Hamburgh and resided there till he was twenty-two years of age.

Mr. C. J. Bosdet having quitted Hamburgh, the Senate published his name in the list of deserters, thereby subjecting him to certain penal consequences should he return within the Hamburgh territory.

It was decided that the enforcement of the Decree of the Senate within their jurisdiction, should Mr. Bosdet place himself within it, would not constitute any ground for the official interference of Her Majesty's Government, and instructions in this sense were accordingly furnished to Her Majesty's Chargè d'Affaires.

Another case occurred in 1866, in which Mr. C. Dodgshun, born in Hamburgh of a British father, who had become a burgher of that city, claimed exemption from the conscription as a British subject.

Mr. S. William- January 15, 186

It was decided " that Her Majesty's Government " cannot gainsay the right of the Hamburgh autho- " rities to treat him, so far as their jurisdiction is " concerned, as a citizen, or to sequestrate his pro- " perty in Hamburgh, though they can have no " right to touch the property of his brother and " sister."

In August 1866 another of the Bosdet family appeared as a claimant to British protection.

In this instance the applicant, A. Bosdet, had been born in Jersey, and was resident in Scotland.

To Mr. Ward, No. 6; August 1866.

Mr. Ward was instructed " that Alfred Bosdet " seems to be the son of a native citizen of Ham-

" burgh, now a domiciled merchant in that town. " The municipal laws of Hamburgh treat the son " of such a citizen as a subject, and place him, so " far as their jurisdiction extends, under the obli- " gations of a citizen, one of which is to serve in " Hamburgh military force. The fact that Alfred " Bosdet was born in England confers on him, " according to the law of this country, the cha- " racter of an English subject; and there arises, or " may arise, in these cases a conflict of jurisdiction; " but as the law of England also considers the " son of a native subject, wherever he is born, " as an English citizen, the English Government " cannot fairly complain of the law of Hamburgh, " which in this respect is the same; nor can it " interfere with the execution of that law within " the town of Hamburgh. You may accordingly " represent to the Hamburgh authorities that " Alfred Bosdet has become an English subject, " and ask, *as a matter of comity*, that his name " may, therefore, be taken off the military list. " Mr. Ward cannot be properly instructed to insist " *as a matter of right* upon this being done."

SAXONY.

To Mr. Murray, No. 7; April 26, 1865.

In 1865 Mr. Murray asked what was the nationality of a child of foreign parents born on board a British vessel, and of a child born without the British dominions, of foreigners naturalized as British subjects.

To Mr. Murray, No. 7; April 26, 1865.

Lord Russell replied, "I am of opinion that a " child of foreign parents born on board one of " Her Majesty's ships of war would be a British " subject, wherever the ship might be; and that " a child born on board a British merchant or " private unprivileged vessel on the high seas " would also be entitled to be considered a British " subject. It is more doubtful whether such a " child born on board such a vessel in the port " or waters of a foreign State would be entitled " to be considered as a British subject.

" A child born without the British dominions of foreign parents, naturalized as British subjects, would be entitled to be considered as a British subject with reference to all other States but that to which his parents owed an original allegiance, unless indeed that State had, by its own law, allowed its subject to divest himself of his allegiance."

GREECE.

A question arose at Corfu in 1866, relative to the liability of British subjects domiciled as Ionian citizens in that island to be drawn for the conscription, and whether they could evade it by renouncing the Ionian naturalization acquired by themselves or their fathers during the British protectorate of the island.

To Mr. Erskine, No. 31; November 15, 1866.

Her Majesty's Government thought it would be a reasonable and just concession on the part of the Greek Government to allow British subjects, naturalized during the protectorate of Great Britain, to have the option now of renouncing their Ionian and resuming their British nationality, provided this option be exercised without delay, and put on formal record as soon as possible.

But inasmuch as no stipulation to this effect was made in the treaty by which Great Britain renounced the Protectorate, they did not think that Her Majesty's Government could properly demand, as a matter of right, that such an option should be conceded to them by the Government of Greece.

As it has been stated in the House of Representatives that Don Pacifico, the hero of the 1847–48 claims, was a naturalized British subject, it may be as well to mention here that he was a native British subject, having been born at Gibraltar. (State Papers, vol. xxxix, p. 356.)

GUATEMALA.

In 1859 the attention of the Guatemala Government having been called to the arrangement which had been come to in Buenos Ayres for the exemption of the children of British Residents from military service, Sir Charles Wyke entered into communications with them with the view of securing a similar exemption for the children of British residents in Guatemala.

Sir C. Wyke, No. 1; January 20, 1859.

In a note dated the 17th of January, 1859 the Guatemala Minister stated, "This Government " acknowledges that the children of British subjects " born in this Republic, and as such subject by " our laws to fulfil the duty of Guatemalans, have " also obligations that bind them by the origin of " their parents to the country where said parents " were born. It acknowledges, likewise, that the " discharge of these duties in a new country, and " where the Government and Laws are also new, " and not sufficiently firm, must be grievous in " cases of civil war, and on account of the military " service might bring with it some insecurity that " might extend itself to the fathers of families and " and to the affairs of foreigners settled in the " country, and might give rise to complications, " or at all events to discussions that ought to be " avoided. . . . . Therefore, taking into con- " sideration all the circumstances of the case, the " Government judges it very expedient to obviate " by a resolution and a friendly understanding, all " the difficulties caused by this inequality of con- " ditions, and to remove for any future occurrence " all motives of discussion; and taking into con- " sideration that no serious difficulty presents itself " for the reasons already expressed in the making " some concession as regards the military service " in favour of the sons of British subjects born " in the Republic, and who as Guatemalans are " liable to perform their duties the same as the " natives, acceding to the wishes of Her Majesty, " *is willing to consider them exempt from said* " *military service until they reach the age of* 21 " *years, and to agree that in all cases when they* " *may be required to perform this service they can* " *find a substitute.*"

Sir Charles Wyke in forwarding a copy of this note to Lord Malmesbury remarked that this arrangement was more favourable than the one arrived at with Buenos Ayres, as it did not require that the substitutes should be foreigners.

Costa Rica, Honduras, Salvador, and Nicaragua also acceded to this understanding.

Mr. Hall, No. 37; June 25, 1859. Mr. Hall, No. 48; August 19, 1859.

ITALY.

The following extract from a despatch addressed by Sir W. Temple to Mr. Vice-Consul Barker in 1837, explains the views of the Neapolitan Government in a case of disputed nationality which occurred at that date:—

Sir. W. Temple to Mr. Barker; September 16, 1837. (Inclosure in Vice-Consul Rickards' No. 14; March 1, 1865.)

" I have represented to Prince Cassaro the case of Mr. John and Mr. Benedict Stuart, and he is decidedly of opinion, as well as myself, that they are British subjects, and therefore not liable by Treaty to be called upon to serve in the Sanitary Cordon. Their father, Lieutenant Stuart, having been born in England, was a British subject, and his marrying a Messinese made no difference in the nationality of his sons, for, according to law, the wife follows the condition of the husband. Unless, therefore, the sons in coming of age had declared their intention of being naturalized, and had gone through the formalities prescribed by the law for that purpose, they remain British subjects. Prince Cassaro informed me that this question had been already decided in the case of a French subject, and he has promised me that, if it is necessary, he will apply to the Minister for the Affairs of Sicily for an order to secure these gentlemen from further molestation."

Sir R. Abercromby, No. 152; December 3, 1851.

A question was raised by the Sardinian Government in 1851 respecting the nationality of John Paul Baptiste Vertu, born at Halifax, Yorkshire, of Sardinian parents. The Turin Government contended that he was a Sardinian subject.

To Mr. Hudson, No. 9; March 23, 1852.

Lord Palmerston's instructions to Mr. Hudson were: "I have now to state to you that, as a "general principle, children of alien *friends*, born "in the British dominions, become *de facto* sub- "jects of Great Britain, although not absolutely, "and in all cases, to the entire cessation of all the "bonds, privileges, and duties which might attach "to them as children of the State to which their "parents might belong, particularly when they "themselves return to, and abide in, their parents' "country, and claim to be, and act as, subjects "thereof.

"The right to be considered as British subjects, if fully and completely acquired, and not abandoned or forfeited, may be lawfully extended to them in the foreign State of which their parents were subjects; and it is not necessary, in order to render his children British subjects, that an alien friend transferring his domicil to Great Britain should previously have obtained his legal liberation from his duties and obligations to the State to which he had originally belonged."

To M. Salteri; July 3, 1843.

In 1843 M. Salteri requested to be informed whether his son, who was born and then resident in England, was liable to the conscription in Tuscany.

Lord Aberdeen replied, that his son having been born and being resident within the dominions of the British Crown, cannot be liable to the Conscription Law of Italy, or of any other foreign country.

Marquis d'Azeglio; November 28, 1864.

In November 1864 the Marquis d'Azeglio requested information as to the nationality of Mr. R. E. Sofio, who had claimed exemption from the conscription at Messina as a British subject, although his brother was Counsel to the municipality, and as such undoubtedly an Italian.

To Marquis d'Azeglio; February 6, 1865.

After some inquiry, it proved that Mr. Sofio had been born at Messina, and the Marquis d'Azeglio was accordingly told that Her Majesty's Government could not protect him as a British subject.

Mr. Rickards, No. 15; March 1, 1865.

Mr. Sofio, who was a merchant at New York, in the meanwhile returned to the United States, having been only a short time in Sicily on commercial business.

Marquis d'Azeglio; February 16, 1865.

In February 1865 the Marquis d'Azeglio made a similar inquiry respecting MM. Carlo Hammet and Mariano Stuart (son of the gentleman whose case has been previously referred to), and Lord Russell then urged the Italian Government to abide by the doctrine laid down by the Neapolitan Government in 1837.

To Count Maffei; February 26, 1865.

Marquis d'Azeglio; April 4, 1865.

It seems unnecessary to enter into a detailed account of this correspondence, as the Sicilian law upon which this claim was founded, and which was then in force, has been superseded by the new Italian Code (see "Laws of Italy").

In January 1866 Mr. Elliot reported the case of Philip Smith, who had been drawn for the conscription at Bologna. General La Marmora refused to exempt him, on the ground that he came within the provisions of the Sardinian Code, his father having resided for 20 years in Italy, and the profession of coachman which the father exercised not being considered "comme un commerce ou une industrie."

The papers were referred to the Counsel to the Florence Legation, who pointed out that under the new Code Smith could declare himself a British subject on attaining his majority, and thus procure his discharge; but that in the meanwhile (he being 20 years of age) he must be considered as an Italian subject, and liable to military service.

This opinion is worth notice, as the age for conscription is generally 18; and in countries where a law similar to that of Italy prevails, it follows that the son of a British subject may be called upon to serve in the army from 18 to 21, when he can become a British subject and discharge himself.

It would certainly seem fairer that the youth should have the option of choosing his nationality when he is called upon to perform the duties of a native. It is obviously an anomaly that a man should be considered old enough to be a soldier, but not old enough to decide whether he would be a citizen.

This anomaly is obviated by the French law.

Messrs. Walton and Bubb; April 20, 1866.

In April 1866 M. Rosario Messina claimed British protection in Sicily as a naturalized Maltese. The Italian authorities denied his British nationality, asserting that his naturalization applied only to the island of Malta.

He was informed that his naturalization could not protect him against the law of his native country; the exception of this rule being found in cases in which the country of the original allegiance allows her subjects to put off their allegiance and become the subjects of another country, which was not alleged to be the law of Italy.

In May 1867 Mr. Elliot requested instructions as to the liability of Messrs. Hall and Hoare, and other British subjects, to contribute to a forced loan levied on mines, and other undertakings in which they were associated with Italians.

To Sir A. Paget, No. 3; September 5, 1867

Mr. Elliot was instructed that under the XVth Article of the Treaty of Commerce, British subjects could claim exemption from such loans being levied on dividends payable to them personally, but they could not claim exemption from loans assessed on the value of the mine or other concern in which they were collectively engaged with Italian subjects who were legally liable to it.

MEXICO.

Earl Russell to Mr. Scarlett.

To Mr. Scarlett, No. 43.

"SIR, Foreign Office, June 1, 1865.

"I HAVE received your despatch No. 29 of the 23rd of March, requesting to be furnished with instructions as to the nature and amount of protection which you should afford to naturalized British subjects in Mexico, and I have now to state to you, for your information and guidance, that the rule laid down in Lord Palmerston's Circular of January 8, 1851, is only applicable to persons holding certificates of naturalization granted after that date, and that persons holding such certificates are not to be held entitled to the same rights and capacities in Mexico as a natural-born British subject.

Home Office, May 17, 1865.

"The protection to be accorded in virtue of Lord Clarendon's Circular of May 1, 1854, applies merely to the right of sojourn and of locomotion, but not to protection generally in regard to business pursuits in which naturalized British subjects may be engaged.

"I am, &c.,

(Signed) "RUSSELL."

A question was raised in 1865 as to the liability of British subjects in Mexico to serve in the Police and National Guard.

Law Officers; May 22, 1865. Law Officers; June 20, 1865. To Mr. Scarlett, No. 50; June 26, 1865.

Under the advice of the Law Officers Mr. Scarlett was instructed that they could properly be called upon to serve in the police, or to pay a tax for exemption, but not in the National Guard, which might be used for active military service.

Queen's Advocate; June 9, 1865.

In May 1865 Mr. Scarlett forwarded a copy of a Decree recently published in Mexico, by which the illegitimate children born of foreigners and Mexican women, as well as those foreigners who may acquire landed property in Mexico, are to be considered as Mexican subjects.

To Mr. Scarlett, No. 51; June 26, 1865.

He was instructed that "the Decree respect- "ing illegitimate children seemed to furnish no "reason for remonstrance from foreign Govern-

" ments, except, perhaps, so far as it extended to " the illegitimate children born of Mexican women " in foreign States ('dentro ó fuera del territorio " del Impero'), a matter, however, of little practical " importance."

"The Decree as to foreigners acquiring landed property should be protested against in so far as it was made retrospective, and that time should be allowed to such aliens to determine whether they would retain their property, and to enable them to dispose of it without injury or loss accruing from this *ex post facto* law.

" With regard to its prospective operation, though it would be severe on foreigners, especially if the words 'propieded territoria' extend to shares in mines and leases of land and houses, yet it was within the competence of the Mexican Government to pass such a law."

o Mr. Scarlett, o. 83; ovember 1, 1865.

Mr. Benjamin Crowther, a British subject who had served in the army of the so-called Confederate States, having applied to Mr. Scarlett for protection, Lord Russell instructed Mr. Scarlett in November 1865, that "a British subject who has " neither been enrolled as a citizen nor naturalized " in America, ought not, on the ground of his " having served on either side during the civil war, " to be deprived in a third country like Mexico " of all British protection."

ueen's dvocate, ovember 7, 1865. o Mr. Scarlett, o. 2; ovember, 1865.

M. Saviñon, a Mexican by birth, having claimed British protection as a British naturalized subject, Mr. Scarlett's conduct in refusing it to him in Mexico was approved November 1865.

MONTE VIDEO.

See despatch from Mr. Canning to Mr. Vice-Consul Dale, December 20, 1842, previously cited.

NETHERLANDS.

ir A. Buchanan, os. 19, 23, 31, 32, nd 33.

In 1861 a case arose in which the Dutch Government claimed the military service of Daniel Swan, a British subject born in Scotland of British parents and subsequently domiciled in the Netherlands.

It appeared that the existing Dutch law was in favour of the claim of the Dutch Government; but a clause was proposed to be added to a Militia Bill then before the States General which, if liberally construed, would suffice to provide for the exemption thereafter of British subjects similarly situated.

o Sir A. uchanan, No. 4; July 13, 1861.

The Clause introduced into the Militia Bill by the Second Chamber of the States General was as follows: "A foreigner shall not be considered an " inhabitant if he belongs to a State where a Dutch " subject is not liable to compulsory military service, " or where the principle of reciprocity is received " with respect to liability for service."

Some doubt having been expressed whether, under this Clause, British subjects were exempt, the Dutch Goverment addressed a note to Sir A. Buchanan on the 26th of April, 1861: "Il " a été décidé qu'aussi longtemps que les sujets " Néerlandais établis dans la Grande Bretagne, qui " ne sont pas naturalisés sujets Britanniques, y " seront effectivement exempts du service militaire, " soit en vertu de la coûtume ou des dispositions " administratives, soit en vertu d'actes législatifs " spéciaux, les sujets de Sa Majesté Britannique " jouiront, également dans le Royaume des Pays Bas " à partir de la mise en vigueur de la dite nouvelle " loi, du bénéfice de la disposition de l'Article 15, " qui exempte, à titre de réciprocité, les étrangers " établis dans le Royaume de l'obligation de satis- " faire à la militaire."

ir A. Buchanan, No. 77; ugust 28, 1861.

A clause was at the same time introduced into the Militia Bill, exempting from the conscription the absent sons of residents who were not Netherlands subjects, thereby preventing the recurrence of a case like that of Swan.

In the instructions addressed to Sir A. Buchanan, Lord John Russell observed: "There is no practical " liability imposed on aliens in England to serve in " the militia, inasmuch as the militia ballot is not in " fact resorted to; even their theoretical liability " thereto is a matter not free from legal doubt; " and they are under no liability at all to com- " pulsory military service in the army."

Sir A. Buchanan, No. 34; July 13, 1861. To Sir A. Buchanan, No. 18; July 29, 1861.

NORWAY.

By the Norwegian military law of 1857 "foreigners who have acquired a fast domicilium " in the country" are rendered liable to military duty.

Mr. Crowe, Nos. 48 and 49; November 2, 1861. Mr. Crowe, No. 2; March 15, 1862.

A case occurred in 1861 in which Mr. Walter Foreman claimed British protection against the conscription, and he was advised to try the question before the Supreme Court as provided by the Law of 1857.

If a Convention existed British subjects would be exempt by the express terms of the Law; but in the absence of such a Convention they could only appeal to the principles of equity, and ask for exemption on the ground that Norwegians were not subjected to any such military service in England.

PERSIA.

Lord Palmerston to Mr. Sheil.

" September 4, 1850.

To Colonel Sheil, No. 82; September 4, 1850.

"The principles upon which, as stated in your despatch No. 87 of the 22nd of July, you are in the habit of acting, in regard to granting passports and affording protection to natives of India, appear to me to be correct. The only question would be whether children born in British India of parents subjects of the Shah, can properly be placed under British protection while resident in Persia.

"In Europe the international law would be against such an arrangement. Children born in England of parents subjects of a Foreign State would be entitled to be considered as British subjects everywhere but in the country to which their parents belong, always assuming that the law of that country considers children born to native subjects while out of the country, to be as much native subjects as if they had been born in the country.

"But though that would be the international rule in Europe, yet, considering the different and peculiar habits and practices of Asia, it seems to me that, considering that all persons born in British India, of whatever parents, are entitled to be regarded as British subjects, so far as concerns any privileges and advantages which attach to that character within the British dominions, it would be fair and right to extend to such persons, even in Persia, the benefits of being placed under British protection; and especially if they had resided in British India for any time, so as to have been practically domiciled therein."

Lord J. Russell to Mr. Alison.

" Sir, Foreign Office, August 25, 1860.

Mr. Alison, No. 64.

"I have had under my consideration Sir Henry Rawlinson's despatches No. 50 of the 29th of March and No. 57 of the 11th of April last, inclosing a register of persons enjoying, and claiming to enjoy, British protection in Persia, and requesting definite instructions for his guidance in regard to what constitutes the right of a person to be considered a British subject, and to claim British protection in Persia.

"It does not appear that the Persian Government

has actually raised any objections, or that any case has arisen urgently calling for a decision as to the nationality or right to protection, of any individual or class of persons; but as Sir Henry Rawlinson appeared to apprehend that difficulties would arise, and desired to be instructed beforehand what course he was to adopt in each case, as and when it might occur, I have to observe.

"First, that I am ignorant as to what is the course adopted on the points in question by the other European Governments having diplomatic relations with Persia, more particularly France and Russia; and having regard to Articles IX, XI, and XII of the Treaty of March 4, 1857, as well as to the necessity of not conceding in practice to Persia more than is conceded to her by these Powers on the subject in question, it is impossible for me to furnish you with definite instructions on this head.

"Secondly, I have to point out to you the impracticability of following out strictly, in relation to Persia, or any other Mahometan Power, the principles of international law prevailing between Christian powers, so far as regards nationality and the right to protection. This impracticability is abundantly apparent from Sir Henry Rawlinson's despatch No. 57 of the 11th of April, in which, whilst insisting upon the propriety of conceding, as it were, a reciprocity in point of principle to Persia in the matter of national *status*, he nevertheless suggests, in particular instances, doubtless on strong grounds of policy, the propriety of entirely disregarding or departing from any such principle in actual practice, as, for instance, in the case of the Masulipatan Newal referred to at No. 10, Class VI., in the list inclosed in his beforementioned despatch.

"Thirdly, I have to state to you that no new rule or practice, as to the extending or limiting the application of the existing system as to British protection, ought to be adopted, unless it be made common to other powers, especially France and Russia; no such new rule or practice should be retrospective; and no person now enjoying British protection should be deprived thereof by the application or operation of any such new rule or practice.

"With respect, moreover, to the class of cases particularly adverted to by Sir Henry Rawlinson, namely, the children of Persian fathers born in the Queen's dominions, and afterwards returning to Persia, I have reason to believe that in Turkey such persons habitually enjoy British protection, unless, indeed, they act in such a manner as to forfeit the right thereto, and to show that they have 'elected' the Turkish nationality of their fathers; and I have to state to you, that I see no reason to depart from the instructions laid down on this head by Viscount Palmerston in his despatch No. 82 of the 14th of September 1850, to Lieutenant-Colonel Sheil.

"Subject to the above remarks, and considering the question apart from all considerations of usage, policy, or expediency, but exclusively and strictly with reference to the principles of international law prevailing amongst Christian nations, I have to state to you, that a child of a Persian father, born in the Queen's dominions and returning to Persia, will not, whilst in Persia, be entitled to British protection, if (as stated) the law of Persia considers him a Persian subject by reason of his Persian descent; and on this principle Syud Abdullah could not, whilst he remained in Persia, be claimed, or claim to be treated there, as a British subject. Although, therefore, this would be the correct rule of international law, yet, as it has not been hitherto acted on in Persia, I think it very inexpedient that it should now be made a rule of English procedure there, unless it is also made common to all other European nations, and especially France and Russia.

"You will be guided by what I have stated above, when called upon to interfere on behalf of persons having a claim to British protection.

"I am, &c.

"J. RUSSELL."

Mr. Alison, No. 184; October 26, 1862.

A correspondence took place in 1862 respecting the right of the British Consul-General at Bagdad to afford protection to the children of a person named Ali Agha, who was born in India, but was of Persian descent, the Persian Government having asserted that the children ought to be placed under the protection of the Persian Consul at Bagdad.

To Mr. Thomson, No. 4; December 31, 1862.

Mr. Alison was instructed that the British Consul-General was authorized upon the principle of the law and warranted by the usage applicable to the subject to take under his protection the sons of Ali Agha, while they continued resident at Bagdad.

In 1867, the British Resident at Bushire raised a question as to the nationality of the grandson of a British Indian subject born in Persia.

To Mr. Alison, No. 15; November 12, 1867.

Mr. Alison was instructed that such a person was a British subject by the British Statute law, and as such entitled to the good offices of British authorities, but in the case where the father had been domiciled, and the son resident in Persia, it was not reasonable to claim the latter as a British subject, so as to withdraw him from the operation of the laws of his parent state.

PERU.

In 1851, Mr. Vice-Consul Nugent requested to be informed whether he was to register as British subjects the children of British residents born in Peru, and whether children so registered, born of a Peruvian mother, were exempt from conscription.

Her Majesty's Chargé d'Affaires was directed to furnish Mr. Nugent with instructions on the latter point founded upon those addressed to him on the 17th of February 1848.

From Mr. Nugent; February 1, 1851. To Mr. Adams, No. 6; August 23, 1851.

These instructions were substantially the same as those given to Mr. Vice-Consul Dale (*vide ante*).

PORTUGAL.

"*The Earl of Aberdeen to Lord Howard de Walden.*

"Foreign Office,

"MY LORD, June 10, 1843.

"I HAVE received your Lordship's despatch No. 111 of the 25th of May, stating that you had informed the Portuguese Minister for Foreign Affairs that Her Majesty's Government cannot for an instant admit the right claimed by the Portuguese Government to consider as Portuguese subjects all persons born in Portugal, notwithstanding that they may be the issue of foreigners residing in that country.

"I think it necessary for your information to put you in possession of the opinion of the Queen's Advocate-General upon several cases which have arisen in foreign countries, and in which the right referred to in your despatch has been questioned.

"The substance of that opinion is, that although by the statute law of this country all children born out of the allegiance of the King, whose fathers or grandfathers, by the fathers's side, were natural-born subjects, are themselves entitled to enjoy British rights and privileges while they are within British territory, yet the effect of British statute law cannot extend so far as to take away from the Government of the country in which those persons may have been born, the right to claim them as natural-born subjects, at least so long as they remain in that country.

"By the common law of England, all persons born within the King's allegiance, whether the

children of British subjects or of foreigners, are deemed to be natural-born subjects of the Crown of England; and if the law of any foreign state upon this point be the same as the English law, and if such foreign state places persons born within its territory upon the same footing as its own subjects or citizens, the Government of that state has the right to exact the service of a subject from such persons, even if they may have been the children of foreigners, at least whilst such children remain in the country of their birth.

"It may be necessary that I should add that the children or grandchildren by the father's side, of natural-born British subjects, born in any other country than Portugal, are entitled to be protected by you, in Portugal, as natural-born subjects of the Crown of Great Britain; but the children of British fathers born in Portugal cannot be protected by you against the operation of the laws affecting the subjects of Portugal, unless the laws of that country withhold from the child of a foreigner the rights of a Portuguese subject."

PRUSSIA.

To Lord Bloomfield, No. 249. August 11, 1865.

In reply to inquiries from Lord Bloomfield, Lord Clarendon furnished him with the following instructions in 1855:—

"1st. That a woman, a British-born subject, who has married a foreigner, puts on the status of her husband, and during the continuance of that coverture is not entitled to claim the protection of Her Majesty's legations abroad.

"2nd. The same woman, on becoming a widow, is entitled to re-assume the character of a natural-born British subject; but her children by her alien husband, if born abroad, follow the nationality of their father, except that by virtue of the 3rd section of the 7 & 8 Vict. cap. 66, they are made capable of taking any estate, real or personal, by devise or purchase or inheritance in England.

"3rd. As already stated the mother, whilst under coverture, follows the condition of her husband, and is an alien; but the children, as well during as after the coverture, are entitled to the privileges conferred by the 3rd section of the 7 & 8 Vict. cap. 66.

"4th. During coverture by an alien husband the mother cannot demand a British passport. When 'discouverte' she may demand one. The children, however, are aliens and cannot demand passports as British subjects either during or after coverture."

Law Officers; November 5, 1862.

In 1862, Mr. Crossthwaite, Her Majesty's Consul at Cologne, requested to be informed whether, he having been naturalized as a Prussian subject, his sons were liable to the Prussian conscription.

It was decided that the sons of a naturalized Prussian subject (owing allegiance to Her Majesty) who are between the ages of 17 and 25, and are resident in Prussia, would be compellable to serve in the Prussian army.

December 4, 1865.

In 1865 it was decided that a M. Renkewitz, a person born in the British Colony of Tobago, of a Saxon father and a Danish mother, and who had not resided in British territory since he was seven years of age, might properly receive a British passport from the Berlin Embassy.

In October 1867 the Prussian Chargé d'Affaires, with a view to the controversy between the Prussian and United States' Governments, made an inquiry as to the liability to serve in Her Majesty's army and navy of British subjects who, having emigrated to a foreign country and become naturalized citizens of that country, subsequently return to their native land.

To Count Bernstorff; November 13, 1867.

Count Bernstorff was informed "that no practice has prevailed in England since the Peace of 1815 which has any bearing on the question of the treatment in Prussia of these subjects of the King of Prussia, liable to military service, who, after they have emigrated to a foreign country, and been naturalized there, come back again to Prussia, inasmuch as the practice in England has always been, both before and since the Peace of 1815, to recruit the Royal Army by voluntary enlistment.

"On the other hand, the militia of the counties which used to be called out by ballot has ceased to be so called out since 1829, and on the last occasion when the militia was embodied, during the Russian war in 1854, the quota of each regiment was furnished by volunteers. There has thus been no opportunity for a tacit practice to grow up either in regard to the army or the militia, under which any privilege of exemption from the liability to military service should become established in Great Britain in favour of those subjects of the Queen who, after they have emigrated and been naturalized abroad, have returned to Great Britain.

"With regard to the Royal Navy, the same observations apply, as the practice of impressment has been allowed to fall into desuetude, and the Royal Navy has been for some time recruited by voluntary enrolment."

RUSSIA.

Lord Wodehouse, No. 12; January 3, 1857. Queen's Advocate; January 15 and 21, 1857. To Lord Wodehouse, No. 69; January 21, 1857.

In 1857 Madame von Essen applied to Lord Wodehouse, at St. Petersburgh, for a British passport to enable her to be recognized as a British subject by the Russian authorities, she being the widow of a Prussian who had been naturalized in Russia.

Lord Wodehouse was instructed "to grant her a passport if she can show that she was a natural-born Englishwoman, and that she forfeited, upon the death of her husband, the rights she acquired in Russia as the wife of a naturalized Prussian subject; but if she did not forfeit those Russian rights, you will inform Madame von Essen that she cannot under such circumstances be provided with a British passport, more especially as she appears to have no intention of leaving Russia.

The Queen's Advocate remarked, in regard to this case, that there was no *law* as to the right of a British-born subject to a passport, and that it would be very inexpedient to lay down any inflexible rule in such matters. The primary intention and use of a passport was for travelling purposes, and it was for the Secretary of State to give such directions from time to time as he might think fit as to the grant of passports in special cases, having regard to the conditions as to domicil and residence in a foreign country, under which such applications were made.

Consul-General Mansfield, No. 16; February 24, 1857.

Shortly afterwards Consul-General Mansfield inquired whether a Polish lady married to an Englishman could legally be entered in her husband's *passeport de séjour* as a British subject. He was told that during marriage she became entitled to the *status* and civil rights of her husband, and consequently to the protection of the British Government as a British subject.

In 1862 a question arose as to the *status* of British Jews in Russia.

To Lord Napier, No. 105; May 15, 1862.

Her Majesty's Ambassador was instructed that, having regard to the language of the treaty between Great Britain and Russia of 1859, and to the facts stated with reference to the legal *status* of Russian Jews in their own country, Her Majesty's Government would not be justified in claiming exemption for British Jews in Russia from the disabilities to which Russian Jews are there liable by law. The effect of the 1st and XIth Articles of the Treaty was to place British subjects on the footing of Russian subjects before the law, each class being alike, and one not more than the other amenable to all general laws applicable in like cases. Russian subjects, being

Jews, incurred certain disabilities, and the equality intended and provided by the Treaty was not infringed by British subjects who are Jews, whilst residing there, also sharing the same disabilities.

In 1865 the British Factory at St. Petersburgh wished to obtain a revision of the 6th section of the Russian naturalization law relating to children born after their parents had adopted Russian allegiance, with reference especially to the fact that previously to 1862 no alien could carry on business in Russia without being naturalized, and that the new law of 1864 made no provision for the denaturalization of persons who had assumed Russian nationality before it was passed.

Sir A. Buchanan, No. 21.

Sir A. Buchanan was instructed to assist the Factory as far as he could.

At the same time he was warned that it was impossible to press upon the Russian Government the law of England as a complete reason for the desired concession.

Queen's Advocate; January 31, 1865.

"The present law of England would allow a Russian merchant to carry on his business in Great Britain without being naturalized, and so far the doctrine of reciprocity might be made available; but, on the other hand, the law of England considered that allegiance, whether acquired by birth or by naturalization, is indelible, except, perhaps, in the case of a conflict of duty between the obligations of the naturalized foreigner to the State to which he originally belonged and Great Britain.

"A Russian could exercise wholesale and retail trade in England on the same footing as a British subject, with the exception that he could not lease land or house for a longer term than twenty-one years without being naturalized. A Russian could not,* according to the theory of the law, put off the allegiance acquired by naturalization, though practically he would do so if he returned to his own country, except, perhaps, in a case of war between Russia and England."

Sir A. Buchanan, No. 80; March 12, 1867.

In March 1867, Mr. George Wolff applied to Sir A. Buchanan for a British passport. Mr. Wolff was born in England of a Hanoverian father and English mother, had resided in England until he was eleven years of age, and had never claimed Hanoverian nationality.

Under these circumstances, Sir A. Buchanan was told that he might give notice to the Russian authorities of Mr. Wolff's name being withdrawn from the family passport, and give him a separate passport as a British subject.

SPAIN.

Consul Brackenbury, Nos. 6, 9, 9. 11, 1841. To Consul Brackenbury, No. 4; November 5, 1841.

Her Majesty's Consul at Cadiz having requested instructions in 1841 as to the claims of the sons of British subjects born in Spain to exemption from the conscription, he was informed that as British law considered all persons born in Great Britain to be British subjects, Her Majesty's Government could not urge the claims of persons born in Spain to British protection as against the laws of that country.

Lord Aberdeen, however, pointed out that by the Spanish Constitution of 1837 it was declared that all persons born in Spain were Spaniards, but when that law was passed it was interpreted by the Spanish Government to mean that such persons have the right of being admitted to the privileges of Spanish subjects *at their option*, and that if it was thereby meant that the children of aliens born in Spain were aliens unless they declared ther option of becoming Spaniards, it might be contended that the sons of British parents so situated, who had not made such a declaration, remained British subjects, and, as such, exempt from conscription.

* *See*, however, previously as to British naturalization, the certificates of which, as at present granted, are cancelled by absence from England without licence beyond a certain specified time.

Lord Howden, No. 96; March 25, 1856.

By Article 24 of the Royal Decree of 17 November 1852, it was provided that persons domiciled or travelling in Spain, as well as their sons, who had not chosen Spanish nationality, should be exempt from military service, with the exception of those whose parents were born in Spanish territory.

In 1856 a question arose as to the interpretation of this law, and certain persons, grandsons of native British subjects, claimed exemption in the face of it.

The case was referred to Lord Clarendon, who decided that the claim was inadmissible.

In 1861, however, it appeared that Her Majesty's Consuls in Spain still continued to claim to protect the grandsons of British subjects from military service, and Lord Russell then gave instructions that they should desist from doing so.

To Sir J. Crampton; December 11, 1861.

Further correspondence passed between Sir J. Crampton and Lord Russell on this subject in 1862, and the following depatch was addressed to Sir J. Crampton (July 9, 1862):—

Sir J. Crampton, No. 197; May 2, 1862. To Sir J. Crampton, No. 139; July 9, 1862. Law Officers; July 7, 1862.

"I have to state to you that with regard to the general question I have nothing to add to the instructions conveyed to you in my despatch No. 164 of the 17th December last, to which Her Majesty's Government adhere.

"With respect to the particular cases of Lieutenant Arguimban and his son Mr. Joseph Arguimban, and to any other cases which may come under the same category, I am advised that they should be determined by the domicil of the parents at the time of the birth of the children within the territories of the Crown of Spain. If at the time of the birth of Lieutenant Arguimban, his father was not only a natural-born British subject but legally domiciled in the British dominions, I am of opinion that Lieutenant Arguimban himself was at the time of his birth a British subject, owing permanent allegiance to the British Crown, and entitled to British protection. If, on the contrary, his father was then domiciled in the dominions of the Spanish Crown, he became a Spanish subject, and is not entitled to claim British protection against any obligations resulting from his Spanish allegiance, although by an English Statute he may be also entitled to the privileges of a natural-born British subject in Great Britain.

"The same observations apply to the case of Mr. Joseph Arguimban, whose position is likewise dependent on the allegiance and domicil of his father at the time of his birth.

"The fact of Lieutenant Arguimban and one of his sons being officers in the Royal navy tends *primâ facie* to show that the domicil of Lieutenant Arguimban, if originally in England, did not afterwards cease to be so; but even this point would not be conclusive if that gentleman has resided for a long time in the Spanish dominions, and I am advised that no length of service in the army or navy of Great Britain would be material for the purpose of the present question if the allegiance and domicil of the person engaged in such service were originally Spanish.

"I should add that, even in the case of persons owing permanent allegiance to the British Crown, but domiciled and resident in Spain, the claim to exemption from military service in Spain cannot justly be extended on their behalf to any services required for the legitimate purposes of internal defence only, and which do not involve any act at variance with the duties of their British allegiance."*

* The tenour of this despatch seems inconsistent with the doctrine previously held by the British Government, as it makes the nationality of the son to depend on the domicil of his father instead of the place of his own birth. It is to be presumed that the instruction was framed with reference to the peculiar law and usage of Spain, and was not intended to lay down any general principle applicable to other countries.

SWITZERLAND.

Lord Palmerston to M. Drouey, President of the Swiss Confederation.

"October 16, 1859.

"THE undersigned has the honour to acknowledge the receipt of the note addressed to him in the name of the Federal Council in Switzerland by M. Drouey, President of the Confederation, requesting to be made acquainted with the provisions of the English law as regards the cases in which foreigners lose their rights of nationality.

"In reply, the undersigned has the honour to inform M. Drouey that he is not aware of any case in which a British-born subject can lose his right of nationality unless he should be deprived of it by an Act of Parliament.

"It is well established that a natural-born British subject cannot put off his allegiance to the British Crown by any act of his own, not even by swearing allegiance to a foreign Power; and though it is not illegal for a British subject to contract engagements with a foreign Power with the licence of the British Crown, yet such engagemeent do not affect his national status according to the English law, and the licence so given may be revoked at any moment.

"But though a British subject cannot get rid of his national character, he may so misconduct himself either by committing piracy, or in other ways, as to forfeit all claim to the protection of the British Government."

In 1863 the Swiss Government claimed to include in the conscription at Geneva two brothers named Fournier, born in England, but whose father had been naturalized subsequently to their birth as a citizen of Geneva.

To Admiral Harris, No. 16; April 22, 1863.

As the young men were both of full age, and had done nothing to forfeit their British character, Her Majesty's Minister at Berne was informed that they came within the meaning of the term "British subjects" in the 6th Article of the Treaty of 1855, and, as such, were exempt from Swiss military service.

To Admiral Harris, No. 2; November 20, 1865.

In 1865 a question arose whether an English Company (the European Central Railway Company), whose direction and agent was located in the Canton of Tessin, was entitled to the support of the British Legation.

Admiral Harris was instructed "that this "English company has not forfeited its right to "the protection of the British Legation, because "in the Act of Concession the technical domicil of "the company ('la direction technique du chemin "de fer') is to be considered as being in the Canton where the Board of Administration of the "Company is situated. The distinction between "different kinds of domicil is familiar to all "jurists. The domicil which incorporates a "foreign citizen into the State in which he is "resident is wholly distinct in its character and "consequences from the domicil which is assigned "by the State to a foreign subject with relation to "certain legal acts or liabilities. Such a domicil "is for the purpose of founding jurisdiction in the "event of legal proceedings being taken, either by "him or against him in the country in which he is "resident. The domicil specified in the concession "for the Company is of this nature, and falls under "this category; but it does not affect the right of "the Company to the intervention of its Government for the purpose of preventing an act of "injustice being done to it by the foreign Government. The intervention, however, of the British "Legation in Switzerland should be strictly confined to such a case, and should not attempt to "interfere with the ordinary course of the municipal law in its operation upon the rights and "liabilities of the Company."

Mr. J. G. Koch, March 16, 1866.

In 1866, Mr. J. G. Roch protested against being called upon for military service in Switzerland as a Genevese.

Mr. Roch's grandfather was a Genevese by birth, having been born in a territory ceded by Sardinia to Geneva in 1816 by a Treaty, one of the conditions of which was, that those so born should, being Christians, be considered as Genevese. By the law of that Canton the national character is inalienable, and extends to the grandchild.

To Admiral Harris, No. 21; March 29, 1866. Queen's Advocate; April 14, 1866. Queen's Advocate: May 8, 1866. Queen's Advocate; May 21, 1866.

As Mr. Roch lived and was domiciled at Geneva, Admiral Harris was informed that the claim to exemption could not be put—the English law on the same subject being duly borne in mind—upon the high ground of strict right. The claim could only be preferred upon the lower ground of usage and convenience.

TUNIS.

Lord Palmerston to Sir T. Read.

"SIR, January 16, 1840.

"Mr. ANCRAM, in his despatch No. 14 of the 2nd of June 1838, reported the case of a young Maltese girl, Grazia Abela, the wife of a Maltese, who had been persuaded to embrace the Mahomedan religion, but who afterwards desired to recant. Mr. Ancram, it appears, made thereupon an application to the Bey that the girl should be restored to her husband, but the Bey refused to restore her. Since that time I have heard nothing further from Mr. Ancram or from yourself on this subject; and I would hope that the Bey, on further reflection, may have been induced to give up the girl. But if that should not have been the case, I have to instruct you to state, by a written note to the Bey, that all the subjects of Her Majesty are free to change their religion, if they think fit to do so, and the British Government never interferes with the conscience of British subjects; but that every person who is born a subject of the British Crown must, by the law of England, continue during life to owe allegiance to the Sovereign of Great Britain; and, on the other hand, every such person is entitled during life to the protection of the British Crown.

"The woman in question having been born in Malta is a British subject; and though she is at liberty to embrace the Mahomedan religion if she shall think fit to do so, she cannot thereby cease to be a British subject, and she is as much entitled to British protection as if she had remained a Christian. The law of Tunis may be different; but the British Government has nothing to do with that law, and Great Britain never can permit the laws of any foreign State to interfere with the indissoluble connection which binds a British-born subject to the British Crown.

"Moreover, marriage is by the law of England a tie which can only be dissolved by an Act of the British Legislature, and Her Majesty's Government never can permit any foreign Government to assume that a marriage legally contracted between two British subjects can be dissolved by the circumstance that one of these parties has changed their religion.

"Her Majesty's Government, therefore, expect that this Maltese woman shall be placed under your protection, in order that she may have an opportunity of freely choosing whether she will return to her husband and her country, or remain where she is.

"I am, &c.

"PALMERSTON."

In 1865 Mr. Wood reported that he had sent to Malta a Maltese family, consisting of a widow and minor children, who had been induced by distress to embrace the Mahomedan religion.

As the children of a Maltese father during their minority remained British subjects, and it was assumed that the application made for their removal to Malta had been at the instance of their next relation or friend, Mr. Wood's proceedings were approved.

Queen's Advocate; January 13, 1865.

TURKEY.

The question as to the protection of British subjects in the East does not come within the scope of this Memorandum, but it would require careful attention in case any alteration of the present law of allegiance were contemplated.

To Mr. C. Murray, Consular, No. 13; November 17, 1849.

The following instruction was addressed, in 1849, to Mr. Murray, respecting the amount of protection to be granted in Egypt to aliens who had obtained letters of naturalization in England :—

" Your inquiry arises out of three questions which have been put to you by Mr. Walne, Her Majesty's Consul at Cairo; and I will give answers to those questions.

" The first question is, whether Greek houses in Egypt, being branches of establishments belonging to Greeks who have been naturalized in England, are entitled to protection ?

" Upon this point I have to answer, that those members of such houses who are not naturalized British subjects cannot claim for themselves nor for their branch house British privileges, merely because another member of the house residing elsewhere has been naturalized in England.

" The second question is, whether British protection is to be extended in Egypt to subjects of the Kingdom of Greece who have obtained letters of naturalization in England and have returned to the Levant ?

" The answer to this is, that if these persons have been legally naturalized in England, they are entitled everywhere but in the Kingdom of Greece to the privileges of British subjects.

" The third question is, whether Greek rayahs, resuming their residence in the Ottoman territory, after having obtained naturalization in England, are to be protected ?

" The answer is, that these persons cannot, within the country of their natural allegiance, that is to say, within the Ottoman Empire, claim to be considered British subjects, because natural allegiance in the country of a man's birth over-rides privileges obtained by naturalization elsewhere."

To Mr. D. Cassavetti; February 22, 1851.

In 1851 this instruction was modified as regards Mr. Cassavetti, a Greek naturalized British subject resident in London, and Her Majesty's Consul-General in Egypt was instructed to afford to his branch establishments at Cairo and Alexandria the same protection as would have been afforded to the branch establishments of an English firm.

To Mr. Brant, Consular, No. 4; August 26, 1852.

A similar instruction was sent to Mr. Consul Brant in the case of Mr. Calimachi, a Greek, the agent at Trebizond of Mr. Mathew Schilizzi, a resident in London.

To Mr. Theologo; January 12, 1855.

In 1855 like protection was extended to Messrs. Bogni and Kotti, Greek agents at Galatz for M. Theologo.

To Mr. P. Theologo; February 8, 1856.

In 1856 Mr. P. Theologo was informed that his naturalization would not entitle him to protection in Turkey, he having been born in Broussa in Asia Minor.

To Mr. Giro; September 7, 1858. To Mr. Muller, No. 2; February 14, 1859.

In 1858 protection in Egypt was refused to Mr. Giro, a native of Lemnos; but in the following year it was decided that, bearing in mind the peculiar relations between Egypt and the Porte, he might properly receive British protection in Egypt, unless the Egyptian authorities objected.

In October 1859 a question was raised as to the nationality of Mr. John Aslan, born at Cerigo, but who had not complied with the provisions of the Ionian Law in order to constitute himself an Ionian citizen.

To Mr. Colquhoum, Consular, No. 36; December 9, 1859.

Eventually it was arranged that protection should be afforded to him until he had an opportunity of returning to the Ionian Islands and completing his naturalization there.

To Mr. Theologo; November 11, 1861.

In 1861 Mr. Sophocles Theologo was informed that his agent at Galatz was not entitled to personal protection for himself or his concerns; but that the interests he represented, as the agent of a naturalized British subject resident in London, would be entitled to such protection.

Messrs. Wilson, Dodgshun, and Papayanni; April 2, 1861.

In April 1861 an application was made for British protection on behalf of the estate of a bankrupt, Mr. Rodocanachi, a native of Scio, who had been naturalized as a British subject in 1855.

As his certificate of naturalization contained an express exception of " any rights and capacities of " a natural-born British subject out of or beyond " the dominions of the British Crown and the " limits thereof" (the usual clause at that date), and Mr. Rodocanachi was at Constantinople in no danger of molestation, Her Majesty's Government refused to interfere.

In the case of Themistocles George Aslan, who claimed to have his declaration of part-ownership in a British vessel registered at the Cairo Consulate in 1861, it was decided that the question of Mr. Aslan's right to have his declaration of part-ownership in a British vessel attested at the British Consulate at Cairo depended not upon the terms of his letters of naturalization, nor upon the circumstance of his having or not having a foreign passport, but upon the provisions of " The Merchant " Shipping Act, 17 & 18 Vict., cap. 104, sec. 18." By that Act persons who are naturalized by or pursuant to statute are rendered capable of being owners or part-owners of a British ship, only if they " are and continue to be, during the whole " period of their so being owners, first, resident in " some place within Her Majesty's dominions, or " second, if not so resident, members of a British " factory or partners in a house actually carrying " on business in the United Kingdom, or in some " other place within Her Majesty's dominions." Mr. Aslan, it appeared, was not a person fulfilling the first of these conditions, but it did not appear whether he was or was not a member of a British factory, or a partner in a house actually carrying on business within Her Majesty's dominions. If he was, the application made by him to the British Consul at Cairo ought to be complied with; if not he was by law incapable of being owner or part owner of a British ship, and the ship of which he was owner or part-owner could not be deemed to be British; in which case the Consul ought not to attest his declaration.

Acting Consul at Cairo, No. 25; May 30, 1861. Law Officers; August 9, 1861.

The clause in Mr. Aslan's letters of naturalization excepting from the grant " any rights and capa- " cities of a natural-born British subject out of " and beyond the dominions of the British Crown " and the limits thereof," was intended only to prevent the person thereby naturalized from claiming, by virtue of his naturalization, as against foreign governments while within their territories, the benefit of the *status* of a British subject. It was not intended to be applicable to the right and capacity of the person naturalized (provided he fulfils the requirements of the Merchant Shipping Act), to be and continue, while locally resident beyond the limits of Her Majesty's dominions, an owner or part owner of a British ship, and to do while there all acts proper to be done by him in that character. Such a right is not one of which any foreign locality can be predicated, merely because the person entitled to it may happen to be residing abroad; it is in its nature essentially a British right, its subject being a British ship having its port of registry within the dominions of the British Crown, and if locality was to be ascribed to it at all, it must follow the port or domicil of the ship, and not the residence of the owner.

To Mr. Theologo; December 24, 1862.

In December 1862 Mr. Sophocles Theologo was informed " that a foreign house having foreign " interests, although connected with the English " house, and being conducted by foreigners and in " a foreign country, cannot claim the protection of " a British consul, except in so far as the direct " interests of British subjects, apart from those of " foreigners, are involved."

In 1864 Sir E. Hornby was authorized to register Messrs. Cuppa as British subjects, reserving any rights of allegiance which might be preferred against them by the country of their birth.

r E. Hornby, o. 42; me 22, 1864. w Officers; ly 23, 1864.

These gentlemen were Ionians by birth, sons of an Ionian who had commanded, as a British naval officer, a scamparia or gunboat in the war with France, and they claimed, accordingly, to be British subjects, under the Act 13 Geo. II. cap. 3.

ay 14, 1866.

In the case of M. Mavrogodato in 1866 it was decided that "although in strictness a foreigner "who is merely naturalized in Great Britain "has no title to British protection abroad, the "good offices of Her Majesty's representatives "may as a general rule be properly extended to "such persons elsewhere than in the dominions of "the State to which they owe natural allegiance;" and that such claim as M. Mavrogodato might have to those good offices in the Ottoman dominions must be "subject to the determination of any "question which may be raised by the Turkish "Government, arising out of his place of birth, "and that if that question is raised M. Mavrogo-"dato must be prepared to establish to his Excel-"lency's satisfaction that he forms one of a class "of persons over whom the Porte has renounced "its right of regarding them as its subjects, not-"withstanding their birth in its territory."

VENEZUELA.

Mr. Riddell, Consular, No. 42; August 12, 1851. Queen's Advocate; January 19, 1852. Law Officers; February 3, 1852.

A question arose in 1851 whether the illegitimate children of British parents, born in Venezuela, were entitled to be registered as British subjects at Her Majesty's Consulates.

Sir John Dodson, then Queen's Advocate, considered that such persons might be taken to be British subjects *for the purposes of registration only*, but that their claim to British nationality could not be asserted against an actual adverse claim of the Venezuelan Government to treat them as natural-born citizens.

It having been pointed out to Sir John Dodson that this opinion seemed to be at variance with a report which he had previously made in the case of a Mr. Stratford, when he had stated that the illegitimate children of British parents born abroad was not entitled to be considered a British subject in foreign countries, Sir John Dodson replied that the question was one of much difficulty in which the other law officers should be consulted.

This was accordingly done, and, on the 3rd of February 1852 the Law Officers advised that illegitimate children born abroad of English parents are not British subjects, and therefore not entitled to British protection. By the common law, children born abroad of English parents were not, except in certain special cases, English subjects. Acts of Parliament have been passed to remedy this inconvenience, but these Acts, from their particular purposes and wording, can only be held to apply to legitimate children.

During the discussion of the British claims on Venezuela in 1865, the Venezuelan Government objected to the insertion of certain claims in the British Schedule on the ground that the claimants were citizens of Venezuela.

Mr. Edwardes, No. 66; August 23, 1865.

In support of the principle on which this objection was based they quoted at considerable length passages from Wheaton, Blackstone, Sir R. Phillimore, and other jurists showing the doctrine of native nationality held by England.

With regard to the particular case of Venezuela the Foreign Secretary stated (July 27, 1865), "Now "in this country it has been judged suitable, for "many reasons, to establish that all that are born "in its territory are Venezuelans. It has been "thus declared in the Constitutions that have ruled "the country since 1821. In the long process of "time which has elapsed, it has been understood "that the fact of being born in Venezuela carries "with it the obligation of naturalization. A con-"troversy which originated with the Spanish "Legation in 1847, for pretending to include in the "matriculation of subjects of Her Catholic Majesty "persons born in Venezuela, although of Spanish "parents, might be cited."

"During the war of five years, on an occasion which created difficulties, and to avoid others, the executive power deviated in one single instance from the common practice, that of the young man, Alexander d'Empaire, and declared him exempt from military service, as a minor, being under the protection of his father and not having signified his wish to become a citizen of Venezuela. But that resolution cannot be considered definitive, for it is not given to the Executive power to point out the sense of the Constitution. The President understood it to be so, and mentioned it in his Message to Congress in 1861, asking that a law should interpret the Constitutional rule. Nothing was then resolved. The question was still undecided when the Constituent Assembly met in 1863; the Government insisting for a termination, it pronounced itself in this manner in Article 6 of the Federal Constitution:—

"'Venezuelans are—1. All persons born, or who may be born in the territory of Venezuela, whatever may be the nationality of their parents.

"'2. The children of a Venezuelan father, or of a Venezuelan mother, born in other territories, who may fix their residence in this country, and shall express their desire to be considered as such.'

"It therefore appears that there can be no doubt as to the meaning of the legislators, and if a more explicit declaration has been asked for, it is owing to its being considered that it should come directly from them."

Mr. Edwardes. No. 89; October 25, 1865.

On the 23rd of October 1865 Mr. Edwardes, under instructions from Lord Russell, replied, "Her Majesty's Government are of opinion that "the general principles on which his Excellency "founds his particular position are sound; though it "is to be observed that by Treaty stipulation and by "long usage one State may concede to the subjects "of another privileges which are not accorded to "its own subjects. Many circumstances may make "such a usage not impolitic or unreasonable."

"Her Britannic Majesty's Government are, moreover, of opinion that when such usage is abrogated by the Municipal Law, ample time should certainly be given to the subjects of the State from whom the privilege is withdrawn to make up their minds whether they will remain in or leave the country in which this change in their former relation to it has been effected.

"M. Seijas will perceive from the foregoing opinions that, although Her Britannic Majesty's Government offer no opposition to the change which the Venezuelan Government desire to make in the position of children born to British subjects in Venezuela, they are far from admitting its power of retro-action.

Mr. Harrison. No. 5; December 9, 1865.

"The undersigned, therefore, being unable to see how the solution of the question at issue can possibly affect the settlement of claims already pending, avails himself, &c."

The Venezuelan Government rejoined, on 22nd of November 1865, that it was not a question of passing a new law, but of interpreting a principle which had been (with the exception of the French case previously referred to) maintained since the foundation of the Republic.

To Mr. Fagan. No. 3; January 16, 1866.

In January 1866 Lord Clarendon instructed Mr. Fagan "that Mr. Edwardes appears to have "stated the matter very properly to the Venezuelan "Government. It seems clear that the new "law ought not to affect the position of British "claimants whose claims had accrued previously "to the passing of this law; and the argument "that the law is not retro-active but explanatory "is inadmissible.

"Previously to the passing of it, practice and usage had interpreted the law as treating the children of foreign subjects, though born in the Venezuelan territory, as foreigners. To pass a law now, explaining that the law had never meant to consider such persons as foreigners, is substan-

tially to pass a retro-active law to the injury of foreigners."

Mr. Edwardes, No. 93; November 9, 1865. Mr. Edwardes, No. 97; November 22, 1865.

In November 1865 Mr. Edwardes forwarded a list of claims admitted by the Venezuelan Government. This list includes the claims of persons alleged to be British subjects although born in Venezuela, and a note is appended to their names showing that these claims were admitted subject to their nationality being proved.

Mr. Irving's Memorandum: February 2, 1867.

Negotiations are now pending for the settlement of these admitted claims, together with any other claims not yet investigated, by a mixed Commission, when the right of these Venezuelan natives to British nationality will again come under discussion.

CHAS. S. A. ABBOTT.

To Mr. Fagan, No. 4; January 30, 1868.

Foreign Office,
March 5, 1868.

ADDENDA.

(A.)

OPINION OF MR. CALEB CUSHING.

RIGHT OF EXPATRIATION.

Citizens of the United States possess the right of Voluntary Expatriation, subject to such Limitations, in the interest of the State, as the Law of Nations or Acts of Congress may impose.

Attorney-General's Office,
SIR, October 31, 1856.

I HAVE to apologise to you for having omitted to reply at an earlier day to your communication, inclosing extract from a letter addressed to Mr. Vroom, Minister of the United States in Prussia, by the Count de Montgelas, Minister of Bavaria at the same court, and requesting me to consider the question of law propounded by the Count de Montgelas.

The question is, "Whether, according to the laws of "the United States of America, a citizen thereof, when "he desires to expatriate himself, needs to ask either "from the Government of the United States, or of the "State of which he is the immediate citizen, permission "to emigrate; and if so, what are the penalties of con-"travention of the law?"

It might suffice, perhaps, for me to say that there is no provision of law on the subject in the Constitution of the United States, or in any Act of Congress; and that, therefore, a citizen of the United States, desiring to emigrate, is free to do so, without express consent of the Government of the Union: and that no law of any one of the States forbids the citizen thereof to emigrate, or imposes any penalties on him if he do so without the consent of such State.

This naked statement, however, though a substantial response to the inquiry, leaves out of view some relations of the subject, which, in deference to the possible wishes of the Count de Montgelas, it may be desirable to expose.

In the popular discussions of the United States, it is common to assume that the theory of their political organization requires, and that their laws admit, unlimited right of emigration.

This impression is partly derived from the fact that, the United States having so recently by force made themselves independent of Great Britain, ideas of right, which belong to revolutionary epochs, still predominate over those of duty, which belong to the regular action of all political society, and the importance of which grows more and more apparent with every year's duration of the Union.

To justify the supposition of unlimited right of emigration, it is common to appeal to the provisions of the Constitution of the United States, and of its laws regulating the naturalization of foreigners. These provisions do, indeed, show that the encouragement of foreign immigration is a feature of the public policy of the United States, and suggest implication, that, in the spirit of international equity, we shall concede to our own citizens a reciprocal faculty of emigration, and of foreign naturalization, involving abjuration of allegiance to the Union.

Acting on these impressions attempts have been made from time to time in the Congress of the United States to legalize the right of emigration; but, on all such occasions, careful scrutiny has made evident the fallacy of the popular assumption, and has caused the whole subject to be left, as it now stands, as a question of our public law, unsolved in its complete generality—but with elements of solution, which have not failed to strike the observation of many jurists and statesmen of the United States.

To begin: it is true, as the tenor of the question of the Count de Montgelas implies he presumed might be the case, that the conditions of citizenship of the United States and of any one of the states are not identical; that is to say, it may happen that by the laws of a given state a person shall be a citizen thereof, and still not be a citizen of the United States. Nor does it follow, because he is a citizen of a given State by the very letter of its laws, that therefore he is of every or any other State. Persons may be, and in fact are, citizens of the State of Massachusetts, that is, invested with all the rights, political and municipal, which its institutions can bestow, without being citizens of the State of Virginia or of the United States. But the distinctions which exist in this respect are not very important in international relations; and so far as they are anywise material they will come up incidentally in considering the duties and the rights of citizens of the United States.

Neither in the Constitution nor in the laws of the United States is there any definition of citizenship. The Constitution, which is the organic law of the Union, confines the exercise of all the great functions of state to citizens, and some of these functions to natural citizens; and it empowers congress to enact laws of naturalization. Such laws have been enacted, and provide in effect that any free white alien, after five years' residence in the country, and two years' intermediate declaration of intention to become a citizen, may become such on his making proof of good character, and abjuring, in certain prescribed forms, all foreign allegiance, and taking oath of allegiance to the United States. And many ordinary municipal rights are, by other laws, capable of being enjoyed by citizens alone: such as the ownership of merchant ships, the command and in part the manning of such ships, and the purchase of public lands by pre-emption.

To this it may be added, that in many of the States the right to own land within the same is by their laws restricted to citizens of the United States. But I repeat citizenship, whether acquired by birth or by naturalization, is not a thing specifically defined in its elements, either by the Constitution or by the laws of the Union.

Nor is there in the Constitution or laws of the United States, any general provision to define how the rights of citizenship may be lost, or its duties be made to cease, whether by one's own act or by that of the Government.

And in the codes of the States there is occasional confusion of thought, arising from the want of proper attention to the difference between the enjoyment of mere civil rights, the right of suffrage, and the right of citizenship as a political status of persons, independent of their sex, age, or condition. Thus women, minors, and some other persons do not possess the right of suffrage in any of the States although citizens of the United States, and it is possessed in some of the States by persons who are not citizens of the United States.

As to citizenship and its termination, though we do not find them defined by any law of the Union, still we may gather the prevailing thought of the nation on the subject, by inspecting the legislation of some of the States.

In truth, we must divide the people of the United States into two classes: those in the full enjoyment of all the rights of citizenship, and those deprived of some or all of those rights; and then we must distinguish between such of the inhabitants of the country as are citizens, and such as are subjects only, and whether capable or not of becoming citizens, yet not so at the present time. I allude in the latter case to the Indians who, in some of the States are the subjects of the State in which they exist, but who are in general subjects of the United States; and to the Africans, or persons of African descent who, being mostly of servile condition, are of course not citizens but subjects, in reference as well to the respective States in which they reside as to the United States.

In the sequel of these remarks it will be seen that the distinction between citizens and subjects in the United States is material to the just appreciation of the question of the right of emigration in its domestic relations, and still more in its foreign relations, and especially as admonitory of candid consideration of the laws regulating emigration, which exist in some of the countries of Europe.

These are prefatory considerations. I proceed now to state how far limitations of the right of emigration are imposed in fact by the laws either of the Union or of individual States.

The Union, as already explained, has not as yet undertaken to formalise any general law, either of citizenship or of emigration. One of the States, Virginia, has done this; and its express legislation on the subject, though imperfect, is quite suggestive, and leads directly to important reflections.

The code of Virginia contains the following provisions:—

"All free white persons born in this State, all free white persons born in any other State of this Union, who may be or become residents of this State, all aliens being free white persons naturalized under the laws of the United States, who may be or become residents of the State; all persons who have obtained a right to citizenship under former laws, and all children, wherever born, whose father, or if he be dead, whose mother shall be a citizen of this State at the time of the birth of such children, shall be deemed citizens of this State.

"2. Whensoever any citizen of this State, by deed in writing, executed in the presence of, and subscribed by two witnesses, and by them proved in the court of the county or corporation where he resides, or by open verbal declaration made in such court and entered of record, shall declare that he relinquishes the character of a citizen of this State, and shall depart out of the same; such person shall, from the time of such departure, be considered as having exercised his right of expatriation, so far as regards this State, and shall thenceforth be deemed no citizen thereof.

"3. When any citizen of this State, being twenty-one years of age, shall reside elsewhere, and in good faith become the citizen of some other State of this Union, or the citizen or subject of a foreign State or Sovereign, he shall not, while the citizen of another State, or the citizen or subject of a foreign State or Sovereign, be deemed a citizen of this State.

"4. No such act of becoming the citizen or subject of a foreign State or Sovereign, and no act under the second section shall have any effect if done while this State or the United States shall be at war with any other foreign power." (Revised Code, tit. ii.)

Without stopping to comment on the conditions of citizenship here laid down, let us attend to the conditions of its relinquishment. These are two, namely: 1. Solemn declaration of intention to emigrate, with actual emigration. 2. Residence elsewhere, that is, actual emigration from the State, and the assumption in good faith of citizenship in some other State of the Union, or of allegiance to a foreign State or Sovereign.

But the rights thus defined are of the change of citizenship, which involves emigration: not of pure emigration. The law does not comprehend the case of subjects of the State.

And the rights accorded are with significant restriction: they cannot be exercised in time of war. That is, the legislator, while nominally admitting the general rights of citizens to emigrate, reflected that it would not answer to leave the right without such limitation, at least, as to deprive the citizen of the power to abstract himself from the public service in certain emergencies by emigration, or under the same emergencies to shelter acts of treason under pretences of emigration.

Thus, in the very act of legalizing emigration, the State of Virginia declares expressly that the right is, in its judgment, subject to the paramount rights of the State.

How could it be otherwise? If the State owes protection to the citizen, does not the citizen owe service to the State? Above all, in a republican country, in which the State is but the congregation of the citizens, are not the interests of all bound up together into a unity of common interest, so that rights are but correlative to obligations? The assumption of the unlimited right of emigration would make of the inhabitants of a country a mere collection of individuals each pursuing blindly his own passionate or narrow view of his apparent personal interests, instead of an organized political society, combining individual right with public power, and maintaining the true rights of individuals as well against individual wrongdoers as foreign foes, by means of the aggregate force of the State. But of this more hereafter.

To return to the actual laws of Virginia. These, in formalizing the right of emigration, impose restriction upon it, and thus recognize the public right of restriction.

But other restrictions of the right are found in the laws of the same State.

A citizen of Virginia, it is clear, does not effectually cast off any private obligations of his, whether relating to person or property, by pretence of emigration. He may, it is true, be sheltered by the foreign jurisdiction, and thus enabled to evade legal obligations existing in the state of Virginia; but those obligations do not the less continue in force within that State, until discharged by its laws. This doctrine comprehends citizens of that State *a fortiori* its subjects.

But the more material question is of the obligations of citizens to the State itself. And here, the proposition is a general one; thus, a citizen of the State of Virginia cannot, by emigration, discharge himself of any obligation to the State, the non-performance of which involves by its laws any penal consequence. If he leave the State under such circumstances, though under pretence of expatriation, he is a fugitive from justice, not a lawful emigrant; the State will demand his extradition from the State to which he assumes to emigrate, and obtain it, in virtue of an express provision of the Constitution of the United States; and the State will itself deliver up, on demand, any such person undertaking to emigrate to it from any other State. (Code, tit. x, ch. 17, § 8–16.

The State of Kentucky imitated the State of Virginia in this respect, repeating in substance, and almost in the same words, the enactment of the latter as well as to citizenship as expatriation.

No other State of the Union has, so far as my observation extends, attempted to solve these interesting questions by express legislation.

The Constitution of the State of Pennsylvania declares that "emigration from the State shall not be prohibited" (Art. ix. § 25). The same provision is contained in the Constitution of the State of Indiana, and, it may be, of some other States. But this declaration is to be taken subject to all the qualifications which have been exhibited in discussing the institutions of the States of Virginia and Kentucky.

The nature of these qualifications may be illustrated further, by supposing the militia of the State of Pennsylvania or of Indiana to be in the field. If a discontented soldier in the ranks undertakes to escape his duties by professed emigration, will that profession be admitted by the State? Undoubtedly not. It will reply that desertion cannot be covered up under the cloak of emigration; in a word, that emigration or expatriation cannot shelter a criminal act, and is of necessity subject to conditions of the service of the State.

If we pass now to the legislation of the United States we shall encounter a series of provisions which confirm the conclusions already drawn from the legislation of the States, involving the general doctrine that a citizen of the United States cannot, of right, discharge himself by emigration from subsisting obligations, either private ones or to the Union.

In the first place, the Federal Government recognizes the general doctrine that a citizen or subject cannot, by pretence of expatriation, relieve himself from any existing penal liability to the Union, or to any one of its States. It provides, by the Constitution and by laws, for the extradition of fugitives from service or crime as between the States respectively; and it provides, by numerous treaties and by laws, for the extradition of fugitives from justice as between the United States and foreign Governments.

Nor, in the second place, can it be doubted that the same doctrine may be applied in the United States to some cases in which the act of expatriation is itself, in motive as in fact, an evasion of duties to the State. Thus, we should not be prepared to admit that a soldier in the army, or a seaman in the navy, can, by pretence of expatriation, relieve himself from the charge of desertion; or an officer of the army or navy on the same pretence anticipate and escape a charge of treason involved in the very act of expatriation.

To the contrary of this, we have the case reported of one Elijah Clark, who was tried and sentenced as a spy during the last war between the United States and Great Britain, although he had professedly emigrated to Canada. (Breckenridge's Miscellanies, p. 409.)

For there is unanimity of opinion among jurists and statesmen alike, that expatriation, even if admitted of general right, must not involve any collateral violation of law or of duty to the State or to fellow-citizens. "The laws do not admit," says Mr. Jefferson, "that "the bare commission of crime amounts, of itself, to a "divestment of the character of citizen, and withdraws "the criminal from their coercion," (Letter to Mr. Morris, August 16, 1793. American State Papers, Foreign Relations, vol. i. p. 169).

This remark of Mr. Jefferson's is the more significant, inasmuch as he applied it to the very case of alleged

emigration as the cover of acts in violation of the neutrality of the United States.

But here debate opens. The Government of the United States commenced with successful revolution; it was organized on the hypothesis of allowing the largest range to individual volition compatible with public safety; the people of the United States are composed of emigrants from Europe, most of whom expatriated themselves in order to escape from oppression, or, if you please, legal impediments to personal action, in the countries of their birth,—and many of whom were the actors and the victims of revolutions or of civil wars. Thus it happens that the sympathies of the people of the United States, and to a certain degree their laws, tend to admit full freedom of expatriation, under all circumstances, where the inducement is political opinion or action.

Accordingly, the United States, while readily entering into treaty stipulations with foreign Governments for the reciprocal extradition of persons accused of mere municipal offences, have never conceded, and, of course, never asked the extradition of persons accused of political offences, or other acts in derogation of mere allegiance.

Meanwhile, in matters akin to this in principle, though apparently distinct, the legislators and the courts of the United States have exhibited much uncertainty of opinion, consequent on the popular assumption of a theory of unlimited right of emigration, and the undeniable difficulty of reconciling that theory to some of the exigencies of public security and peace.

For the preservation of the neutrality of the United States, we have enacted laws which forbid foreign recruitments in the country, or the equipment of expeditions therein, by land or sea, for the purpose of hostilities against any Government with which the United States are at peace. These enactments proceed on the sound hypothesis that the right of war belongs only to States, not to individuals. These enactments also recognize the fact that no country can permit its inhabitants to make war on the inhabitants of another country, without giving just umbrage to the latter, violating the principles of natural justice and of international law, and thus in the end superinducing war between the two Governments. Nothing can be plainer than the position that the body politic should determine the question of peace or war through its appointed agents, legislative or executive. And no Government, which respects its own dignity, or desires to maintain its independence and sovereignty, will suffer unauthorized individuals to wield at will this the highest of all the political functions of a State.

The remarks of Mr. Jefferson are pertinent and conclusive on this point. In a despatch of his already quoted, he says:—

* * "If one citizen has a right to go to war of his own authority, every citizen has the same. If every citizen has that right, then the nation (which is composed of all its citizens) has a right to go to war, by the authority of its individual citizens. But this is not true, either on the general principles of society, or by our Constitution, which gives that power to Congress alone, and not to the citizens individually. Then the first position was not true, and no citizen has a right to go to war of his own authority; and for what he does without right he ought to be punished.

"Indeed, nothing can be more obviously absurd, than to say all the citizens may be at war, and yet the nation at peace." (Ubi supra, p. 161.)

Of course, laws of this description are just in themselves and conformable to reason; and, as such, have been constantly maintained by the United States.

In this condition of the law, a case of prize, in which one of the questions was whether the capture was invalidated by reason of the cruiser having been fitted out in the United States, in violation of law, came up for adjudication in the Supreme Court of the United States; and, as incidental to this question, there was elaborate discussion, at the bar, of the right of expatriation, induced by the fact that the commander of the cruiser assumed, as preparation for that command, to have renounced his allegiance to the United States. (Talbot *v.* Janson, iii. Dallas' Rep. p. 383.)

It clearly appeared in the case that the cruiser was armed and fitted out in fraud of the law; and for that reason the prize was restored to her owners. Two of the judges, Chief Justice Rutledge and Justice Wilson, rested on this point, with but brief allusion to the question of expatriation; but the other three spoke of this in terms not to be mistaken.

Justice Patterson made the significant remark, "It is "an obvious principle, that an act of illegality can "never be construed into an act of emigration or "expatriation. At that rate, treason and emigration, "or treason and expatriation, would, in certain cases, "be synonymous terms."

To which he added the query, "Can that emigration "be legal and justifiable which commits or endangers "the neutrality, peace, or safety of the nation of which "the emigrant is a member?"

Justice Cushing calls attention to the necessity of proving the *bonâ fides* of an alleged act of expatriation; which is the more essential in the case of persons who engage in illegal military enterprises under the guise of emigration, and who do not, in purpose or fact, renounce their allegiance to their native Government, and do not hesitate to claim its protection when they become involved in difficulties by reason of their illegal undertaking.

But Justice Iredell entered fully into the general merits of the subject, as follows:—

"That a man ought not to be a slave; that he should not be confined, against his will, to a particular spot, because he happened to draw his first breath upon it; that he should not be compelled to continue in a society to which he is accidentally attached, when he can better his situation elsewhere, much less when he must starve in one country, and may live comfortably in another; are positions which I hold as strongly as any man, and they are such as most nations in the world appear clearly to recognise.

"The only difference of opinion is, as to the proper manner of executing this right.

"Some hold that it is a natural, unalienable right in each individual; that it is a right upon which no act of legislation can lawfully be exercised, inasmuch as a legislature might impose dangerous restraints upon it; and, of course, it must be left to every man's will and pleasure to go off, when, and in what manner he pleases.

"This opinion is deserving of more deference, because it appears to have the sanction of the Constitution of this State (Pennsylvania), if not of some other States in the Union.

"I must, however, presume to differ from it, for the following reasons:—

"1. It is not the exercise of a natural right in which the individual is to be considered as alone concerned. As every man is entitled to claim rights in society, which it is the duty of the society to protect, he, in his turn, is under a solemn obligation to discharge all those duties faithfully which he owes, as a citizen, to the society of which he is a member, and, as a man, to the several members of the society, individually, with whom he is associated. Therefore, if he has been in the exercise of any public trust, for which he has not fully accounted, he ought not to leave the society until he has accounted for it. If he owes money, he ought not to quit the country and carry all his property with him, without leave of his creditors. Many other cases might be put, showing the importance of the public having some hold of him, until he has fairly performed all those duties which remain unperformed, before he can honestly abandon the society for ever. But, it is said, his ceasing to be a citizen does not deprive the public, or any individual of it, of remedies in these respects. Yet, the right of emigration is said to carry with it the right of removing his family and effects. What hold have they of him afterwards?

"2. Some writers on the subject of expatriation say a man shall not expatriate in a time of war, so as to do a prejudice to his country. But, if it be a natural unalienable right, upon the footing of mere private will, who can say this shall not be exercised in time of war as well as in time of peace, since the individual upon that principle is to think of himself only? I therefore think, with one of the gentlemen for the defendant, that the principle goes to a state of war as well as peace, and it must involve a time of the greatest public calamity as well as the profoundest tranquillity.

"3. The very statement of an exception in time of war shows that the writers on the law of nations, upon the subject in general, plainly mean, not that it is a right to be always exercised without the least restraint of his own will and pleasure, but that it is a reasonable and moral right, which every man ought to be allowed to exercise, with no other limitation than such as the public safety or interest requires, to which all private rights ought and must for ever give way.

"And if in any Government principles of patriotism and public good ought to predominate over mere private inclination, surely they ought to do so in a Republic founded on the very basis of equal rights, to be perfectly enjoyed in every instance where the public good does not require a restraint.

" 4. In some instances, even in time of war, expatriation may fairly be permitted. It ought not then to be restrained. But who is to permit it? The Legislature surely, the constant guardian of the public interest where a new law is to be made or an old one dispensed with. If they may take cognizance in one instance (as, for example, in time of war) because the public safety may require it, why not in any other instance, where the public safety for some unknown cause may equally require it? Upon the eve of a war it may be still more important to exercise it, as we often see in case of embargoes.

" 5. The supposition that the power may be abused is of no importance if the public good require its exercise. This feverish jealousy is a passion that can never be satisfied. No man denies the propriety of the Legislature having a taxative power. Suppose it should be seriously objected to, because the Legislature might tax to the amount of 19s. to the pound. They have the power, but does any man fear the exercise of it? A Legislature must possess every power necessary to the making of laws. When constructed as ours is, there is no danger of any material abuse. But a Legislature must be weak to the extremest verge of folly to wish to retain any man as a citizen whose heart and affections are fixed on a foreign country in preference to his own. They would naturally wish to get rid of him as soon as they could, and therefore, perhaps, the proper precaution would be to restrain acts of banishment (if such could be at all permitted) rather than to limit the Legislative control over expatriation. But is there no danger of abuse on the other side? Have not all the contentions about expatriation in the courts arisen from a want of the exercise of this very authority? For if the Legislature had prescribed a mode, every one would know whether it had or had not been pursued, and all rights, private as well as public, would be equally guarded; but upon the present doctine no rights are secured but those of the expatriator himself. I, therefore, have no doubt that, when the question is in regard to a citizen of any country whose Constitution has not prohibited the exercise of the Legislative power in this instance, it not only is a proper instance in which it may be exercised, but it is the duty of the Legislature to make such provision, and for my part I have always thought the Virginia Assembly showed a very judicious foresight in this particular.

It is impossible to misapprehend the general effect of the opinion expressed by Mr. Justice Iredell. It disaffirms unlimited right of expatriation. It reserves all the rights of the State in the premises. (Serjeant's Constitutional Law, p. 319.)

Indeed when this case first made its appearance in the Admiralty Court of the State of South Carolina, under all the influences of local sympathies to bias him, the Judge (Bee) in maintaining the right of expatriation and emigration expressly adds the conditions " Where " no legal prohibition exists, and no prejudice is done " thereby." (Jansen *v.* The Christina Magdalena, Bee's Rep., pp. 11, 23.)

This was in the year 1794. In the year 1799 the same question recurred, but under different circumstances. Indictment was found in the proper Court of the United States against a person, a natural citizen of the United States, charged with acts of hostility against a foreign Government, who pleaded that he had expatriated himself, and become the subject of the belligerent State in whose service he committed the acts of hostility. But the plea was overruled by the Court (Chief Justice Ellsworth), and the party was convicted and sentenced. (The United States *v.* Williams, ii. Cranch's Rep., p. 82, note.)

In this case the Chief Justice said, and said truly, that the political society, that is, the whole body of the citizens associated in a government, had rights as well as its individual citizens; and that the latter had no rights to be enjoyed to the destruction of the whole society. He also said with truth that " The most " visionary writers on this subject do not contend for " the principle in the unlimited extent that a citizen " may at any and at all times renounce his own, and " join himself to a foreign country." These views it is clear are in accordance with the spirit and letter of the existing laws of the States of Virginia and Kentucky.

The opinion expressed by the Chief Justice on this occasion was much criticised at the time; but with the less reason, considering, as the facts in the case indicate, that the party assumed foreign allegiance only for the special purpose, and then returned to reclaim his ancient rights as a citizen of the United States.

No laws in any country would be capable of execution if men were allowed to oscillate thus between different allegiances, at the dictate of caprice or self-interest.

There was another act of Congress, in the execution of which questions of the same class came once again before the Supreme Court of the United States.

During the partial estrangement which occurred, between the United States and the French Republic at the close of the last century, an act of Congress was passed, which for the time being prohibited all commercial intercourse with France on the part of persons resident within the United States, or under their protection; and subjected to forfeiture all vessels employed in the prohibited commerce, and belonging to persons residing in the United States, or to citizens thereof residing elsewhere. It contained other provisions in the same spirit not material to the present question.

While such was the law a vessel was captured, and came before the courts of the United States for adjudication under circumstances which raised the question whether her owner fell within the scope of persons to whom commerce with France was prohibited.

This person was born in the State of Connecticut before it became independent of Great Britain, and thus might, perhaps, have claimed the rights of citizenship in the United States. But he went to the Danish island of St. Bartholomew's at an early age, married, and was domiciled there, and became a subject of Denmark.

Upon these facts, the whole question of expatriation passed in review before the Supreme Court. The Court, by Chief Justice Marshall, disposed of it in these words: " Jared Shattuck, having been born within the United States, and not being proved to have expatriated himself according to any form prescribed by law, is said to remain a citizen, entitled to the benefit and subject to the disabilities imposed upon American citizens; and, therefore, to come expressly within the description of the act which comprehends American citizens residing elsewhere.

" Whether a person born within the United States, or becoming a citizen according to the established laws of the country, can divest himself absolutely of that character, otherwise than in such manner as may be prescribed by the law, is a question which it is not necessary at present to decide. The cases cited at bar, and the arguments drawn from the general conduct of the United States on this interesting question, seem completely to establish the principle that an American citizen may acquire, in a foreign country, the commercial privileges attached to his domicil, and be exempted from the operation of an Act expressed in such general terms as that now under consideration. Indeed, the very expressions of the act would seem to exclude a person under the circumstances of Jared Shattuck. He is not a person under the protection of the United States. The American citizen, who goes into a foreign country, although he owes local and temporary allegiance to that country, is yet, if he performs no other act changing his condition, entitled to the protection of our Government, and if, without the violation of any municipal law, he should be oppressed unjustly, he would have a right to claim that protection, and the interposition of the American Government in his favour would be considered a justifiable interposition. But his situation is completely changed, where, by his own act, he has made himself the subject of a foreign power. Although this act may not be sufficient to rescue him from punishment for any crime committed against the United States, a point not intended to be decided, yet it certainly places him out of the protection of the United States while within the territory of the sovereign to whom he has sworn allegiance, and consequently takes him out of the description of the act.

" It is, therefore, the opinion of the Court, that the 'Charming Betsy,' with her cargo, being at the time of her recapture the *bonâ fide* property of a Danish burgher, is not forfeitable in consequence of her being employed in carrying on trade and commerce with a French island." (Murray v. Schooner " Charming Betsy," ii. Cranch, pp. 64, 119.)

It is observable, that the Court carefully abstain from asserting any unlimited right of expatriation. Nor was any such right pretended among the eminent counsel Messrs. Key, Alexander J. Dallas, and Martin, who argued the case. On the contrary, it was conceded on all hands, in the words of Mr. Dallas, " that a man " cannot expatriate himself unless it be done in a fit " time, with fairness of intention, and publicity of " act."

At the commencement of the last war between the United States and Great Britain, this question again

presented itself, in two cases of great interest, where, however, the main question being of the effect of commercial domicil on the national character, the doctrine of expatriation was touched only, without being elucidated. (The Venus, viii. Cranch, p. 253: the Francis, ibid, p. 335.) In each of these cases, the party concerned was a native of Great Britain, who, after coming to the United States and being naturalized here, returned to Great Britain, and there resided at the time of the declaration of war. Laying aside all consideration, either of naturalization or of expatriation, the Supreme Court, in discussing the effect of their commercial domicil in the enemy's country, conceded to them, for the argument's sake, all the rights of native Americans.

Soon after this, in a question of the ownership of a vessel as bearing upon the question of domestic or foreign bottom, Mr. Justice Washington said:—

"I do not mean to moot the question of expatriation, founded on the self-will of a citizen, because it is entirely beside the business before the Court. It may suffice for the present to say, that I must be more enlightened on this subject than I have yet been, before I can admit that a citizen of the United States can throw off his allegiance to his country without some law authorizing him to do so." (United States v. Gillies, i. Peters' C. C. Rep. p. 159, 161.)

Finally, at a later period, the same question came before the Supreme Court, and was argued by eminent counsel, including Mr. Tazewell and Mr. Webster, in exposition of a clause of the existing Treaty between the United States and Spain, which prohibits the citizens or subjects of the respective Contracting Parties from taking commissions to cruise in private-armed vessels against the other, under penalty of being considered pirates. On this occasion, Justice Story, in delivering the opinion of the Court, made the following observations:—

"This view of the question renders it unnecessary to consider another, which has been discussed at the bar, respecting what is denominated the right of expatriation. It is admitted by Captain Chayton, in the most explicit manner, that, during this whole period, his wife and family have continued to reside at Baltimore; and, so far as this fact goes, it contradicts the supposition of any real change of his own domicil. Assuming, for the purposes of argument, that an American citizen may, independently of any Legislative Act to this effect, throw off his own allegiance to his native country—as to which we give no opinion—it is perfectly clear that this cannot be done without a *bonâ fide* change of domicil, under circumstances of good faith. It can never be asserted as a cover for fraud, or as a justification for the commission of a crime against the country, or for a violation of its laws, when this appears to be the intention of the Act. It is unnecessary to go into a further examination of this doctrine; and it will be sufficient to ascertain its precise nature and limits when it shall become the leading point of a judgment of the Court." (The Santissima Trinidad, vii. Wheaton, pp. 283, 357.)

There is one other important relation of the subject, in which it has come before the Supreme Court of the United States, and that is in the discussion of questions of allegiance as bearing on the rights of property of persons, who, though natives of the United States, yet left the country on its revolutionary separation from Great Britain. It is the celebrated question of the *antenati*, discussed in Calvin's case (vii. Co. R., p. 18 b), and previously determined by Bracton. (De Legibus Angliæ, fol. 427 b.)

In disposing of such cases, the Supreme Court has occasionally, and at a relatively late time, referred to the question in very expressive language. Thus in one of them, Justice Thompson assumes that "allegiance may "be dissolved by the mutual consent of the Government "and its citizens and subjects" (Inglis v. Sailors' Snug Harbour, iii. Peter's R., pp. 99, 125); and in another, Justice Story says, "The general doctrine is, that no "persons can, by any act of their own, without the "consent of the Government, put off their allegiance "and become aliens." Shanks v. Dupont, Ibid. pp. 242, 247.)

Here, in so far as regards the views of the Supreme Court or its members, the matters stands,—unadjudicated as decision, but not undetermined as opinion. After carefully reviewing the whole subject, Chancellor Kent pronounces the better opinion to be, that a citizen cannot renounce his allegiance to the United States without permission of the Government, to be declared by law. (Commentaries, vol. ii., p. 49.) It is a significant fact, at all events, that, on so many occasions when the question presented itself, not one of the judges of the Supreme Court has affirmed, while others have emphatically denied the unlimited right of expatriation from the United States.

This exposition of the opinions on the question of the right of expatriation by the judicial authorities of the United States would be incomplete without some brief statement of what has occurred on the subject in the Courts of the States.

Observations on the subject occur in sundry cases of the class already spoken of, where the main question was of land belonging to persons who were born in the United States before their separation from Great Britain, but adhered to the mother country. As the law of England maintains the unalterable perpetuity of allegiance,—and, as that of England, transmitted to many of the States of the Union, denies the capacity of aliens to hold lands,—the question of citizenship repeatedly came before the Courts in the early years of the Republic.

In such a case in the State of Massachusetts, its Supreme Court, by Chief Justice Parsons, say:—

"Protection and allegiance are reciprocal. The Sovereign cannot refuse his protection to any subject, nor discharge him from his allegiance against his consent; and he will remain a subject, unless disfranchised as a punishment for some crime. So, on the other hand, he can never discharge himself from his allegiance to his Sovereign, unless the protection which is due to him from the laws is unjustly denied him." (Ainslie v. Martin, vi. Mass. R., p. 460.)

Here, a most important condition of the rightfulness of the claim of society, as against the citizen, is indicated,—namely that the laws of the country afford him due protection.

In a case of the same character in the State of Pennsylvania, her Supreme Court, by Chief Justice Tilghman, speaks of a "principle not compatible with the Constitution of Pennsylvania or her sister States; that is to "say, that no man can, even for the most pressing reasons, divest himself of the allegiance under which he "was born." (Jackson v. Burns, iii. Binney's R., pp. 75, 85.)

Allusions to the point as being yet unsettled, occur in the State of Alabama, in a case where distinction between emigration and expatriation is well suggested. (Beavers v. Smith, Alabama Reports, N.S. vol. xi., pp. 20, 29.)

The doctrine is touched, also, in several cases involving matrimonial rights, as affected by domicil or citizenship; but without any result of importance. (See Bishop on Marriage, b. vii.)

But, of the cases in the several States, those adjudged by the Courts of Virginia and Kentucky are the most important, because of the special laws of those two States on the subject of citizenship; and these cases also possess intrinsic interest.

Controversy arose in the State of Virginia, in a matter not material to be here explained, which presented the immediate question of expatriation from the State, but involved in argument that of expatriation generally. (Murray v. McCarty, ii. Mumford's R., p. 393.)

In this case, Judge Cabell, with concurrence of his associates of the court, affirms the general right of expatriation in these words:—

"Nature has given to all men the right of relinquishing the society, in which birth or accident may have thrown them, and of seeking subsistence and happiness elsewhere; and it is believed that this right of emigration, or expatriation, is one of those inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity. But, although municipal laws cannot take away or destroy this great right, they may regulate the manner, and prescribe the evidence of its exercise; and in the absence of these regulations, *juris positivi*, the right must be exercised according to the principles of general law." (Ibid. pp. 396, 397.)

The same judge suggests reasonable doubt of the effect of that provision of the law of Virginia, which requires a formal declaration of the purpose of change of citizenship. "If," he says, "arguments drawn from "the long and uniform practice of a country are ever "allowed to have any influence on a question concerning "the construction of its laws, they might here be urged "with much force. For, of the innumerable emigrants "from Virginia, who have overspread the Southern and "Western States and Territories, and filled their highest "offices, it is believed that not one has ever deemed it "necessary to conform to our Act concerning expatriation. Are they still citizens of the State?" (Ibid. p. 399.)

And he adds expression of opinion, that, "if a citizen "of Virginia shall have departed out of this Common-

" wealth with an open and avowed, fair and *bonâ fide*,
" intention of quitting it, and of becoming a citizen of
" some other State, and shall, in fact, have become a
" citizen thereof, that, from thenceforth, he ceased to be
" a citizen of Virginia, notwithstanding he may have
" omitted to comply with the requisites of our Expatria-
" tion Act." (Ibid. p. 400.)

Judge Roane, another member of the court, dwells on the important fact of the difference between citizenship of a State and that of the United States; the consideration of which leads him to say, among other things:

" I entirely subscribe to the doctrine that the situation of America, in this particular, is new, and may produce new and delicate questions; that we have sovereignties moving within sovereignties; that allegiance to a particular State is one thing, and that to the United States is another; that a renunciation of the former allegiance does not draw after it a renunciation of the latter; and that a statute of the United States on the subject of expatriation is much wanted." (Ibid. 403.)

And the same distinction draws after it the following reflection:

" The power of expatriation, in relation to the Commonwealth of Virginia, is one, with which Congress had certainly nothing to do; it is not granted in the instrument of Government; and it is a fundamental principle in our system, that each State retains every power, jurisdiction, and right, which is not delegated to the United States by the Constitution, nor prohibited by it to the States. The power of legislation on the subject of expatriation from the Commonwealth of Virginia, has not and ought not to have been given up by Virginia, to the United States." (Ibid. p. 405.)

As to which, it may be observed, that, undoubtedly, the State of Virginia may determine who is a citizen of that State, in relation to any matter of the proper jurisdiction of the State, but not in matters of the jurisdiction of the United States. The question of citizenship, for instance, as affecting the right to hold lands in the State, the State itself may decide, without interference on the part of the United States. Not so, in regard to federal citizenship.

Indeed, in one great class of cases, that of suits in the courts of the United States by the citizens of one State against the citizens of another, as provided for by the Constitution, it has been adjudged that mere simple removal to one State from another, and residence in the former, constitutes a change of citizenship in that respect within the meaning of the Constitution and the Acts of Congress. (Cooper *v.* Galbraith, iii. Washington's C.C.R., p. 546; Case *v.* Clark, v. Mason's R., p. 70.) The party must of course be otherwise a citizen of the United States. (Gassies *v.* Ballon, vi. Peters 761.)

Finally, the members of the court affirm, with one accord, that, conceding the right of expatriation, however regulated, its effective exercise depends on the completeness, publicity, and good faith of the assumed act of expatriation.

Views to the same effect, in substance, appear to have been entertained by the courts of the State of Kentucky. In one case, to be sure, the court merely refer to this matter as a " litigated question," and refuse to pass upon it without necessity. (Brooks *v.* Clay, iii. A. K. Marshall's R., p. 545. See S. C., Shearer *v.* Clay, i. Littell's R. p. 261.) But, in a later case, the Court of Appeals of that State, by Chief Justice Robertson, met the great question directly, and placed it on what are, in my judgment, its true foundations.

In the first place, the court construe the law of Virginia reasonably, suggesting that the mode of expatriation, proscribed by that law, is very proper, but " is not, of
" course, the only admissible or satisfactory evidence of
" the fact that the admitted right has been exercised."

In the second place, the court say:

" Whatever may be the speculative or practical doctrine of feudal governments or ages,—*allegiance*, in these United States, whether local or national, is, in our judgment, altogether conventional, and may be repudiated by the native as well as adopted citizen, with the presumed concurrence of the government, without its formal or express sanction. Expatriation may be considered a practical and fundamental doctrine of America. American history, American institutions, and American legislation, all recognise it. It has grown with our growth, and strengthened with our strength. The political obligations of the citizen, and the interests of the Republic, may forbid a renunciation of allegiance by his mere volition or declaration, at any time, and under all circumstances. And, therefore, the government, for the purpose of preventing abuse and securing the public welfare, may regulate the mode of expatriation. But when it has not prescribed any limitation on the right, and the citizen has, in good faith, abjured his country, and become a subject or citizen of a foreign nation, he should, as to his native government, be considered as denationalized, especially so far as his civil rights may be involved, and, at least, so long as that government shall seem to acquiesce in his renunciation of his political rights and obligations."—(Alsberry *v.* Hawkins, ix. Dana's R., p. 177.)

These are intelligent views:—expatriation a general right, subject to regulation of time and circumstance according to public interests; and the requisite consent of the State presumed where not negatived by standing prohibitions.

In conclusion of this part of the subject, it seems proper to add, that the juridical authorities of the United States admit that a party may by his own act be subject to the conflicting obligations of two different allegiances. (United States *v.* Williams, ii. Cranch, p. 82, note; Ainslie *v.* Martin, ix. Massachusetts R., p. 453; Sergeant's Constitutional Law, p. 319.)

A meritorious writer on constitutional law (Mr. Rawle), has devoted some pages to the discussion of the question. He maintains, with reason, that no such thing as absolute or indefeasible right of expatriation exists, any more than absolute or indefeasible right of allegiance; and suggests consideration of the distinction between mere emigration, involving question of domicil only, and expatriation, involving of necessity change of allegiance. (Rawle on the Constitution, ch. 9. See also Duer's Lectures, p. 302.)

Another legal commentator has been disposed to affirm, with more absoluteness, the right of expatriation, and with perhaps insufficient regard for the contingent rights of the State. (Tucker's Blackstone, vol. ii. pt. 2. p. 90.)

There is a small, but well-written treatise on the question by Mr. Hay, elicited by the circumstances in which the second war between the United States and Great Britain originated, and which involved, among other things, extravagant assertions of the doctrine of indefeasible allegiance, as against British emigrants to the United States.

In truth, opinion in the United States has been at all times a little coloured on the subject by necessary opposition to the assumption of Great Britain to uphold the doctrine of indefeasible allegiance, and in terms to prohibit expatriation. Hence we have been prone to regard it hastily as a question between kings and their subjects. It is not so. The true question is of the relation between the political society and its members, upon whatever hypothesis of right, and in whatever form of organization, that society may be constituted.

The assumption of a natural right of emigration, without possible restriction in law, can be defended only by maintaining that each individual has all possible rights against society, and the society none with respect to the individual; that there is no social organization, but a mere anarchy of elements, each wholly independent of the other, and no otherwise consociated save than by their casual co-existence in the same territory. (Ahrens, Droit Natural, p. 324.)

Accordingly through all the diversities of opinion respecting the question, the true doctrine of our law is readily distinguishable, as it appears to me, and is not in contradiction with jurisprudence, theoretical or positive, of the enlightened nations of Europe.

If we cursorily inspect the existing laws of different countries, we discern in them three aspects of the main question.

In Great Britain the professed theory and the actual law combine to prohibit expatriation in terms. (Act of 3 James I., cap. 4.) In practice, however, emigration is permitted, nay encouraged. And, on the other hand, the most striking negation of the indefeasibility of allegiance as a principle, is afforded by the Act of Parliament of 7 and 8 Victoria, cap. 66, which makes permanent a general provision for the naturalization of aliens in Great Britain. (See Bowyer's Const. Law of England, p. 406.) Thus it is that the jurisprudence of England, little capable of generalization, asserts an assumed rule of public law, or denies it, according to the caprices of apparent local interest; and her diplomacy, with characteristic inconsequence and partiality of thought, upholds abroad, while it repudiates at home, the saying of the great republican jurisconsult, *civitas carcer non est*. (Bynkershoek, Quæst. J. Pub. lib i. cap. 22.)

The singularity of the law of England consists in the doctrine, that, as explained by Sir William Blackstone, a natural subject cannot by any possibility or for any

reason cease to be a subject, save by the permission of his liege lord. (Blackstone's Com. vol. i, p. 369.) And this, adds Blackstone, is a "principle of universal law;" in support of which strange assertion he cites,—not any of the great authorities of universal or public law,—all of whom, as we shall presently see, maintain the contrary, but a common lawyer of his own country, namely, Sir Matthew Hale. (Pleas of the Crown, vol. i, p. 68.) And a very modern commentator on the laws of England (Mr. Anstey) adheres to the doctrine, applying to every Englishman who leaves the country, the phrase of *amittit regnum sed non regem.* (Lectures on the Laws of England, p. 94.)

In other countries, the party emigrating contrary to law may lose the civil rights of his birthplace, and become liable to forfeitures of a local description, but without drawing upon himself the extreme consequences involved in the doctrine of the laws of England.

Thus, the Code Napoleon provides, that, "The quality "of Frenchmen will be lost: 1, by naturalization acquired "in a foreign country; 2, by the acceptance, without "authority of the government, of public functions con- "ferred by a foreign government; 3, by establishment in "a foreign country without purpose of return." (Art. 17.) It also provides the means of recovering the lost quality, except in the case of the party bearing arms against his country. (Art. 18, 20, 21.) There are several decrees, one of the reign of Louis XIV., and two of that of Napoleon I., which add confiscations and loss of civil rights, as the penalty of any Frenchman expatriating himself without public authority. But some doubt exists whether these decrees are now in force, and at any rate they are not so, as respects the provision of confiscation: the doctrine of the general right of expatriation being maintained in France. (Dalloz, Dic. Jur. voc. Droit Civil, 53.)

Spain and the Spanish American Republics contemplate and provide for voluntary expatriation. (Escriche, Dic, sub. vocc. Espanol, Natural.)

It is a curious fact, that, at the time when Bynckershoek wrote, the Governments, which prohibited expatriation under penalties, were Great Britain, Russia, France, and China. (Quæst. Juris. Publ. lib. i. cap. 22.)

Then, as now, expatriation was lawful in Spain; as it now is in the Spanish American Republics. (Escriche, ubi, supra.) And the public policy of Spain has never been otherwise in this relation. (Dou, Derecho Publico, lib. i, tit. 7.)

But the most explicit and complete enactments on the subject, are those of some of the States uf the Germanic Confederation. I take as example the legislation of Austria and Prussia.

In each of these countries emigration is permitted by law, but regulated. In neither of them can expatriation take place legally in evasion of military duty. In both special conditions apply to the time of war. In Prussia permission to emigrate is not refused unless for prescribed causes, appertaining to military or civil obligations: in Austria it may be refused at discretion. In Prussia ten years residence in a foreign country, with some exceptions, effects the result of expatriation: this provision is omitted in Austria. Of each eystem, the common and essential feature is a standing provision for emigration on application to the public authorities. (Decree of the Emperor Francis I., of March 24, 1832: Circular of King Frederick William, of December 31, 1842.)

In the United States, as we have seen, there is no provision of federal law which defines citizenship; and none which expressly forbids or expressly authorizes the expatriation of citizens of the United States.

On several occasions, when the question was before Congress, doubts were suggested whether the Federal Government has power to legislate on the subject. I cannot perceive the force of these doubts. Citizenship is a federal qualification for the tenure of office, and for the enjoyment of many other rights under the Constitution of the Union. What constitutes citizenship of the United States cannot be determined by the several States. If they were to undertake it, they would be found to differ radically and irreconcilably in the matter. If Congress cannot do it then the Union is in the singular predicament of the constitutional impossibility of ascertaining who compose it, who may be its President, Senators, and Representatives. No such impossibility exists. When Congress enacts that only citizens of the United States are competent to do certain things, it may well proceed to say, if it choose, who the persons thus designated are, and to define them by classes or description of inclusion or exclusion. If it could not say this directly, and by systematic definition, in the way other nations do, it could say it indirectly by acts of penalty; it could say what are the circumstances of time or manner in which the act of emigration would or would not deprive an American of rights, or subject him to penalties and forfeitures. But the idea that citizenship, or the loss of it, cannot be defined by Congress, is one of the lingering prejudices of the common law, which relies upon judicial exposition to deduce general rules from particular cases, instead of laying down general rules by previous legislative survey of the subject matter. Thus it is that Congress leaves this question to the fortuitous occurrence of some judicial contingency, in which it may be definitely disposed of by decision of the Supreme Court.

In the absence of such a decision, we are compelled to reason out a conclusion in the premises, with aid of analogies of our own or of the public law applicable thereto.

The doctrine of absolute and perpetual allegiance—the root of the denial of any right of emigration—is inadmissible in the United States. It was a matter involved in, and settled for us by, the Revolution, which founded the American Union.

Moreover, the right of expatriation, under fit circumstances of time and of manner, being expressly asserted in the legislation of several of the States, and confirmed by decisions of their Courts, must be considered as thus made a part of the fundamental public law of the United States.

Most of the jurisconsults and judges, who have had occasion to discuss the subject, admit, as we see, either directly or indirectly, that it is a question of circumstances and conditions.

The admissibility of change of allegiance in the United States without necessary *express* co-operation of the foreign government, is implied by the naturalization acts, which require conditions of residence, of personal character, of publicity, and of actual abjuration of the foreign allegiance, as indispensable to the consummation of an act of expatriation.

I think, in consideration of these premises, that the omission of the federal laws to enact any express or specific restraints on expatriation, is tacit or implied consent, subject only to such conditions of good faith, of discharge of subsisting obligations to the society left, and of consummated expatriation in fact, as the principles of international right require to be observed.

As a question of natural right, emigration belongs to the general category of those elements of individual happiness which every citizen is entitled to pursue, but in subordination, always to the general welfare. (Grotius, De Jure Bell, ac Pacis, lib. ii, ch. 5, no. 24; Wolff, Jus Naturæ, part vii, cap. i, s. 186, 187; Burlamaqui, Droit de la Nature, p. 2, ch. 5, s. 13; Almeda, Derecho Publico, tom. i, cap. 17).

The society cannot absolutely take away this right, but may regulate it in such way as to reconcile the interest of the individual and of the community. (Wolff, Jus Naturæ, pars viii, cap. 3, s. 415; Vattel, Droit des Gens, liv. i, ch. 19, s. 10.)

In fine, the present state of the law of nations and of nature on this point is well stated by D. Antonio Riquelme, as follows:

"It is a recognized principle of the law of nations that all can change their primitive nationality, according to their convenience. This principle, admitted by all the world, and in virtue of which every individual may renounce the nationality which birth combined with parentage gives him, does not release him, who avails himself of it, of the obligations which he owes to his country; so that the citizen or subject, who, without authorization of his government, accepts the nationality of a foreign state, may be called upon for the performance of the personal charges imposed on him by his primitive country in the form which the laws establish. Thus, a deserter from the military service, who becomes naturalized in the state to which he flies, though not subject to extradition without special treaty authorizing it, if, nevertheless, he come within the jurisdiction of the authorities of his primitive country, cannot be reclaimed by his new one, but remains bound to fulfil the obligations of his service. While the law of nations concedes to individuals the liberty of changing their nationality, it also empowers a state to restrict this faculty in certain circumstances, as in case of war and others, in return for the services and protection, which it bestows on the citizen or subject; and when he changes his nationality in contempt of the laws, he gives occasion for the disregard of his new nationality." (Derecho Internacional, tom. i, p. 319).

In the absence of general prohibition, general consent

of the state is presumed. "Vel si consenu expresso *aut tacito*." (Puffendorf, De Officio Hominis et Civis, lib. ii, cap. 18.) Or, in the words of Bynkershoek, "Si non sit lex quæ prohibeat, utique licet subditi conditionem exuere, et civitatem ut lubet mutare." (Quæstiones Juris Publici, lib. i, cap. 22).

Of course, the citizen cannot apply such implied consent to any act of pretended emigration, which is itself a violation otherwise of the law, either public or municipal, as in the case of illegal military enterprises; nor, by it, can he escape the punishment of crime or the performance of local contracts, nor appeal to it as a mask to cover desertion or treasonable aid of the public enemy. I am not prepared to say that the right of a citizen of the United States to expatriate himself, implied in the absence of any prohibition, may not be exercised in time of war; but, if so, it would have to be done with attendant circumstances clearly showing good faith, in order to be justifiable; and, it is not easy to see how citizenship could be transferred in time of war to the foreign enemy in such way as to escape reprehension, if the party should afterwards return to the United States.

And, whether in peace and war, the expatration would have to be an actual one, by foreign residence, and with authentic renunciation of the pre-existing citizenship. Under the circumstances and with the conditions thus indicated, and subject to such others as the public interest might seem to Congress to require to be imposed, it seems to me that the right of expatriation exists, and may be freely exercised by the citizens of the United States.

I have the honour to be, very respectfully,

Hon. William L. Marcy, Secretary of State. C. Cushing.

(B.)

United States Naturalization Act, 1802. Seventh Congress.—Session I.

Chap. xxviii.—An Act to establish an uniform rule of naturalization, and to repeal the Acts heretofore passed on that subject.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any alien, being a free white person, may be admitted to become a citizen of the United States, or any of them, on the following conditions and not otherwise:

First, That he shall have declared on oath or affirmation, before the supreme, superior, district or circuit court of some one of the states, or of the territorial districts of the United States, or a circuit or district court of the United States three years at least, before his admission, that it was *bonâ fide* his intention to become a citizen of the United States, and to renounce for ever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whatever, and particularly, by name, the prince, potentate, state, or sovereignty, whereof such alien may at the time be a citizen or subject.

Secondly, That he shall, at the time of his application to be admitted, declare on oath or affirmation, before some one of the courts aforesaid, that he will support the constitution of the United States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty whatever, and particularly, by name, the prince, potentate, state, or sovereignty whereof he was before a citizen or subject, which proceedings shall be recorded by the clerk of the court.

Thirdly, That the court admitting such alien shall be satisfied that he has resided within the United States five years at least, and within the state or territory where such court is at the time held one year at least, and it shall further appear to their satisfaction that during that time he has behaved as a man of good moral character, attached to the principles of the constitution of the United States, and well disposed to the good order and happiness of the same. Provided, that the oath of the applicant shall, in no case, be allowed to prove his residence.

Fourthly, That in case the alien applying to be admitted to citizenship shall have borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application shall be made, which renunciation shall be recorded in the said court.

Provided, That no alien who shall be a native-born citizen, denizen, or subject of any country, state, or sovereign with whom the United States shall be at war at the time of his application, shall be then admitted to be a citizen of the United States. Provided also, that any alien who was residing within the limits or under the jurisdiction of the United States before the twenty-ninth day of January one thousand seven hundred and ninety-five may be admitted to become a citizen, on due proof made to some one of the courts aforesaid, that he has resided two years at least within and under the jurisdiction of the United States, and one year at least immediately preceding his application within the state or territory where such court is at the time held, and on his declaring on oath or affirmation that he will support the constitution of the Unired States, and that he doth absolutely and entirely renounce and abjure all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty whatever, and particularly, by name, the prince, potentate, state or soveignty whereof he was before a citizen or subject, and moreover on its appearing to the satisfaction of the court that during the said term of two years he has behaved as a man of good moral character, attached to the constitution of the United States, and well disposed to the good order and happiness of the same; and where the alien applying for admission to citizenship shall have borne any hereditary title, or been of any of the orders of nobility in the kingdom or state from which he came, on his moreover making in the court an express renunciation of his title or orders of nobility, before he shall be entitled to such admission; all of which proceedings, required in this proviso to be performed in the court, shall be recorded by the clerk thereof: and provided also, that any alien who was residing within the limits and under the jurisdiction of the United States at any time between the said twenty-ninth day of January one thousand seven hundred and ninety-five and the eighteenth day of June one thousand seven hundred and ninety-eight, may within two years after the passing of this Act be admitted to become a citizen without a compliance with the first condition above specified.

Sec. 2. Provided also, and be it further enacted: That in addition to the directions aforesaid, all free white persons being aliens, who may arrive in the United States after the passing of this Act, shall in order to become citizens of the United States make registry and obtain certificates, in the following manner, to wit: Every person desirous of being naturalized shall, if of the age of twenty-one years, make report of himself, or if under the age of twenty-one years or held in service, shall be reported by his parent, guardian, master or mistress, to the clerk of the district court of the district where such alien or aliens shall arrive, or to some other court of record of the United States, or of either of the territorial districts of the same or of a particular state, and such report shall ascertain the name, birthplace, age, nation, and allegiance of each alien, together with the country whence he or she migrated, and the place of his or her intended settlement; and it shall be the duty of such clerk on receiving such report to record the same in his office, and to grant to the person making such report, and to each individual concerned therein, whenever he shall be required, a certificate under his hand and seal of office of such report and registry, and for receiving and registering each report of an individual or family he shall receive fifty cents; and for each certificate granted pursuant to this Act to an individual or family, fifty cents, and such certificate shall be exhibited to the court by every alien who may arrive in the United States after the passing of this Act on his application to be naturalized as evidence of the time of his arrival within the United States.

Sec. 3. And whereas doubts have arisen whether certain courts of record in some of the states are included within the description of district or circuit courts: Be it further enacted, that every court of record in an individual state, having common law jurisdiction and a seal and clerk or prothonotary, shall be considered as a district court within the meaning of this Act; and every alien who may have been naturalized in any such court shall enjoy, from and after the passing of the Act, the same rights and privileges as if he had been naturalized in a district or circuit court of the United States.

Sec. 4. And be it further enacted: That the children of parents duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject by the government of the United States, may have become citizens of any one of the said states under the laws thereof, being under the age of twenty-one years at the time of their parents being so

naturalized or admitted to the rights of citizenship, shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who now are or have been citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States: Provided, That the right of citizenship shall not descend to persons whose fathers have never resided within the United States: Provided also, that no person heretofore proscribed by any state, or who has been legally convicted of having joined the army of Great Britain during the late war, shall be admitted a citizen as aforesaid, without the consent of the Legislature of the State in which such person was proscribed.

Sec. 5. And be it further enacted, That all Acts heretofore passed respecting naturalization, be and the same are hereby repealed.

Approved April 14, 1802.

PRACTICAL FORMS annexed to a Manual of the United States Naturalization Laws, published by an United States Barrister, 1855.

1. *Declaration of Intention.*

I, *A. B.*, do declare on oath (or affirmation) that it is *bonâ fide*, my intention to become a citizen of the United States, and to renounce for ever all allegiance and fidelity to every foreign Prince, Potentate, State, or Sovereignty whatever, and particularly to [*here insert the name of the Prince, Potentate, State, or Sovereignty, whereof the alien may at the time be a citizen or subject*].

A. B.

Sworn in open court, this day of , 18 ,
before me *L. F.* Clerk, of

2. *Oath to support the Constitution.*

I, *A. B.*, do declare on oath (or affirmation) that I will support the constitution of the United States, and that I do entirely renounce and abjure all allegiance and fidelity to every foreign Prince, Potentate, State, or Sovereignty whatever, and particularly to [*here insert the name of the Prince, Potentate, State, or Sovereignty, whereof the applicant was before a citizen or subject*].

A. B.

Sworn in open court, this day of , 18 ,
before me *L. F.* Clerk, of

[*If the applicant has borne any title or been of any order of nobility, he must also expressly renounce it.*]

3. *Oath of Citizens to prove Residence.*

State of *New York*, County, *S.S.*
C. D., of , and *E. F.*, of ,
being duly sworn, do severally depose, and each for himself says, that he is a citizen of the United States, that he is well acquainted with the aforesaid *A. B.*; that the said *A. B.* has resided for the last five years within the United States, and for one year past within the State of *New York*, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same.

C. D.
E. F.

Sworn in open court, this day of , 18 ,
before me *L. F.* Clerk, of

4. *Certificate of Citizenship.*

United States of America, State of ,
County, *S.S.*

Be it remembered, that on the day of ,
in the year one thousand eight hundred and ,
A.B., late of , in , now of ,
in the State of , aforesaid, appeared
in the Court of , being a Court of
Record, having common law jurisdiction and a seal and clerk, and applied to the said Court to be admitted to become a citizen of the United States of America, according to law: And the said *A. B.* having thereupon produced to the Court such evidence, taken such oath, and made such declaration and renunciations as are required by law: thereupon it was ordered by the said Court to be a citizen of the United States of America.

In testimony whereof, the seal of the said Court is hereunto affixed this day of 18 , and in the year of our independence

(L. S.) By the Court. *L. F.*, Clerk.

(C.)

"ANN," SMITH.

This ship, under American colours, was seized in the River Thames, by the Marshal of the Admiralty, on the 1st of August 1812. A claim was given by the master, who was also sole owner of the ship, describing himself to be a British subject, and as such entitled to the benefit of the Order in Council of November 1812. directing the restitution of British ships under the American flag. It appeared that he was a native of Scotland, and that his wife and family resided in that country, but that he had himself been admitted a citizen of America about sixteen years ago, upon taking an oath that he had been sailing out of the American port for two years; that from the year 1799 till 1805, he had been connected with a house of trade at Glasgow, which had an establishment at New York, and another at Charlestown, and that he had occasionally resided at each of the last-mentioned places; that he had purchased this vessel at public auction in America, and had made three voyages in her, the two first from Charlestown to Kingston in Jamaica, returning each time in ballast, and the last from Charlestown to the River Thames. The question was, whether, from the residence and employment of this man, he was, *quoad* this vessel, to be considered as a British subject.

JUDGMENT.

Sir W. Scott.—This ship, when seized by the Marshal in the River Thames, was under the American flag but, according to the account given by the master, was not furnished with the American, or indeed with any pass whatever. It is very difficult to conceive that this was the true state of the case, since the ship was not only American-built, but likewise American owned, as far, at least, as the ostensible character of the claimant is concerned; for though he could not altogether throw off his allegiance to his native country, he had been admitted a citizen of the United States. I cannot conceive, therefore, why the pass was not granted, or what obstacle prevented this man from obtaining so important a document. I must presume that the vessel was furnished with an American pass; but, supposing the case to be otherwise, still, if the ship was furnished with the documents usually granted to American ships, the same rule of law must be applied as if she had been furnished with a regular flag and pass. The ship must be conclusively held to be American property and consequently subject to condemnation.

It is said, however, that this ship is protected by the Order in Council issued on the 28th of November 1812, by which it is directed "that all vessels under the flag of "the United States of America which are *bonâ fide* and "wholly the property of His Majesty's subjects, and not "purchased by them subsequent to the date of hostilities "on the part of the United States of America, and "which shall have been detained in port under the "embargo, or shall have sailed to or from the ports of "this kingdom previous to the knowledge of hostilities, "and shall have been captured on such voyage, shall be "restored to the British owners, upon satisfactory proof "being made to the High Court of Admiralty, or the "Courts of Vice-Admiralty, to which they shall be "taken for adjudication, that the said vessels are *bonâ* "*fide* and wholly the property of His Majesty's subjects "as aforesaid, and had been engaged in trade as above "described." A claim has been given for this ship by Mr. Smith, describing himself to be a British subject; and, if he is a British subject, he will, under this Order in Council, be entitled to restitution.

The question therefore, comes to this, whether the claimant is, *quoad* this property, to be considered a British subject. For some purposes he is undoubtedly so to be considered. He is born in this country, and is subject to all the obligations imposed upon him by his nativity. He cannot shake off his allegiance to his native country, or divest himself altogether of his British character by a voluntary transfer of himself to another country. For the mere purposes of trade he may, indeed, transfer himself to another State, and may acquire a new national character. An English subject, resident in a neutral state, is at liberty to trade with the enemy of this country in all articles, with the exception of those which are of a contraband nature: but a trade in such articles would be contrary to his allegiance. Now, the account which he gives of himself is, "that he "was born at Falkirk, in Scotland; that during the last

" seven years he has been chiefly at sea, but, when at " home, he has lived, and still lives, at Bathgate, in the " shire of Linlithgow, in North Britain; that he is a " subject of our Sovereign Lord the King, but, about " sixteen years ago, he was admitted a citizen of the " United States of America, for the purpose of commerce " only." Why, this transaction is for the purpose of commerce. According to his own account, then, he ceased to be a British subject for commercial purposes. He goes on to say, that he was admitted "for the " purpose of covering a ship of his own, to enable her " to sail without risk of capture, and he was so admitted " by the magistrates of Philadelphia, on oath being " made that he had sailed out of an American port for " two years; that he hath never been admitted a " burgher or freeman of any city or town, but, from the " year 1799 to the year 1805, the deponent having been " connected in a house of trade at Glasgow, which had " a house at New York, and another at Charlestown in " South Carolina," so that, from 1799 to the year 1805, he might, as far as he was connected with the house at Glasgow, and for that particular branch of his trade, be considered a British subject. But since that time, I understand him to say that he has withdrawn altogether from that connection. He says afterwards, in answer to the ninth interrogatory, "that he is a North Briton by " birth, and, when he is at home, his place of residence " is Bathgate, in the shire of Linlithgow, in North " Britain, where his wife and family reside, and where " he the deponent hath always resided from the time he " was ten or eleven years of age, when he was not at sea " or in foreign parts." The affirmative part of his history, as far as it goes, shews that he lived very much abroad, and principally at New York or Charlestown in America. True it is that he had no house in either of these places, but he was there as a single man. It is not the mere circumstance of leaving a wife and family in Scotland that will avail him for the purpose of retaining the benefit of his national character. He cannot be permitted to take the advantage of both characters at the same time, and in the same adventure. The utmost that can be allowed to him is, that he should be entitled to the one character or the other, according to the circumstances of the transaction. When the vessel herself is American-built, when the personal residence of the owner, as far as he has any, is in America (for it does not appear that this man at all resided in Scotland), it would be difficult to say that it could be any other than an American transaction. Since the purchase of this ship by Mr. Smith, he has made three voyages, two of them to Kingston in Jamaica, and one to the port of London; but to the ports of Scotland he has never sailed, nor does it appear that he has even visited his wife and family in that country. He has been sailing constantly out of American ports, and his prevailing destination has been to the West India islands. It is quite impossible that he can be protected under the Order in Council, which applies only to those who are clearly and habitually British subjects, having no intermixture of foreign commercial character. It never could be the intention of His Majesty's Goverment that the benefit of this Order should be extended to a person who has thrown off his allegiance, and estranged himself from his British character, as far as his own volition and act could do. I am of opinion that Mr. Smith is not entitled to the benefit of the Order in Council, and therefore I reject the claim.—Ship condemned.

(D.)

Extrait des Minutes du Greffe du Tribunal Civil de première instance de l'Arrondissement de Wissembourg, Département du Bas Rhin.

Le Tribunal Civil de première instance de l'arrondissement de Wissembourg à rendu le Jugement suivant:—

Audience du vingt-cinq Avril, mil huit cent soixante:

Entre Michel Zeiter, cultivateur, domicilié aux Etats-Unis de l'Amérique, Demandeur, comparant par Maître Volpert, son avoué;

Contre M. le Préfet du Bas Rhin, Défendeur.

Après avoir ouï à l'audience du vingt courant, les conclusions de M. de Ring, substitut du Procureur Impérial, et après en avoir délibéré en la Chambre du Conseil:

Attendu que les tribunaux sont compétents d'après l'Article vingt-six de la Loi du vingt-un Mars, mil huit cent trente-deux, pour décider les questions relatives à l'état ou aux droits civils des jeunes gens appelés à faire partie du contingent de l'armée; attendu que, d'après l'Article deux de la même Loi, nul ne peut être admis dans les troupes Françaises s'il n'est Français:

Que le Demandeur prétendant qu'il a perdu sa qualité de Français par sa naturalisation en pays étranger, il n'y a pas à s'inquiéter si cette naturalisation en pays étranger a eu lieu sans l'autorisation du Gouvernement Français, contrairement aux prescriptions du Decret du vingt-six Août, mil huit cent onze, mais seulement si, au moment actuel, le Demandeur est encore Français.

Attendu que le Demandeur rapporte un certificat constatant qu'il s'est présenté devant la Cour des Plaids Communs du Comté d'Essex, Etat de New Jersey, et a fait la demande d'être admis à devenir citoyen des Etats Unis d'Amerique, mais qu'il n'est pas justifié que cette formalité suffise pour conférer cette qualité; que le Tribunal doit exiger un supplément de renseignements, tel, par exemple, qu'une attestation du Consul des Etats Unis en France de reconnaissance du titre de citoyen des Etats Unis d'Amérique.

Par ces motifs, le Tribunal surseoit à statuer sur la demande jusqu'à ce que le Demandeur rapporte une attestation du Consul des Etats Unis en France, constatant qu'il a rempli toutes les formalités nécessaires pour devenir citoyen des Etats Unis, ou toute autre pièce justificative de sa nouvelle nationalité, et le condamne dès à présent aux dépens.

Jugé et prononcé à l'audience publique du Tribunal Civil de l'arrondissement de Wissembourg présents Messieurs Bardy, President; Lanth et Stoffel, Juges; et Richert, Procureur Impérial.

(Signé) N. Bardy, et
Vogt,
Commis Greffier.

Extrait des Minutes du Greffe du Tribunal Civil de première instance de l'Arrondissement de Wissembourg, Bas Rhin.

Le Tribunal Civil de première instance de l'arrondissement de Wissembourg a rendu le Jugement suivant:—

Audience du deux Juin, mil huit cent soixante:

Entre Michel Zeiter, cultivateur, domicilié aux Etats Unis d'Amérique, Demandeur, comparant par Maître Volpert, avoué;

Contre M. le Préfet du Bas Rhin, Défendeur, représenté par M. le Procureur Impérial.

Après avoir ouï les conclusions respectives des parties, ainsi que celles du Ministère Public:

Attendu que, par la production du certificat qui lui a été delivré le vingt-huit Mai dernier, par le Consul des Etats Unis à Paris, et qui a été enregistré à Wissembourg aujourd'hui, le Demandeur a justifié qu'il est citoyen Américain:

Le Tribunal donne acte au Demandeur de ce que, par la production du dit certificat, il a satisfait au Jugement rendu en ce Siège le vingt-cinq Avril dernier.

En conséquence dit et reconnait que le Demandeur, Michel Zeiter, par sa naturalisation en pays étranger, a perdu la qualité de Français, et le condamne aux dépens.

Jugé et prononcé à l'audience publique du Tribunal Civil de l'arrondissement de Wissembourg: presents, Messieurs Bardy, Président; Lanth et Stoffel, Juges; et De Ring, substitut du Procureur Imperial.

(Signé) N. Bardy, et
Vogt,
Commis Greffier.

Note.—M. Treitt, who has procured the copy of this paper, states that the Judgment attracted little attention at the time it was given, and that it must not be accepted as a definitive exposition of French Law, on a point which, as he believes, is still open to controversy.

(E.)

Extracts of an Opinion of Mr. Attorney-General Bates, dated November 29, 1862.

Who is a citizen? What constitutes a citizen of the United States? I have often been pained by the fruitless search in our law books and the records of our Courts for a clear and satisfactory definition of the

phrase *citizen of the United States*. I find no such definition, no authoritative establishment of the meaning of the phrase, neither by a course of judicial decision in our Courts nor by the continued and consentaneous action of the different branches of our political Government. For ought I see to the contrary, the subject is now as little understood in its details and elements, and the question as open to argument and to speculative criticism, as it was at the beginning of the Government. Eighty years of practical enjoyment of citizenship, under the Constitution, have not sufficed to teach us either the exact meaning of the word or the constituent elements of the thing we prize so highly.

In most instances, within my knowledge, in which the matter of citizenship has been discussed, the argument has not turned upon the existence and the intrinsic qualities of citizenship itself, but upon the claim of some right or privilege as belonging to and inhering in the character of citizen. In this way we are easily led into errors both of fact and principle. We see individuals, who are known to be citizens, in the actual enjoyment of certain rights and privileges, and in the actual exercise of certain powers, social and political, and we, inconsiderately, and without any regard to legal and logical consequences, attribute to those individuals, and to all of their class, the enjoyment of those rights and privileges and the exercise of those powers as incidents to their citizenship, and belonging to them only in their quality of citizens.

In such cases it often happens that the rights enjoyed and the powers exercised have no relation whatever to the quality of citizen, and might be as perfectly enjoyed and exercised by known aliens. For instance, General Bernard, a distinguished soldier and devoted citizen of France, for a long time filled the office of General of Engineers in the service of the United States, all the time avowing his French allegiance, and, in fact, closing his relations with the United States by resigning his commission and returning to the service of his own native country. This and all such instances (and they are many), go to prove that in this country the legal capacity to hold office is not confined to citizens, and therefore, that the fact of holding any office for which citizenship is not specially prescribed by law as a qualification is no proof that the incumbent is an American citizen.

Again, with regard to the right of suffrage, that is the right to choose officers of Government, there is a very common error to the effect that the right to vote for public officers is one of the constituent elements of American citizenship, the leading faculty indeed of the citizen, the test at once of this legal right, and the sufficient proof of his membership of the body politic. No error can be greater than this, and few more injurious to the right understanding of our Constitutions and the actual working of our political Governments. It is not only not true in law or in fact, in principle or in practice, but the reverse is conspicuously true; for I make bold to affirm that, viewing the nation as a whole, or viewing the States separately, there is no district in the nation in which a majority of the known and recognized citizens are not excluded by law from the right of suffrage. Besides those who are excluded specially on account of some personal defect, such as paupers, idiots, lunatics, and men convicted of infamous crimes, and, in some States, soldiers, all females and all minor males are also excluded. And these, in every community make the majority; and yet, I think, no one will venture to deny that women and children, and lunatics, and even convict felons may be citizens of the United States.

Our code (unlike the codes of France, and perhaps some other nations) makes no provision for loss or legal deprivation of citizenship. Once a citizen whether *natus* or *datus*,) as Sir Edward Coke expresses it,) always a citizen, unless changed by the volition and act of the individual. Neither infancy nor madness nor crime can take away from the subject the quality of citizen. And our laws do, in express terms, declare women and children to be citizens. See, for one instance, the Act of Congress of February 10, 1855, 10 Stat., 604.

The Constitution of the United States does not declare who are and who are not citizens, nor does it attempt to describe the constituent elements of citizenship. It leaves that quality where it found it, resting upon the fact of home, birth, and upon the laws of the several States. Even in the important matter of electing members of Congress it does no more than provide that "the House of Representatives shall be composed of "members chosen every second year *by the people* of the "several States, and the *electors* in the several States shall "have the qualifications requisite for the electors of the "most numerous branch of the State Legislature." Here the word *citizen* is not mentioned, and it is a legal fact, known of course to all lawyers and publicists, that the constitutions of several of the States, in specifying the qualifications of electors, do altogether omit and exclude the words *citizen* and *citizenship*. I will refer, in proof, to but three instances.

1. The Constitution of Massachusetts, adopted in 1779-80, in Article 4 of section 3, cap. 1, provides as follows:—"Every *male person*, being twenty-one years "of age, and *resident* of a particular town in this Com-"monwealth for the space of one year next preceding, "having a freehold estate within the same town of the "annual income of three pounds, or any estate of the "value of sixty pounds, shall have the right to vote in "the choice of representative or representatives for "said town."

2. The Constitution of North Carolina, adopted in 1776, after a Bill of Rights, and after reciting that "whereas allegiance and protection are, in their nature, "reciprocal, and the one should of right be refused "where the other is withdrawn," declares, in section 8, "that all *freemen* at the age of twenty-one years, who "have been *inhabitants* of any one county within the "State twelve months immediately preceding the day of "any election, and shall have paid public taxes, shall "be entitled to vote for members of the House of Com-"mons for the county in which he resides."

3. The Constitution of Illinois, adopted in 1818, in Article 2, section 27, declares that "in all elections all "*white male inhabitants* above the age of twenty-one "years, having resided in the State six months next "preceding the election, shall enjoy the right of an "elector; but no person shall be entitled to vote except "in the county or district in which he shall actually "reside at the time of the election."

These three Constitutions belong to States widely separated in geographical position, varying greatly from each other in habits, manners, and pursuits, having different climates, soils, productions, and domestic institutions, and yet not one of the three has made *citizenship* a necessary qualification for a voter; all three of them exclude all females, but only one of them (Illinois) has excluded the black man from the right of suffrage. And it is historically true that the practice has conformed to the theory of those Constitutions respectively; for without regard to citizenship, the coloured man has not voted in Illinois, and freemen of all colours have voted in North Carolina and Massachusetts.

From all this it is manifest that American citizenship does not necessarily depend upon nor co-exist with the legal capacity to hold office and the right of suffrage, either or both of them. The Constitution of the United States, as I have said, does not define citizenship; neither does it declare who may vote, nor who may hold office, except in regard to a few of the highest national functionaries. And the several States, as far as I know, in exercising that power act independently and without any controlling authority over them, and hence it follows that there is no limit to their power in that particular but their own prudence and discretion: and therefore we are not surprised to find these faculties of voting and holding office are not uniform in the different States, but are made to depend upon a variety of facts, purely discretionary, such as age, sex, race, colour, property, residence in a particular place, and length of residence there.

On this, point, then, I conclude that no person in the United States did ever exercise the right of suffrage in virtue of the naked, unassisted fact of citizenship. In every instance the right depends upon some additional fact and cumulative qualification, which may as perfectly exist without as with citizenship.

I am aware that some of our most learned lawyers and able writers have allowed themselves to speak upon this subject in loose and indeterminate language. They speak "of all the rights, privileges, and immunities guaranteed "by the Constitution to the citizen" without telling us what they are. They speak of a man's citizenship as defective and imperfect, because he is supposed not to have "all the civil rights" (all the *jura civitatis*, as expressed by one of my predecessors), without telling what particular rights they are nor what relation they have, if any, with citizenship. And they suggest, without affirming, that there may be different grades of citizenship, of higher and lower degree in point of legal virtue and efficacy; one grade "in the sense of the Constitution," and another inferior grade made by a State and not recognized by the Constitution.

In my opinion the Constitution uses the word citizen only to express the political quality of the individual in his relations to the nation; to declare that he is a member of the body politic, and bound to it by the reciprocal obligation of allegiance on the one side and protection on the other. And I have no knowledge of any other kind of political citizenship, higher or lower, statal or national; or of any other sense in which the word has been used in the Constitution, or can be used properly in the laws of the United States. The phrase "a citizen of the United States," without addition or qualification, means neither more nor less than a member of the nation. And all such are, politically and legally, equal—the child in the cradle and its father in the Senate are equally citizens of the United States; And it needs no argument to prove that every citizen of a State is, necessarily, a citizen of the United States; and to me it is equally clear that every citizen of the United States is a citizen of the particular State in which he is domiciled.

And as to voting and holding office, as that privilege is not essential to citizenship, so the deprivation of it by law is not a deprivation of citizenship. No more so in the case of a negro than in case of a white woman or child.

In common speech the word citizen, with more or less of truth and pertinency, has a variety of meanings. Sometimes it is used in contrast with *soldier*; sometimes with *farmer* or *countryman* sometimes with *alien* or *foreigner*. Speaking of a particular man we ask, Is he a citizen or a soldier? meaning is he engaged in civil or military pursuits? Is he a citizen or a countryman? meaning. does he live in the city or in the country? Is he a citizen or an alien? meaning, is he a member of our body politic or some other nation? The first two predicates relate only to the pursuits and to the place of abode of the person. The last is always and wholly political, and concerns only the political and governmental relations of the individual. And it is only in this last sense, the political, that the word is ever used in the Constitution and statutes of the United States.

We have *natural-born* citizens (Constitution, article 2, § 5), not made by law or otherwise, but *born*. And this class is the large majority; in fact, the mass of our citizens; for all others are exceptions specially provided for by law. As they become citizens in the natural way *by birth*, so they remain citizens during their natural lives, unless, by their own voluntary act, they expatriate themselves, and become citizens or subjects of another nation. For we have no law (as the French have) to *decitizenise* a citizen, who has become such either by the natural process of birth, or by the legal process of adoption. And in this connexion the Constitution says not one word, and furnishes not one hint, in relation to the colour or to the ancestral race of the "natural born citizen." Whatever may have been said in the opinions of judges and lawyers, and in State statutes, about negroes, mulattoes, and persons of colour, the Constitution is wholly silent upon that subject. The Constitution itself does not *make* the citizens (it is, in fact, made by them). It only intends and recognizes such of them as are natural—home-born—and provides for the *naturalization* of such of them as were alien—foreign-born—making the latter, as far as nature will allow, like the former.

And I am not aware of any provision in our laws to warrant us in presuming the existence, in this country, of a class of persons intermediate between citizens and aliens. In England there is such a class, clearly defined by law, and called *denizens*. "A denizen (says Sir "William Blackstone) is an *alien born*, but who has "obtained, *ex donatione regis*, letters patent to make "him an English subject; a high and incommunicable "branch of the *royal preroyatixe*. A denizen is in a kind "of middle state between an alien and a natural born "subject, and partakes of both of them."—*Sharwood's Com.*, 374). In this country I know of but one legal authority tending to show the existence of such a class among us. One of my learned predecessors, Mr. Legaré (4 *Opin.*, 147) supposes that there may be such a class, and that free coloured persons may be ranked in it. Yet, in that same opinion, he declares that a "free "man of colour, a *native* of this country, may be admitted "to the privileges of a pre-emptioner under the 10th "section of the Act of the 4th September 1841." And that Act declares that a pre-emptioner must be either a citizen of the United States or a person who had declared his intention to become a citizen, as required by the naturalization laws. Of course, the "coloured man" must have been *citizen* or he could not have entered the land under that Act of Congress. If not a citizen *then*, by virtue of his native birth, he never could become one by force of law, for our laws extend the privileges of naturalization to such persons only as are "*aliens*, being free *white* persons," and he was neither; not alien, because natural-born in the country, and not a free *white* person, because, though free, confessedly "a man of colour."

As far as I know, Mr. Secretary, you and I have no better title to the citizenship which we enjoy than "the accident of birth"—the fact that we happened to be born in the United States. And our Constitution, in speaking of *natural-born citizens*, uses no affirmative language to make them such, but only recognizes and re-affirms the universal principle, common to all nations, and as old as political society, that the people born in a country do constitute the nation, and, as individuals, are *natural* members of the body politic.

If this be a true principle, and I do not doubt it, it follows that every person born in the country is, at the moment of birth, *primâ facie* a citizen; and he who would deny it must take upon himself the burden of proving some great disfranchisement strong enough to override the "*natural-born*" right as recognized by the Constitution in terms the most simple and comprehensive, and without any reference to race or colour, or any other accidental circumstance.

That nativity furnishes the rule, both of duty and of right, as between the individual and the government, is a historical and political truth so old and so universally accepted that it is needless to prove it by authority. Nevertheless, for the satisfaction of those who may have doubts upon the subject, I note a few books, which, I think, cannot fail to remove all such doubts—Kent's Com., vol. 2, part 4, sec. 25; Bl. Com., book 1, ch. 10, p. 365; 7 Co. Rep., Calvin's case; 4 Term Rep., p. 300. Doe v. Jones; 3 Pet. Rep., p. 246, Shanks v. Dupont; and see a very learned treatise, attributed to Mr. Binney in 2 Am. Law Reporter, 193.

In every civilized country the individual is born to duties and rights—the duty of allegiance and the right to protection; and these are co-relative obligations, the one the price of the other, and they constitute the all sufficient bond of union between the individual and his country, and the country he is born in, *is, primâ facie, his* country. In most countries the old law was broadly laid down that this natural connexion between the individual and his native country was perpetual; at least, that the tie was indissoluble by the act of the subject alone.—(See Bl. Com. *supra.*) 3 Pet. Rep.

But that law of the perpetuity of allegiance is now changed, both in Europe and America. In some countries by silent acquiescence; in others by affirmative legislation. In England, while asserting the perpetuity of natural allegiance, the King, for centuries past, has exercised the power to grant letters of denization to foreigners, making them English subjects, and the Parliament has exercised at pleasure the power of naturalization.

In France the whole subject is regulated by written law, which plainly declares who are citizens (*citoyens Français*) and who are only *the* French (*Français*), meaning the whole body of the French people.—(See *Les Codes Français titre premier.*) And the same law distinctly sets forth by what means citizenship and the quality of *French* may be lost and regained; and maintains fully the right of expatriation in the subject, and the power of naturalization in the nation to which he goes.

In the United States it is too late now to deny the political rights and obligations conferred and imposed by nativity; for our laws do not pretend to create or enact them, but do assume and recognize them as things known to all men, because pre-existent and natural; and therefore things of which the laws must take cognizance. Acting out this guiding thought, our Constitution does no more than grant to Congress (rather than to any other department) the power "to establish a *uniform rule* of naturalization." And our laws made in pursuance thereof indue the made citizen with all the rights and obligations of the natural citizen. And so strongly was Congress impressed with the great legal fact that the child takes its political status in the nation where it is born, that it was found necessary to pass a law to prevent the *alienage* of children of our known fellow-citizens who happen to be born in foreign countries. The Act of February 10, 1855, 10 Statutes, 604, provides that "persons," (not *white* persons) "persons "heretofore born, and hereafter to be born, out of the "limits and jurisdiction of the United States, whose "fathers were or shall be at the time of their birth, citi-

" zens of the United States, shall be deemed and consi-
" dered and are hereby declared to be citizens of the
" United States: *Provided, however,* That the rights of
" citizenship shall not descend to persons whose fathers
" never resided in the United States."

" SEC. 2. *And be it further enacted,* That any woman who might lawfully be naturalized under the existing laws, married, or who shall be married to a citizen of the United States, shall be deemed and taken to be a citizen."

But for that Act, children of our citizens who happen to be born at London, Paris, or Rome, while their parents are there on a private visit of pleasure or business, might be brought to the native home of their parents, only to find that they themselves were aliens in their father's country, incapable of inheriting their father's land, and with no right to demand the protection of their father's government.

That is the law of birth at the common law of England, clear and unqualified; and now, both in England and America, modified only by Statutes, made from time to time, to meet emergencies as they arise.

Every citizen of the United States is a competent member of the nation, with rights and duties, under the Constitution and laws of the United States, which cannot be destroyed or abridged by the laws of any particular State. The laws of the State, if they conflict with the laws of the nation, are of no force. The Constitution is plain beyond cavil upon this point. Article 6: " This Constitution, and the laws of the United States
" which shall be made in pursuance thereof, and all
" treaties, &c., shall be the supreme law of the land, and
" the judges in *every State* shall be bound thereby, any-
" thing in the constitution or laws of *any State* to the
" contrary notwithstanding." And from this I assume that every person who is a citizen of the United States, whether by birth or naturalization, holds his great franchise by the laws of the United States, and above the control of any particular State. Citizenship of the United States is an integral thing, incapable of legal existence in fractional parts. Whoever, then, has that franchise is a whole citizen and a citizen of the whole nation, and cannot be (as the argument of my learned predecessor seems to suppose) such citizen in one State and not in another.

I fully concur in the statement that " the description,
" *citizen of the United States,* used in the Constitution,
" has the same meaning that it has in the several acts of
" Congress passed under the authority of the Constitu-
" tion." And I freely declare my inability to conceive of any second or subordinate meaning of the phrase as used in all those instruments. It means in them all the simple expression of the political status of the person in connexion with the nation—that he is a member of the body politic. And that is all it means, for it does not specify his rights and duties as a citizen, nor in any way refer to such " rights, privileges, and immunities " as he may happen to have, by State laws or otherwise, over and beyond what legally and naturally belong to him in his quality of citizen of the United States. State laws may and do, nay must, vest in individuals great privileges, powers, and duties which do not belong to the mass of their fellow-citizens, and in doing so they consult discretion and convenience only. One citizen, who happens to be a judge, may, under proper circumstances sentence another to be hanged, and a third, who happens to be governor, may grant a pardon to the condemned man, who, *as a citizen,* is the undoubted peer of both the judge and the governor.

The Constitution, I suppose, says what it means, and does not mean what it does not say. It says nothing about " the high characteristic privileges of a citizen of the State " (of Virginia or any other). I do not know what they were, but certainly in Virginia, for the first half of the existence of the commonwealth, the right of suffrage was not one of them. For during that period no man ever voted there *because* he was a free white adult male citizen. He voted on his freehold, in land; and no candidate, in soliciting his election, appealed to the people or to the citizens, but to the *freeholders* only, for they alone could vote

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(F.)

Chief Baron Pigott's refusal of a mixed jury in Warren's case.

The *Chief Baron.*—My learned brother and I do not entertain the least doul as to the course we ought to adopt in reference to this proceeding. It is essential to sustain the application; and assuming the Court has the power to grant it, the practice has been invariably to award a *jure de medietate,* as it is called, wherever an alien claims it. But assuming the authority of the Court, upon which I will not now cast the slightest doubt, it is perfectly plain the person who claims a jury *de medietate linguæ* must *be* an alien. It is *very* truly put by the counsel for the prisoner, that what the prisoner contends for in the present case is, that by reason of what appears—assuming the statement to be fact—what appears stated in the suggestion, he is an alien, and he is not now under the allegiance of the Queen, I cannot allow that proposition to be put forward without meeting it with a prompt and unhesitating denial. According to the law of England, a law which has been administered without any variation or doubt from the very earliest times, he who once is under the allegiance of the English sovereign remains so for ever. It would be really almost pedantry for me to cite authorities on that subject. They are familiar to every lawyer. I shall cite one English authority, and I shall then cite some American authorities of the greatest weight and highest reputation. In the first volume of Blackstone's Commentaries, pages 269 and 270, the law is thus stated:—

" Allegiance, both express and implied, is, however, distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. Natural allegiance is such as is due from natural-born subjects. This is a tie which cannot be severed or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature. An Englishman who removes to France or to China, owes the same allegiance to the King of England there as at home, and 20 years hence as well as now. For it is a principle of universal law that the natural-born subject of one prince cannot by any act of his own, no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former, for this natural allegiance was intrinsic and primitive, and antecedent to the other, and cannot be divested without the concurrent act of that prince to whom it was first due. Indeed the natural born subject of one prince, to whom he owes allegiance, may be entangled by subjecting himself absolutely to another, but it is his own act that brings him into these straights and difficulties of owing service to two masters; and it is unreasonable, that, by such voluntary act of his own, he should be able at pleasure to unloose those bonds by which he is connected to his natural prince."

Blackstone then proceeds to show that local allegiance, which by foreigners is due to the monarch, continues so long as the foreigners reside within the kingdom. The maxim of the law on this subject, referred to by Sir Michael Foster, page 184 of his Treatise, and referred to by a variety of other authorities, is *nemo potest exuere patriam.* I said I would only refer to one English authority; I have brought down, with a view to some possible matter which might have arisen, some American authorities, and I don't think it is unuseful to cite these authorities on the subject now before us. In Storey's " Conflict of Laws," page 23, section 21, referring to the general maxim or rule, that the laws of one State do not bind property or persons in another, he says:—

" Upon this rule there is often engrafted an exception of some importance to be rightly understood. It is that although the laws of a nation have no direct binding force or effect, except upon persons within its own territories; yet that every nation has a right to bind its own subjects by its own laws in every other place. In one sense this exception may be admitted to be correct and well founded in the practice of nations; in another sense it is incorrect, or at least it requires qualification. Every nation has hitherto assumed it as clear that it possesses the right to regulate and govern its own native-born subjects everywhere, and consequently that its laws extend to and bind such subjects, at all times and in all places. This is commonly adduced as a consequence of what is called natural allegiance; that is, of allegiance to the government of the territory of a man's birth. Thus, Mr. Blackstone says, natural allegiance is such as is due from all men born within the king's dominions immediately upon their birth."

He then proceeds to quote the passage from Blackstone which I have cited. In Chancellor Kent's Commentaries, in the 2nd volume, page 42, the following is laid down as English law. He is expounding the

American law; and expounding the American law, founded as it is on the law of England, he says:—

"It is the doctrine of the English law, that natural born subjects owe an allegiance which is intrinsic and perpetual, and which cannot be divested by any act of their own."

He then cites an English authority, in the case of M'Donnell, who was tried for high treason in 1746, by Lord Chief Justice Lee, and who, he says—

"Though born in England, had been educated in France, and spent his riper years there. His counsel spoke of the doctrine of natural allegiance as slavish and repugnant to the principles of their Revolution. The Court, however, said that it had never been doubted that a subject born, taking a commission from a foreign prince and committing high treason, was liable to be punished, as a subject, for that treason. They held that it was not in the power of any private subject to shake off his allegiance, and transfer it to a foreign prince; nor was it in the power of any foreign prince, by naturalizing or employing a subject of Great Britain, to dissolve the bond of allegiance between that subject and the Crown. Entering into foreign service without the consent of the sovereign, or refusing to leave such service when required by proclamation, is held to be a misdemeanour at common law."

Chancellor Kent then deals with the question, how far the doctrine of the English law prevails in America, he says:—

"It has been a question (here he leaves the English law, and proceeds to expound the other) frequently and gravely argued, both by theoretical writers and in frequent discussions, whether the English doctrine of perpetual allegiance applies in its full extent to this country."

That is, whether in America that doctrine is recognized. Its recognition there or repudiation could not in the slightest degree affect this country or its tribunals. Chancellor Kent then proceeds with an elaborate review of the authorities, and he closes thus, stating his view of the American law:—

"From this historical review of the principal discussions in the Federal Courts on this interesting subject of American Jurisprudence, the better opinion would seem to be that—a citizen cannot renounce his allegiance to the United States without the permission of Government, to be declared by law; and that, as there is no existing legislative regulation on the case, the rule of the English common law remains unaltered."

I have thought it right to cite these two great American authorities—Mr. Justice Storey in his book on the Conflict of Laws; that is, on the laws of nations as they relate to each other—and Chancellor Kent expounding the law of America, and expounding it in the first instance by an exposition of the law of England, which is its foundation. We in our courts have been in the habit of treating, not merely with respect but with reverence, these two great lights of the laws of America. We have cited them in our courts of justice; they have been quoted in our forensic discussions. The principles laid down by them in interpreting in America the laws of England as they are adopted there, have been approved and adopted by some of the ablest judges that have sat on the British bench. Mr. Justice Storey was himself a great judge. So was Chancellor Kent; and some of the finest contributions that have ever been made to the science of jurisprudence, or to the law of England as a science, have been made by these two great men from whose works I have read these passages. I have thought it not unuseful since I had the opportunity of doing so, of stating that this was the law as laid down by the great authorities in America, because I think it is desirable that they who in America formed views—I will say no more now than that—with respect to what is passing, or what is expected to pass, within the dominions of the Crown of England, should be aware of the obligations imposed on them if they have ever been under the allegiance of the Crown of England; and how, according to the laws of England, they may be dealt with when they are found here. For these reasons we are of opinion that the objection made by the Attorney-General is well founded, and that we ought not to comply with this application, and that the prisoner is not entitled to a jury *de medietate linguæ*.

(G.)

Memorandum on Prussian Laws.

(Translation.)

By the terms of section 1 of the law of 3d September 1814 (Collections of Laws for the Year 1814, p. 79), every Prussian subject who has attained the age of 20 full years is obliged to serve in the army.

In consequence in each year all the young men of that age must present themselves at a certain time before the Military Commission of the circle in which they are domiciled, to be examined as to their fitness to render service, and designated, the case happening, to the detachment in which they are to be incorporated.

This obligation to present themselves for service is not extinguished by time. Whoever does not appear at the point indicated, is held to serve at a more advanced age; and if he can be got hold of, is enrolled under the flag before any other.

Service in the army in active employ lasts three years.—(Section 6 of the law above mentioned.)

During the two years following the soldier is dismissed on leave, and belongs to the reserve; thenceforward he is not called into service until a war, or an increase of the active force requires it.

After the expiration of these two years, the soldier passes for seven years into the first levy of landwehr (Land-guard), which, in time of peace, musters only annually for some weeks of drill.

These seven years completed the soldier becomes a member for seven years longer of the second levy of the landwehr, which is only called out in time of war.

Whoever evades the duties of the landwehr is obliged to take part therein at a later time, and his more advanced age does not exempt him from such call.

Emigration is not permitted, except with express leave from the Government. This permission cannot be granted to males between 17 and 25 years of age, unless they produce a certificate from the Commission for Recruiting the Army, testifying that they do not propose to expatriate themselves for the sole purpose of evading their military obligations.—(Section 17 of the law of 31st of December 1842, on the mode in which the quality of subject of Prussia acquired and lost. Bulletin of the Laws of the year 1843, p. 15, *et seq.*)

This certificate serves also as a guide when it is required to determine if there is reason to grant to minors authority to emigrate with their parents.

Soldiers belonging to the army in active service, or to the reserve, do not obtain leave to expatriate themselves until they have been dismissed.

On the other hand, the service in the first or second levy of the landwehr does not prevent the person who may still be subject to such service from disengaging himself from the ties which bind him to his native land; one exception alone is made to this regulation, which is when the landwehr is called into active service.

Whoever leaves Prussia without permission, and thereby evades service either in the army, in active service, or the landwehr, incurs a penalty of 50 to 1,000 crowns, or incurs an imprisonment of one month to one year.—(§ 110 of the Penal Code of April 14, 1851.)

But the payment of the penalty, or the infliction of the punishment of imprisonment does not dispense with the obligation to render the military service. This obligation continues the rather until he who may have neglected his duty discharges it completely.

Proceedings are taken against such persons the moment it is perceived that they are unlawfully absent, and without regard to the age they may meantime have attained.

The permission to emigrate, of which a formula is annexed to this Memorandum, puts an end to the quality of Prussian subject (§ 20 of the Law of December 31, 1842), and whoever has obtained it is no longer under any obligation to serve in the army. Unless there be a formal exception, this permission embraces also the wife of the individual to whom it has been granted, as well as the minor children, who are still subject to the paternal authority.

Berlin, January 6, 1859.

Form.

(Translation.)

The undersigned Royal Government certifies hereby, that a permit of emigration has been granted to [name, profession, residence], at his request, and for his emigration to . with his wife, formerly Miss

and the following minor children still being under the authority of the father:

[Name and time of their birth.]

This permit of emigration causes the loss of the quality of Prussian subject from the date of its delivery, only, however, for those persons expressly named therein.

The day of

ROYAL PRUSSIAN GOVERNMENT.

[Seal.]

(No. .)

(H.)

Report by Counsel to the Vienna Embassy on Austrian Laws.

The qualification of an Austrian subject can be attained:

1. By way of birth. The citizenship in the Austrian States is inherent in the children of Austrian subjects from their birth. (Sec. 28 of the Austrian Civil Code.)

2. A female foreigner becomes an Austrian in marrying an Austrian subject. (Decree of the Imperial Chancery, 23d February 1833; No. 2,596.)

3. By an expressed investing a foreigner with the rights of an Austrian subject. (See Sec. 30 of the Civil Code.)

4. By accepting a situation in the Public Service. (Sec. 29 of the Civil Code.)

5. By an uninterrupted residence of 10 years a foreigner can obtain the quality of an Austrian subject, provided that he has during this time not suffered any punishment for crime, and that his behaviour was always respectable. Only on this presumption such a foreigner is to be admitted to take the oath of an Austrian subject. (Sec. 29 of the Civil Code and Aulic Decree of 1st of March 1833.)

6. In conformity with sec. 21 of the Patent, 24th March 1832, an Austrian subject, who has, without legal authorization, emigrated, and consequently lost his rights as an Austrian subject, can be re-established by the grace of His Imperial Majesty.

The rights arising from the quality as an Austrian subject cease:—

1. In consequence of emigration, which can take place with or without the authorization of the competent authorities. (Patent, 24th March 1832; No. 2,557.)

2. For females, on their marrying a foreigner. (Sec. 19 of the Patent, 24th March 1832, No. 2,557.)

Particular Remarks.—It is nearly impossible to give a distinct and coherent summary of all the laws concerning the mode of acquiring the quality of an Austrian subject, and the mode of losing it. The first and systematic dispositions regarding this matter are contained in the Austrian Civil Code. They have, however, experienced in the course of time so many alterations, that the Code can no longer be considered as the principal source regulating such matters. The above cited laws, copies of which accompany this note, contain most of the now existing rules. There are besides some which exercise a certain influence on the subject, even if they have not been issued with the intention to give a new rule of attaining the quality of an Austrian subject. So, for instance, the now existing law in regard to trade does no longer maintain the distinction between business requiring a regular domicile in a certain place and other undertakings. Therefore the establishing of a business requiring a regular domicil can no longer be considered as a mode of acquiring the quality of an Austrian subject. This is the more accurate, as foreigners, according to this law are fully entitled to carry on such business in this country without undergoing any alteration of their quality as foreigners. Further, the law concerning the communes establishes the principle that any Austrian subject must be a member of a community in the country. And as no commune (gemeinde) can be compelled to receive a new member against their will, it is a natural consequence that a foreigner who is about to apply for the Austrian citizenship must secure himself the reception in some Austrian community, and that he cannot obtain the citizenship itself without having secured an eventual reception in such an Austrian community.

D. J. Winiwarter.

Vienna, 8th February 1868.

(Inclosure 1.)

Code Civil, sec. 28.)

On acquiert la jouissance complète des droits civils par le droit de bourgeoisie. Le droit de bourgeoisie dans nos Etats héréditaires appartient, par droit de naissance, aux enfants de tout bourgeois Autrichien.

(Inclosure 2.)

(Translation.)

Court Chancery Decree of 23rd February 1833, to all the Chief National Authorities, in pursuance of the Imperial Resolution of 26th January 1833.

His Imperial Royal Majesty has been pleased to decide, in addition to the methods of acquiring Austrian citizenship in the General Code of Civil Law, and in accordance with section 32 thereof, and with section 19 of the Emigration Patent of 24th March 1832 (I. G. S., No. 2,557), that Austrian citizenship may also be acquired by a foreign woman through her marriage with an Austrian citizen.

(Inclosure 3.)

Code Civil, sec. 29.

Les étrangers acquièrent le droit de bourgeoisie Autrichienne en entrant dans un service public, en entreprenant une industrie dont l'exercice exige un domicile habituel dans le pays; par un séjour non interrompu de dix années dans nos Etats, sous la condition toutefois que, dans ce laps de temps, l'étranger ne se sera attiré aucune peine à raison d'un délit.

(Inclosure 4.)

Code Civil, sec. 30.

On peut aussi, sans l'exercice d'une industrie ou d'un metier, et avant l'écoulement de dix années, se pourvoir auprès des autorités politiques pour obtenir le droit de bourgeoisie, et celles-ci pourront l'accorder suivant l'état de la fortune, la capacite industrielle, et la moralité du demandeur.

(Inclosure 5.)

Abstract of an Ordinance by Francis I., Emperor of Austria, respecting the Emigration or Expatriation and unauthorized absence of his subjects from their country, applicable to his German States, to Lombardy and Venice, Dalmatia, Galacia, and Lodomeria.

I. *Emigration or Expatriation.*—Any Austrian subject who leaves his own country for a foreign State without the intention of returning is to be considered as an emigrant.

II. *Lawful Emigration.*—Those who wish to emigrate must apply to the proper authority to be released from their Austrian citizenship. They must prove that they are self-dependent, and in the free exercise of their rights; they must state what members of their family are to emigrate with them; prove that they have all fulfilled their military liabilities; and show that no hindrances exist in regard to public duties. Should the application be rejected, recourse may be had to the Privy Council.

III. *Unauthorized Expatriation.*—Those who go to a foreign country without leave, with the expressed or apparent intention to return no more are to be considered as unauthorized emigrants. Such intention is shown by the acceptance of foreign citizenship, or a foreign, civil, or military office without special permission; by joining a foreign religious institution or other association out of the Empire, requiring personal attendance; by staying abroad for five years without having property or business there requiring such absence, and if the family and property of the emigrant be withdrawn from the country; by staying abroad for 10 years without the previous conditions; by non-obedience to a summons of recall to the Austrian States, issued by the Authorities. The five and 10 years periods are not applicable to Austrian subjects residing in States with which Austria has Treaties of free emigration.

IV. *The Effects of Emigration.*—Those who emigrate with permission lose their character as Austrian subjects and are treated as foreigners. Those who emigrate without permission lose their rights of citizenship, and

are liable to all the legal consequences of that loss; they lose the rank and advantages which they held in Austria, and are struck off the registers; they can neither acquire nor transfer property where this law applies; any previous testamentary dispositions with regard to such property become void; their inheritances go to the next heir after them. Their property is sequestered without prejudice to the claims thereon. Their children or descendants resident in the State are suitably maintained out of the sequestrated property. The net overplus goes to increase the property, the whole of which reverts to the heirs at the death of the expatriated owners. In special cases the Sovereign can allow the children to enjoy the sequestrated property.

V. *The Children of Unauthorized Emigrants.*—Those who are born before sentence has been passed against the father do not lose their Austrian citizenship or their position during their minority, nor for 10 years after coming of age if the father be still living; nor for one year after his death, if within the 10 years; nor for three years after coming of age if the father die before they do so; and they enter upon their full rights if they return to the Austrian States within those periods. This favour is also applicable to children sent to reside abroad by an Austrian subject living himself in the country. Such children are, however, to be looked upon as foreigners if they have acquired citizenship abroad, or if they do not claim the reserved rights within the prescribed periods.

VI. *Female Subjects married to Foreigners.*—They lose the Austrian citizenship on such marriage, and if they become widows, can only regain it, in the same way as any female foreigner.

VII. *Re-habitation.*—Citizenship can only be re-conferred on unauthorized emigrants by permission of the Sovereign; but those who have emigrated with permission may regain it in the manner prescribed in the General Code of Civil Law. Such regained citizenship is only available in regard to subsequently acquired rights.

VIII. *Unauthorized Absence.*—Subjects who go out of the State without Passports or permission, or who stay away longer than the time fixed, are considered to be absent without authority; and if they cannot justify themselves they are liable for that absence alone to a penalty of from five to 50 florins, or imprisonment for from three to 14 days, and to double the amount of fine and one or more fast days during the imprisonments, if the absence continue for longer than three months.

IX. *Proceedings against unauthorized Emigrants.*—The absentees are to be summoned to appear within a certain time by edicts duly promulgated in newspapers and in the neighbourhoods to which they belong. If they do not appear within the appointed period proceedings are taken against them in the Civil Courts by order of the Government, and their property is sequestrated.

X. *Proceedings against unauthorized Absentees.*—The absentee is first to be summoned by an edict to answer for himself, within three or six months, according to the circumstances; he may justify himself during those periods; if he does not, judgment is passed against him by the competent Court. Appeals are allowed to the superior authority.

XI. *Provisions applicable to the proceedings in both cases.*—If the absentee or emigrant be accused of any criminal act, proceedings are taken in the Criminal Court, and the civil proceedings are stayed meanwhile. The judgment in the criminal proceedings is sent to the Civil Court for its sentence on the absence or expatriation. The sequestration is operative during the criminal proceedings.

XII. *Transitory Provisions.*—Expatriation proceedings pending at the promulgation of this Ordinance are to be adjudged according to it; but if former laws awarded a milder punishment that only is to be inflicted. Sentences passed before the promulgation of this Ordinance remain in full force.

The enactments of the general Civil Code, as well as all military conscription, and police laws applicable to absentees or emigrants retain their full force and validity; all other laws and regulations on the subject are hereby annulled.

Vienna, 24th March 1832.

(Inclosure 6.)

COURT CHANCERY DECREE of 1st March 1833, to all the Chief Authorities of the Country.

(Translation).

His Imperial Royal Majesty has been pleased to command by supreme resolution of the 8th February 1833, that from henceforth Austrian citizenship shall not be acquired by a foreigner through an uninterrupted residence of full 10 years in the countries for which the General Code of Civil Law is binding, until he shall have given the requisite proof thereof to the Chief National Authority of his last dwelling-place; shall have taken the citizen's oath, by order of that Authority, either to itself or at the proper district Court, and shall have received a certificate of his having done so.

The foreigner shall not, however, be allowed to take that oath until the aforesaid Chief National Authority has been fully convinced that throughout the said time, not only has he not rendered himself liable to punishment for any crime, but that his conduct has always been peaceful, obedient to the laws and ordinances of the constituted authorities, and well-mannered, and that by his demeanour and the known tenor of his thoughts, he has never given any real ground for suspicion or complaint.

On the other hand, those foreigners who have, on the day of the publication of this supreme resolution, already completed the 10 years uninterrupted abode in the said countries, are to be allowed to relinquish the Austrian citizenship thereby acquired, by giving proof that they had no intention of becoming Austrian citizens; this proof must, however, be produced absolutely at the latest within six months from the publication of this supreme resolution, as after that time it will no longer be allowed.

(I.)

1.—NATURALIZATION ACT OF 1844.

7 & 8 VICTORIÆ, Cap. 6.—AN ACT to amend the Laws relating to Aliens.—[6th August 1844.]

Whereas it is expedient that the laws now in force affecting aliens should be amended, and that Her Majesty should be enabled to grant to aliens the rights and capacities of British subjects, under such regulations and with such restrictions and exceptions as are herein-after provided: And whereas an Act of Parliament was made and passed in the Twelfth Year of the Reign of His late Majesty King William the Third, intituled "An Act for "the further limitation of the Crown, and better securing "the rights and liberties of the subject;" and another Act of Parliament was made and passed in the First Year of the Reign of His late Majesty King George the First, intituled "An Act to explain an Act made in the "Twelfth Year of the Reign of King William the Third, "intituled 'An Act for the further limitation of the "'Crown, and better securing the rights and liberties "'of the subject;'" and another Act of Parliament was made and passed in the Fourteenth Year of the Reign of His late Majesty King George the Third, intituled "An Act to prevent certain inconveniences that may happen by Bills of Naturalization:" Be it therefore enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that such parts of the said recited Acts of Parliament as are inconsistent with the provisions of this Act shall be repealed.

II. And be it enacted, that so much of the said Act of the First Year of the Reign of King George the First as provides that no person shall hereafter be naturalized unless in the Bill exhibited for that purpose there shall be a clause or particular words inserted to declare that such person shall not thereby be enabled to be of the Privy Council, or a member of either House of Parliament, or to take any office, either civil or military, or to have any grant of lands, tenements, or hereditaments from the Crown to himself or any other person in trust for him, and that no Bill of Naturalization shall hereafter be received in either House of Parliament unless such clause or words be first inserted, be repealed.

III. And be it enacted, that every person now born, or hereafter to be born, out of Her Majesty's dominions, of a mother being a natural-born subject of the United Kingdom, shall be capable of taking to him, his heirs, executors, or administrators, any estate, real or personal, by devise or purchase, or inheritance of Succession.

IV. And be it enacted, that from and after the passing of this Act every alien, being the subject of a friendly State, shall and may take and hold, by purchase, gift, bequest, representation, or otherwise, every species of personal property, except chattels real, as fully and effectually, to all intents and purposes, and with the same rights, remedies, exemptions, privileges, and capacities, as if he were a natural-born subject of the United Kingdom.

V. And be it enacted, that every alien now residing in, or who shall hereafter come to reside in, any part of the United Kingdom, and being the subject of a friendly State, may, by grant, lease, demise, assignment, bequest, representation, or otherwise, take and hold any lands, houses, or other tenements, for the purpose of residence or of occupation by him or her, or his or her servants, or for the purpose of any business, trade, or manufacture, for any term of years not exceeding twenty-one years, as fully and effectually, to all intents and purposes, and with the same rights, remedies, exemptions, and privileges, except the right to vote at elections for Members of Parliament, as if he were a natural-born subject of the United Kingdom.

VI. And be it enacted, that upon obtaining the certificate and taking the oath herein-after prescribed every alien now residing in, or who shall hereafter come to reside in, any part of Great Britain or Ireland, with intent to settle therein, shall enjoy all the rights and capacities which a natural-born subject of the United Kingdom can enjoy or transmit, except that such alien shall not be capable of becoming of Her Majesty's Privy Council, nor a Member of either House of Parliament, nor of enjoying such other rights and capacities, if any, as shall be specially excepted in and by the certificate to be granted in manner herein-after mentioned.

VII. And be it enacted, that it shall be lawful for any such alien as aforesaid to present to one of Her Majesty's Principal Secretaries of State a memorial, stating the age, profession, trade, or other occupation of the memorialist, and the duration of his residence in Great Britain or Ireland, and all other the grounds on which he seeks to obtain any of the rights and capacities of a natural-born British subject, and praying the said Secretary of State to grant to the memorialist the certificate herein-after mentioned.

VIII. And be it enacted, that every such memorial shall be considered by the said Secretary of State, who shall inquire into the circumstances of each case, and receive all such evidence as shall be offered, by affidavit or otherwise, as he may deem necessary or proper for proving the truth of the allegations contained in such memorial; and that the said Secretary of State, if he shall so think fit, may issue a certificate, reciting such of the contents of the memorial as he shall consider to be true and material, and granting to the memorialist (upon his taking the oath herein-after prescribed) all the rights and capacities of a natural-born British subject, except the capacity of being a Member of the Privy Council or a Member of either House of Parliament, and except the rights and capacities (if any) specially excepted in and by such certificate.

IX. And be it enacted, that such certificate shall be enrolled for safe custody as of record in Her Majesty's High Court of Chancery, and may be inspected, and copies thereof taken, under such regulations as the Lord High Chancellor shall direct.

X. And be it enacted, that within sixty days from the day of the date of such certificate, every memorialist to whom rights and capacities shall be granted by such certificate, shall take and subscribe the following Oath; (that is to say,)

"I *A.B.* do sincerely promise and swear, that I will be "faithful and bear true allegiance to Her Majesty Queen "Victoria, and will defend Her to the utmost of my "power against all conspiracies and attempts whatever "which may be made against Her Person, Crown, or "Dignity; and I will do my utmost endeavour to dis- "close and make known to Her Majesty, Her heirs and "successors, all treasons and traitorous conspiracies "which may be formed against Her or them; and I do "faithfully promise to maintain, support, and defend "to the utmost of my power the succession of the "Crown, which succession, by an Act, intituled 'An "'Act for the further limitation of the Crown, and better "'securing the rights and liberties of the subject,' is "and stands limited to the Princess Sophia Electress of "Hanover, and the Heirs of Her Body, being Protes- "tants, hereby utterly renouncing and abjuring any "obedience or allegiance unto any other person claiming "or pretending a right to the Crown of this realm.

"So help me GOD."

Which oath shall be taken and subscribed by such memorialist, and shall be duly administered to him or her, before any of Her Majesty's Judges of the Court of Queen's Bench or Court of Common Pleas or Court of Exchequer, or before any Master or Master Extraordinary in Chancery; and that the Judge or Master or Master Extraordinary in Chancery, whether in England or in Ireland, before whom such oath may be administered, shall grant to the memorialist a certificate of his or her having taken and subscribed such oath accordingly; and such certificate shall be signed by the Judge, Master, or Masters Extraordinary in Chancery, before whom such oath shall be administered.

XI. And be it enacted, that the several proceedings hereby authorized to be taken for obtaining such certificate as aforesaid shall be regulated in such manner as the Secretary of State shall from time to time direct.

XII. And be it enacted, that the fees payable in respect of the several proceedings hereby authorized shall be fixed and regulated by the Commissioners of Her Majesty's Treasury.

XIII. And be it enacted, that all persons who shall have been naturalized before the passing of this Act, and who shall have resided in the United Kingdom during five successive years, shall be deemed entitled to and shall enjoy all such rights and capacities of British subjects as may be conferred on aliens by the provisions of this Act.

XIV. Provided always, and be it enacted, that nothing in this Act shall prejudice or be construed to prejudice any rights or interests, in law or in equity, whether vested or contingent, under any will, deed, or settlement executed by any natural-born subject of Great Britain or Ireland before the passing of this Act, or under any descent or representation from or under any such natural-born subject who shall have died before the passing of this Act.

XV. And be it enacted, that nothing herein contained shall be construed so as to take away or diminish any right, privilege, or capacity heretofore lawfully possessed by or belonging to aliens residing in Great Britain or Ireland, so far as relates to the possession or enjoyment of any real or personal property, but that all such rights shall continue to be enjoyed by such aliens in as full and ample a manner as such rights were enjoyed before the passing of this Act.

XVI. And be it enacted, that any woman married or who shall be married to a natural-born subject or person naturalized shall be deemed and taken to be herself naturalized, and have all the rights and privileges of a natural-born subject.

XVII. And be it enacted, that this Act may be amended or repealed by any Act to be passed in the present Session of Parliament.

2.—Act of 1847.

11 & 12 Vict. Cap. 83.—22d July 1847.

Whereas by divers Acts, statutes, or ordinances enacted by the legislatures of divers of Her Majesty's colonies or possessions abroad provision hath been made for imparting to divers aliens there resident the privileges or some of the privileges of naturalization, to be exercised and enjoyed within the respective limits of such colonies and possessions respectively: and whereas doubts have arisen as to the competency of the said legislatures to enact any such laws, statutes, or ordinances, and as to the validity of the same when so enacted, and it is expedient that such doubts be removed: Be it therefore and it is hereby declared and enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that all Acts, statutes, and ordinances heretofore made and enacted by the legislatures of any of Her Majesty's colonies and possessions abroad for imparting to any person or persons the privileges or any of the privileges of naturalization, to be by such person or persons exercised and enjoyed within the respective limits of such colonies or possessions respectively, shall within such limits have and be taken and reputed to have had from the time of the enactment thereof respectively all such and the same force and effect as doth by law belong to any other law, statute, or ordinance made or enacted by any such respective legislatures.

II. And be it and it is hereby enacted and declared, that all laws, statutes, and ordinances which shall hereafter be made and enacted by the legislatures of any of Her Majesty's colonies or possessions abroad for impart-

ing to any person or persons the privileges or any of the privileges of naturalization, to be by any such person or persons exercised and enjoyed within the limits of any such colonies and possessions respectively, shall within such limits have the force and authority of law, any law, statute, or usage to the contrary in anywise notwithstanding: provided nevertheless, that all such laws, statutes, and ordinances shall be made and enacted in such manner and form, and subject to and in conformity with all such rules as now are or hereafter shall be in force in respect of other laws, statutes, or ordinances enacted or to be enacted by any such legislatures respectively, and shall and may be confirmed or disallowed by Her Majesty in such and the same manner, and subject to the same rules and regulations as extend or as shall hereafter extend to the confirmation or disallowance of any other such laws, statutes, or ordinances.

III. And whereas a certain Act was made and enacted in the seventh and eighth year of the reign of Her present Majesty, intituled "An Act to amend the laws relating to aliens:" and whereas doubts have arisen whether the said recited Act of the seventh and eighth year of Her Majesty's reign extends to and is in force in Her Majesty's colonies or possessions abroad; now it is hereby further enacted and declared, that the said recited Act of the seventh and eighth year of Her Majesty's reign, or any part of it, doth not extend to the said colonies or possessions, or to any of them.

IV. And be it enacted, that this Act may be amended or repealed by any other Act of this present session of Parliament.

3.—Form of Certificate.

Secretary of State's Office, Whitehall.

7 & 8 Vict. cap. 66. In pursuance of an Act passed in the session of Parliament holden in the seventh and eighth years of the reign of Her Majesty Queen Victoria, intituled "An Act to amend the laws relating to aliens,"

I hereby certify that *A.B.*, an alien now residing at London, in that part of Great Britain called England, with intend to settle therein, has presented to me, the right honourable *D.E.*, one of Her Majesty's principal Secretaries of State, a memorial, stating, &c. &c., and praying me, as such Secretary of State, to grant him the certificate therein mentioned: and whereas I have inquired into the circumstances of the case, and have received such evidence as I have deemed necessary for proving the truth of the allegations contained in such memorial: now, in pursuance of the power and authority given to me as Secretary of State by the said Act, I hereby grant to the aforesaid *A.B.* (upon his taking the oath prescribed by the said Act) all the rights and capacities of a natural-born British subject, except the capacity of being a member of the Privy Council, or a member of either House of Parliament, and except any rights and capacities of a natural-born British subject out of and beyond the dominions of the British Crown and the limits thereof, other than such as may be conferred upon him by the grant of a passport from the Secretary of State to enable him to travel in foreign parts: provided always, and I do hereby declare, that all the before-mentioned rights and capacities of a natural-born British subject are granted to the aforesaid *A.B.* upon the condition that he shall continue to reside permanently within the United Kingdom, and that if at any time hereafter he shall voluntarily be absent from the United Kingdom for a period of six months at any one time without licence in writing under the hand of one of Her Majesty's principal Secretaries of State, he shall be deemed to have ceased to reside permanently within the United Kingdom, and then and in such case this certificate and all the rights and capacities thereby granted shall absolutely cease and determine.

In witness whereof I have hereto subscribed my name this day of 186

(Signed) *D.E.*

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7 & 8 Vict. Cap. 66. Sect. 10.

And be it enacted, that within sixty days from the day of the date of such certificate, every memorialist to whom rights and capacities shall be granted by such certificate, shall take and subscribe the following oath; (that is to say,)

"I, *A.B.* do sincely promise and swear, that I will "be faithful and bear true allegiance to Her Majesty "Queen Victoria, and will defend her to the utmost "of my power against all conspiracies and attempts "whatever which may be made against Her person, "crown, or dignity; and I will do my utmost endeavour "to disclose and make known to Her Majesty, Her "heirs and successors, all treasons and traitorous conspiracies which may be formed against Her or them "and I do faithfully promise to maintain, support, and "defend to the utmost of my power the succession of "the crown, which succession, by an Act intituled "'An Act for the further limitation of the Crown, and "'better securing the rights and liberties of the subject,' "is and stands limited to the Princess Sophia Electress "of Hanover and the heirs of Her body, being Protestants, hereby utterly renouncing and abjuring any "obedience or allegiance unto any other person claiming "or pretending a right to the Crown of this realm. "So help me GOD."

Which oath shall be taken and subscribed by such memorialist, and shall be duly administered to him or her, before any of Her Majesty's judges of the Court of Queen's Bench or Court of Common Pleas or Court of Exchequer, or before any master or master extraordinary in Chancery, and that the judge or master or master extraordinary in Chancery, whether in England or in Ireland, before whom such oath may be administered, shall grant to the memorialist a certificate of his or her having taken and subscribed such oath accordingly; and such certificate shall be signed by the judge, master or master extraordinary in Chancery, before whom such oath shall be administered.

N.B.—This certificate must afterwards be enrolled in the High Court of Chancery in conformity with section 9.

4.—Form of Letter granting Certificate.

Sir, Whitehall,

I am directed by the Secretary of State to transmit to you herewith the certificate of naturalization, which he has been pleased to grant to you in pursuance of your request.

I am at the same time to explain to you that no certificate or other act of naturalization granted by the British government to an alien, places him beyond the lawful power and control of his native country, unless he has received from the government of such country a certificate of denationalization or been released from his original obligations as a subject or citizen in some other legal way.

I am, &c.

Adolphus F. O. Liddell.

5.—Form of License to be absent from the United Kingdom.

Whereas on the day of in the year of our Lord One thousand eight hundred and *D.E.*, one of Her Majesty's principal Secretaries of State, in pursuance of the statute 7 & 8 Victoria, c. 66, intituled "An Act to amend the laws relating to aliens" did certify that *A.B.* an alien then residing at London, had presented to *D.E.* a memorial praying him to grant to the said *A.B.* the certificate therein mentioned. And whereas *D.E.* after due inquiries (in the said certificate mentioned) did in and by the said certificate grant to the said *A.B.* (on taking the oath therein referred to) all the rights and capacities of a natural-born British subject (except as therein excepted): Provided always that all the said rights and capacities should be and were granted to the said *A.B.* on the condition that he should continue to reside permanently within the United Kingdom, and that if at any time thereafter he should voluntarily be absent from the United Kingdom for a period of six months at any one time without license in writing under the hand of one of Her Majesty's principal Secretaries of State, he should be deemed to have ceased to reside permanently within the United Kingdom, and then and in such case the said certificate and rights and capacities thereby granted should absolutely cease and determine.

Now I the undersigned *F.G.* being one of Her Majesty's principal Secretaries of State, do hereby at the request of the said *A.B.*, and for divers good causes and reasons, give and grant to the said *A.B.* full license to be absent from the United Kingdom for a period of not exceeding months at one time in addition to the said period of six months: Provided always, and

this license is on the condition that if the said *A.B.* shall voluntarily be absent from the United Kingdom for a period exceeding the said months at one time in addition to the said period of months without the further license in writing under the hand of one of Her Majesty's principal Secretaries of State, the said certificate and all the rights and capacities thereby granted, shall, notwithstanding the license, absolutely cease and determine.

In witness whereof I have hereunto subscribed my name this day of 18

(Signed) *F. G.*

6.—Regulations respecting the Issue of Certificates of Naturalization.

Home Office, Whitehall, August 1, 1847.

Regulations by the Secretary of State with reference to Certificates of Naturalization, in pursuance of Statute 7 & 8 Vict. c. 66, intituled "An Act to amend the Laws relating to Aliens."

I. Upon an application to the Secretary of State for the grant of a Certificate of Naturalization, it will be necessary that the applicant should present to one of Her Majesty's Principal Secretaries of State, a Memorial, praying for such grant stating:—

Of what Friendly State he is a Subject?
His Age, Profession, Trade, or other Occupation?
Whether he is Married, and has any Children?
Whether he has any settled place of Residence, and where situated, and how long he has resided within the Kingdom?
Whether he intends to continue to reside permanently within the United Kingdom?
On what grounds he seeks to obtain the Right and Capacities of a Natural-born British Subject?

II. That the memorialist should make a declaration before a Magistrate, or other person authorized to take such declaration, verifying the statements in his memorial.

III. That a declaration* should be made and signed by four householders at least, who should state their places of residence, vouching for the respectability and loyalty of the memorialist, verifying also the several particulars stated in the memorial; and that this declaration should be made in due form, either together or separately, before a magistrate, or other person authorized by law to receive such declaration, in pursuance of the Act passed in the 5th & 6th years of His late Majesty King William IV.

(K.)

Circulars to Her Majesty's Diplomatic and Consular Agents respecting the Grant of Passports and Protection to Naturalized British Subjects.

1.

Foreign Office, January 8, 1851.

Cases having occurred in which the holders of certificates of naturalization, issued by the Secretary of State under the Act 7 & 8 Vict. cap. 66, have put forward claims to receive from Her Majesty's Diplomatic and Consular Agents abroad the same degree of protection to which the natural-born subjects of Her Majesty are entitled, I have to inform

that Her Majesty's Government have deemed it expedient to insert a new clause in the certificates in question, which are now drawn up as follows:—"I hereby "grant to (*A. B.*) all the rights and capacities of a "natural-born British subject, except the capacity of "being a member of the Privy Council, or a member of "either House of Parliament, *and except any rights and "capacities of a natural-born British subject out of and "beyond the dominions of the British Crown and the "limits thereof.*"

I transmit herewith, for your information and guidance, copies of the new form of certificate now in use, and of the Act 7 & 8 Vict. cap. 66; and I have to add that the holders of these new certificates are not entitled to demand British passports, nor to claim in foreign countries British protection for mercantile firms abroad with which their houses of business in this country may be connected.

I am, &c.

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* In most cases the Secretary of State requires that th declaration should also state that the applicant has resided three years in the United Kingdom.

2.

Foreign Office, May 1, 1854.

In order to obviate the inconvenience experienced by holders of certificates of naturalization of not being able to procure passports for travelling on the Continent, Her Majesty's Government have so far relaxed the regulations which were made known to you by the Circular instruction of the 8th of January, 1851, as to add to the clause heretofore inserted in the certificates in question, granting "all the rights and capacities of a "natural-born British subject, except the capacity of "being a member of the Privy Council or a member of "either House of Parliament, and except any rights and "capacities of a natural-born British subject out of and "beyond the dominions of the British Crown and the "limits thereof;" the following words, "other than "such as may be conferred upon him by the grant of a "passport from the Secretary of State to enable him to "travel in foreign parts."

I am, &c.

3.

Sir, Foreign Office, November 17, 1860.

A question having arisen as to the effect of certificates of naturalization granted by the Senate of the Ionian Islands, I am directed by Lord J. Russell to acquaint you that such certificates do not imply that the persons to whom they are granted are entitled to British protection in the countries to which their national allegiance is due.

You will bear this in mind, in all cases of claims to British protection made by persons in virtue of certificates of naturalization granted to them by an Ionian Senate.

I have, &c.

Her Majesty's Consul.

4.

Sir, Foreign Office, December 8, 1860.

It has come to my knowledge that some doubt has been entertained by certain of Her Majesty's Consuls abroad as to the course which they should pursue when application is made to them by persons holding certificates of naturalization as British subjects, for the renewal of passports granted to them by the Secretary of State.

I think it therefore right to explain to you that certificates of British naturalization are ordinarily granted on the assumption that the persons to whom they have been granted have their usual domicile in this country; and in order to prevent any attempt to evade the obligation as regards domicile, the passports granted to persons naturalized as British subjects since the 24th of August 1850, to enable them to travel abroad, contain a limitation as to the time for which such passports are valid.

Her Majesty's Consuls abroad are therefore not authorized to issue new passports to persons naturalized as British subjects since the above-mentioned date, neither are they authorized to extend the period for which passports have originally been granted to naturalized British subjects; the only exception being that passports strictly limited to a return to England may be granted to such persons when their original passports have expired, if applied for within six months after the expiration, the original passport being in that case retained in the Consulate by which the new one is granted,

I am, &c,

Her Majesty's Consul.

5.

Sir, Foreign Office, July 21, 1863.

Earl Russell's attention having been frequently drawn to cases in which foreigners, naturalized in British Colonies, claim British protection from Her Majesty's Representatives and Consuls abroad, I am directed by his Lordship to state to you that the mere fact of a foreigner having been naturalized in a British Colony does not entitle such foreigner to British protection out of the Colony in which the certificate of naturalization may have been granted, nor does it entitle him to claim a British passport.

I am to add, that Her Majesty's Secretary of State for the Colonies will instruct the Governors of British Colonies to make the above principle clearly understood in granting certificates of naturalization.

I am, &c.

Her Majesty's Consul.

6.

SIR, Foreign Office, May 21, 1866.

I HAVE to acquaint you that I have arranged with the Secretary of State for the Colonial Department that I should send instructions to Her Majesty's Ministers and Consuls abroad, directing them to extend to persons naturalized in British Colonies, and holders of Passports either from the Colonial Governors or from the Foreign Office, bearing on the face of them the place of naturalization and the period for which the passports are good, the same protection during that period as they are now in the habit of extending to persons holding passports in which they are described as "naturalized British subjects."

I have to instruct you to act in conformity with this arrangement.

You will understand that passports granted to persons naturalized in the Colonies, like passports granted to naturalized British subjects generally, cannot, as a general rule, be renewed by any of Her Majesty's Ministers or Consuls abroad; but, in order to relieve any such persons from inconvenience in case they should have remained abroad beyond the time specified in their passports, you are authorized in any such cases to give such parties, in exchange for their original passports, passports strictly limited to the time required for a direct journey back to the United Kingdom, or to any of Her Majesty's Possessions abroad; but no second passport of the same kind must be given, without the case being submitted to this Office, to a person who shall appear to have prolonged his stay beyond that limit.

I am, &c.

Her Majesty's Consul.

(L.)

EXTRACT from Mr. Vernon Harcourt's Letter to the "Times" on British Nationality (published in the "Times" of the 12th of February 1868.)

"The point to which I desire to call particular attention is that of criminal jurisdiction over aliens. It is well known what the law of England now is, viz., that, while British subjects are amenable in case of particular offences to trial in this country for acts committed abroad, foreigners cannot be tried here for any offence committed out of the realm. The jurisdiction for offences committed beyond the realm even in the case of British subjects is of comparatively modern growth in our law. Before the reign of Henry VIII., if one British subject killed another abroad he could only be tried by the same military tribunal of the Constable and Marshal, even though the victim died in England, 'because the stroke was given there where no *visne* can come.' (3 Inst., p. 48.) And so strict was the rule of *venue* that it is said, till the time of Edward VI., if the blow was struck in one English county and the death occurred in another, the murderer could not be tried in either. The policy of the statutes of Henry VIII. has been adopted and extended by more recent enactments. But it seemed hardly settled law till the case of 'R. *v.* Sawyer' (2 C. & K.), at the commencement of this century, that an Englishman could be tried for the murder of another Englishman out of the dominions of the Crown. Nor was it ever determined till the case of 'R. *v.* Azzopandi,' that an English subject could be tried in England for the murder of a foreigner abroad. Indeed, to this day many good lawyers doubt the soundness of this last decision. It is, however, clear law that a foreigner cannot be tried in England for the murder either of a foreigner or of an Englishman. ('R. *v.* Lewis,' D. & B., 1857.) Now the result of this state of the law is strange and unsatisfactory enough; if an Englishman and an American are together in a foreign ship or in a foreign land, if the Englishman kills the American and comes to England, he will be hanged; but if the American kills the Englishman and comes to England, he cannot be tried—a consequence not very consistent with the theory that the laws of England are made mainly for the protection of Englishmen. For some offences, like that of murder, a remedy is provided in treaties of extradition, but to many cases, and especially to those of political offences, extradition is not applied; and in all cases extradition is employed at the demand and for the benefit of the country to which the offender is given up, and not of that where he is found. Cases of great barbarity may and do constantly occur which escape with impunity, to the great scandal of law and order. For instance, a foreign ship comes into the Thames or the Mersey. The foreign captain has barbarously ill-used one or more of his foreign crew on the high seas. The victims of his cruelty may languish or even die in our hospitals, yet the offender may walk the streets of London or Liverpool without punishment. Ought such things to be, or ought such a state of law to continue?

"That, historically speaking, this strict rule of the locality of criminal jurisdiction had its origin in England in the curiously technical doctrine of *venue*, I think, cannot be doubted. I do not wish, however, to rest the discussion solely on that ground, because I am quite aware that writers of considerable authority have contended that the locality of criminal jurisdiction is a general and sound principle of law. I do not purpose at this moment to go into that which is a somewhat abstruse question, or to embark your readers in the technical learning of 'real, personal, and mixed statutes,' which the discussions of the civilians have left even darker than they found it. I shall for the present take a rougher, but perhaps not less satisfactory, method, and inquire what is the actual practice of modern nations on the point.

"The American practice is identical with, and derived from, the English doctrine. But that of all, or almost all, the Continental nations differs from it altogether. The French law, in the Code d'Instruction Criminelle, has the following provisions, Arts. 5 and 6:—

"'Tout Français qui se rendra coupable *hors du territoire de la France* d'un crime *attentatoire à la sûreté de l'Etat*, de *contrefaction du sceau de l'Etat*, de *monnaies nationales ayant cours*, de *papiers nationaux*, &c., pourra être poursuivi, jugé, et puni en France d'après les dispositions des lois Françaises.'

"This is, of course, in conformity with the principles of the English law. But then comes the following important provision:—

"Cette disposition pourra être étendue aux étrangers qui, auteurs ou complices des mêmes crimes, seraient arrêtés en France ou dont le Gouvernement obtiendrait l'extradition.'

"Here it will be seen that in respect of foreigners found on French territory (leaving out of consideration for the present the question of extradition) jurisdiction is assumed for a particular class of offences committed abroad—viz., offences against the State. The discussions which took place on the Commission by which the Code was drawn up are reported in the instructive and interesting work of Baron Locré. The arguments on both sides of this particular question when this provision was resolved on will be found in vol. xxiv, p. 112-521. The Arch-Chancellor who presided over the Commission, says:—'Si après avoir machiné dans sa patrie le bouleversement de la nation; et si après avoir donné toutes les suites qu'il a pu à ses projets, il vient ensuite en France, il ne doit pas y jouir de l'impunité,'—a sentiment which is certainly good sense, and which I believe is sound law. It was quite admitted that there might be practical difficulties in enforcing the principle, and that in policy it might be unwise always to press it. Accordingly the word *sera*, in the original draught, was changed into *pourra*, and the power was made discretionary (*facultative*). This is the law of France. That of most of the States of Europe is identical as to the class of offences. The details of the several codes will be found at length in M. Fœlix's excellent book (L. ii, tit. ix, cap. iii). Some States go further, and apply the jurisdiction to other classes of crime, but all, I think, assume it in the case of injury to the State itself. For the present I wish to confine the discussion to this particular class of offences. M. Ortolan, in his 'Eléments de Droit Penal,' where a very good discussion of the whole question will be found, enumerates, if I remember right, about 20 States where these provisions obtain.

"Here, then, we have a concurrence of both the elements which are essential to establish a rule of International Law—viz. (1), the sound principle that a State may, if it chooses, make such a rule with respect to aliens within its jurisdiction; (2), the fact that by the usage of the majority of States such a rule is actually made. Why, then, should we refuse to adopt a rule

which is clearly for the advantage of our own State? If the French law authorizes criminal jurisdiction over an Englishman taken in France for offences committed abroad against the French State, why should the English Government deliberately refuse to arm itself with the same power of self-defence against a Frenchman? We cannot decline their jurisdiction over our subjects in such cases, and why should we not claim our own jurisdiction over their subjects in a similar case?

"These are questions which deserve the attentive consideration of statesmen. My object has been to show that in the principles of International Law they will find no obstacles in adopting such a course, if it is thought on the whole to be politic. That was a necessary preliminary for all those who do not think that nations ought to be governed solely by the question of whether it is 'worth while to go to war,' but, on the contrary, believe there is such a thing as right and wrong even between nations. In writing on such matters I always desire to deal quite fairly with your readers, and to state both sides of the case with impartiality. When questions are settled by authority and open to no reasonable doubt, like those with which I have recently had to deal, there is no occasion to express a hesitation for which there is no ground. It is otherwise with questions like the present, upon which there exists a real and reasonable difference of opinion among competent writers. I confess it was not without some difficulty that I have been able to overcome in my own mind the inveterate prejudice in which an English lawyer is bred in favour of the exclusive doctrine of the locality of criminal jurisdiction. From the best consideration I have been able to give to the matter, I have come to the conclusion that the Anglo-Saxon doctrine and practice on this point is wrong and impolitic, and that the Continental view and law is right and wise. I do not expect that everyone will share this opinion: but I hope I have said enough to induce them, at least, to examine it.

"I do not deny that there may be considerable practical difficulties which may surround the subject in some instances. But that is equally true as to the jurisdiction we already assume in the case of our own subjects for offences committed abroad, and whatever the difficulties may be, they can afford no argument against a discretionary power such as the French law assumes. If France can deal with these difficulties, why cannot we do so? I ought, in fairness to your readers, to tell them that Sir G. C. Lewis—a philosopher and statesman whom all men regard, and for whose judgment I in particular have a peculiar reverence—has, in his pamphlet on Foreign Jurisdiction and Extradition, expressed a preference for the system of extradition over that of this species of jurisdiction. In that paper, full of his characteristic fairness and learning, all that can be said on that side of the question will be found.

"But it should be observed, first of all, that to the particular case of offences which we have been considering extradition is not properly applicable. If a man comes here having committed a crime against the subject of a foreign State, or perhaps against the State itself, extradition is the proper remedy. But the situation of a man who has come here having committed abroad an offence against our own State, or our own subjects, is not in the proper or usual sense of the word an object of extradition. We may say, 'We will not transact your criminal jurisdiction for you, do it for yourself.' We can hardly say the same of crimes that solely concern ourselves. On the other side of the question a paper in the 'American Jurist,' vol. xxii, page 381, by Mr. Luther S. Cushing, of Boston—as excellent a piece of legal reasoning as I have ever met with—is well worthy of consideration. It is satisfactory to find that one of the strongest arguments for such an alteration of law comes from America. It is now generally admitted that the Anglo-Saxon doctrine of allegiance and citizenship must be reviewed. My object has been further to point out that this question cannot and ought not to be taken alone. While we are willing to relax our hold upon persons who have left the realm, we ought to extend and strengthen our jurisdiction over those who may choose to place themselves within its protection and control. It will be observed that if we assume (as we have a right to assume) similar jurisdiction in all respects on all persons, whether subjects or aliens, within the realm, the whole difficulty as to the distinction between native-born and naturalized subjects of foreign States will become immaterial and disappear; for we shall trust them both alike—*i. e.*, as precisely on the same footing as our own subjects.

"I have only indicated in outline the nature of this general scheme for settling a question of great importance and admitted difficulty. Let it be discussed with fairness, and determined with prudence, for it is a matter in which the peace of nations is deeply involved. I believe that, subject to proper limitations and conditions, the real solution will be found in the concurrent admission and establishment of three principles—1. A general right of expatriation. 2. An universal criminal jurisdiction over all persons within a State, whether subjects or aliens, alike, for offences, wheresoever committed, against that State, and, perhaps, against its subjects. 3. A liberal and extended practice of extradition. The obstacles to the settlement of these questions exist not so much in any difficulties of law or considerations of policy, but rather in the combined influence of pride and ignorance operating upon popular prejudice. It is the true and wholesome business of public discussion to enlighten that ignorance, and to mitigate that pride. We are beginning to see that to claim a dominion over persons who have renounced their country is, after all, not such a very fine thing. It requires but a step further to comprehend that a claim to immunity for the crimes of its citizens against other States is not a legitimate object of national ambition; and that to become the great asylum of unpunished rascality is not the best title to the first place in the civilized world. When these things are better understood nations will be less jealous of that which conduces to the mutual advantage of all. They will be less apt to quarrel, and far less eager to fight. "HISTORICUS.

"*Temple, February* 11."

M.

REPORT of the COMMITTEE ON FOREIGN AFFAIRS concerning the RIGHTS of AMERICAN CITIZENS in FOREIGN STATES, in the House of Representatives, January 27, 1868.

Mr. BANKS, from the Committee on Foreign Affairs, reported a bill concerning the rights of American citizens in foreign states, accompanied by the following report, which was ordered to be printed in the "Globe":—

The Committee on Foreign Affairs, to whom was referred "so much of the President's message as relates to our foreign affairs," also House resolutions Nos. 100, 111, 159, and 166, instructing the committee to inquire into and report upon the subject of the rights of American citizens in foreign countries; as well as 63 resolutions and memorials adopted in public meetings held by citizens of different sections of the country, praying that action be taken to secure to citizens of the United States protection abroad, respectfully report:—

The treaty of peace between the United States and Great Britain at the close of the War of Independence left unsettled three subjects of international importance: First, the impressment of seamen; second, the right of search; and third, the question of expatriation. The impressment of seamen had long been practised under the most absolute of the monarchs of England, and little discrimination was there made between subjects and foreigners.

The right to search American vessels had been asserted and exercised by Great Britain from the recognition of American independence. Both claims were justified upon the theory of intrinsic and perpetual allegiance of all persons born subject to the British crown. The enforcement of this doctrine by the arrest and search of American vessels on the high seas, the impressment of American seamen, and the imprisonment of such as would not fight against their country, led to the war with Great Britain in 1812, which resulted in the triumph of our forces by sea and land. The treaty of peace did not in terms surrender these claims, but they were abandoned in practice. No impressment has been attempted since the war closed. A feeble effort to establish the right of search in a qualified form was made in the quintuple

treaty negotiated in 1841, for the ostensible purpose of suppressing the slave trade and piracy, by the five great powers—England, France, Austria, Russia, and Prussia. Having been declined by the United States, and not being ratified by France, the treaty failed. The exercise of the right of search and impressment of seamen, which led to the war of 1812, have therefore been abandoned. But the claim is still maintained. The very earnest appeals of Mr. Webster, made as late as 1842, enforcing the wisdom and public necessity of removing this ground of past complaint and future danger, were promptly but politely rejected.

The question of the right of expatriation, the most important of all, and upon which both these claims rested, still remains unsettled, and under different circumstances becomes one of the most important questions of our day.

At the commencement of the war of 1812 the number of emigrants in the United States did not exceed 120,000. International difficulties prevented any considerable emigration from 1810 to 1816. The actual returns from 1820 to 1867, added to the estimated emigration from 1790 to 1820, show that the total emigration to this country from Europe since the declaration of independence is 6,640,000 persons. No more important question can arise than that which concerns the relations of this portion of the American people to the governments they have abandoned and that of their adoption. The English law holds them and their descendants as British subjects, "at least to the second "generation, and perhaps for ever."* The theory of a double allegiance is discarded, and they and their descendants, even though born of a foreign mother, are inexorably and for ever held to the service of native-born subjects, incapable of disavowing their allegiance to the mother country or of acquiring a legal citizenship in another land, and liable to punishment as traitors if found in a time of war in the army or navy of their adopted country.

During a general war in Europe they would be deprived of the privileges of travel or commerce; and in the event of participation by this Government in such war, which is not impossible, they would be liable to punishment as traitors by European or American governments, whether yielding compulsory service to one or the other. The execution of naturalized citizens of the United States when captured in the American army by the British troops, who claimed them as British subjects during the late war, was only prevented by the President's orders for retaliation on British soldiers. Deprived of recognized citizenship, debarred from the privileges of travel or commerce in peace, and exposed to punishment in time of war, they are without safety and without rights. The commission of public crimes could not more effectually strip them of privileges which in every age and in all parts of the world have been the accompaniments of civilization and freedom. At the opening of our national career Great Britain attempted to enforce her claims upon her natural-born subjects beyond her territorial jurisdiction, arresting American ships and impressing American seamen under their own flag. The actual sufferers were few in number. Now, after the lapse of half a century a similar claim is enforced against a nation of people; not, it is true, as before, upon their own soil or under their own flag, but wherever found within the jurisdiction of other nations. In the first contest their success would have driven American sailors from the ocean. In this it would deprive masses of the American people of privileges that were never denied to any nation, retaining any sense of the value of personal liberty. It is scarcely to be supposed that it can be pressed to this extent; but if the doctrine be inapplicable to masses of people it is unjust that it should be enforced against individual citizens in a manner to disturb the peace of a nation.

The correspondence transmitted to Congress shows that naturalized citizens of the United States being present in Great Britain, without the commission of any offence, have been arrested, tried, convicted, sentenced, and punished as criminals, upon the ground that they were natural-born subjects of the Crown; that their allegiance was perpetual and indefeasible, except by its consent; and that they were therefore subject to its laws and liable to punishment not only for offences committed within its jurisdiction, but for words spoken and acts performed in the United States. They claim the protection of their adopted country which has made them citizens and conferred upon them the same rights both at home and abroad which are enjoyed by native-born Americans. The Government is in duty bound to listen to their appeal, and to protect them in their rights. The President called the especial attention of Congress to this subject in his last annual message.

It is not our province to examine laws of England under which these prosecutions have been conducted; but as the English judges appeal to the law authorities of this country in justification of their course, it may not be inappropriate to consider the origin and nature of the claim of indefeasible and perpetual allegiance to the British Crown. The principal authority cited in its support is found in Blackstone's Commentaries on the Laws of England, as follows:—

"Natural allegiance is such as is due from all men born within the sovereign's dominions, immediately upon their birth; for, immediately upon their birth, they are under the protection of the Crown, at a time, too, when (during infancy) they are incapable of protecting themselves. Natural allegiance is, therefore, a debt of gratitude which cannot be forfeited, cancelled, or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature. An Englishman who removes to France or to China owes the same allegiance to the King of England there as at home, and 20 years hence as well as now; for it is a principal of universal law that the natural-born subject of one prince cannot by any act of his own—no, not by swearing allegiance to another, put off or discharge his natural allegiance to the former; for this natural allegiance was intrinsic and primitive and antecedent to the other, and cannot be divested without the concurrent act of that prince to whom it was first due."—*Vol. I.* p. 368.

The Commentaries of Blackstone have probably never had greater weight with any people than in this country. In the discussions preceding the Revolution it was the authority mainly relied upon by the colonists in their contest with the mother country for constitutional liberty. More copies of his work were purchased in America than had been sold in Great Britain up to the time of the Revolution. It is not forgotten, however, that he supported in parliament principles of law in direct opposition to those of his Commentaries. Blackstone was the servant of power, and it was not without justice that Junius said of him that "he recollected he "had a place to preserve, though he forgot he had a "reputation to lose." But the American constitution is itself proof that Blackstone's theory of allegiance was not accepted by the American governments. He claimed for the sovereign absolute power. He left to the subject nothing but servile submission. The American statesmen reversed the proposition. In their system the people were absolute and the ruler a representative only. According to the philosophy of Blackstone the people were a possession of the government. Under the American system the government was the property of the people. They reserved to the body-politic collectively the power of reforming its institutions at pleasure, and left to the people individually the right of transferring their allegiance to other governments whenever the safety of life, the welfare of the subject, or liberty of conscience should demand it.

There are no rules of universal authority by which governments are guided in regulating the rights of subjects. The controversy existing between this country and England, and in a less degree with European states, in regard to the rights conferred by emigration and naturalization is a contest between feudal ideas and those that govern civilized states. Feudalism held all rights dependent upon the possession of the soil. The soil was the gift of the crown. Allegiance was due to the crown and controlled by the place of birth, and all the obligations of the people were summed up in that of personal fidelity to the king. It was more absolute in England as established by William the Conqueror than on the Continent under Charlemagne or the Gothic kings.

The oath of allegiance administered to the landowners of England by William the Conqueror at Salisbury, in 1086, sets forth this obligation and the reason upon which it is founded with more authority than in the paraphrase given us by Blackstone. Observe the oath to the crown: "I BECOME YOUR MAN FROM THIS "DAY FORTH, of life and limb and earthly worship, "and unto you will be faithful, and bear you faith *for* "*the land I hold of you.* So help me God."

The feudal law of Europe claimed allegiance to the crown from the barons, and that of lesser lords and landholders to the barons in turn. The English monarch held all alike in subjection to the crown. Other laws

* "Unless the British Government consents to their ancestor's expatriation, the same posterity must be treated as British at least to the second generation, and perhaps for ever."—*Westlake's Private International Law*, page 23.

extended the principle to strangers, who were required to live and die in the king's quarrels, to serve in his wars, and to lodge only in English houses. The king's writ, *ne exeat Regno*, instead of being limited as now to processes of civil courts, obliged his subjects to remain within the realm, or recalled them from beyond the seas, and this "not merely in respect to attempts pre-judicial to the state, but from the king's right to the attendance and service of his liege men within the realm." No merchant was allowed to remain in the country above 40 days, no host to receive a lodger for more than three nights, and no man to wander from the highway without sounding a horn, under penalty of death.

The doctrine taught by Blackstone is hardly less absolute in principle than these provisions of the laws of Alfred, William, and later kings, upon which his theory is founded. It is unnecessary to say that in this age such doctrines have no claim to respect. The truth is now universally recognized in theory if not in practice: the world belongs to its people. Political institutions are rather for them than for their rulers. Under every form of administration it is now admitted that Governments are *for* the people, if not *by* them; and in this view they claim that "that which is best administered is best."

This is true of European States, but especially of England. The great charters of later English history and the popular rights secured by them attest this fact. The feudal theory of allegiance in England was early modified by the statute of Henry VII., which declared that no one was to be called in question for obeying a king *de facto*: denying the theory of divine right, and recognizing partially the revolutionary doctrines of possession and power. This is regarded as the basis of modern English allegiance.

The revolution of 1688 was the foundation of the present British constitution and overthrew all feudal institutions. The king no longer held power exclusively from tenure, birth, or possession, but by the consent of the people. He obtained from their representatives year by year authority for his Government, and supplies for the maintenance of his army and navy. Instead of being held by the king to the soil on which they were born, the people forbade the king to leave the kingdom without the consent of their representatives. "Sovereignty," they said, "was in the king *with the Parliament*." Without the recognition and support of the representatives of the people he had no power. Such is the comparison which history forces upon us between the Governments of William of Normandy, in 1086, and that of William of Orange, in 1688. And such is the contrast between the principles of allegiance contended for by Blackstone and English judges of the present day, and that which is sustained by the principles of modern history based upon public reason and justice.

Restrictive legislation, which forbade subjects to leave, or strangers to enter the kingdom, has been swept away. The prerogative of kings, though sometimes exercised in such matters during the bloodier periods of European history, has been resisted and its abuse punished with exile or death. The Chinese have been compelled to abandon their system of isolation and exclusion, maintained for many thousand years. Within our own time it has been held by all civilized nations that a government of isolation and exclusion presented in itself just grounds of war.

Such changes in the constitution of England and the States of Europe demonstrate that the doctrine of feudal supremacy, which is the basis of feudal allegiance as now upheld, ought to be without authority or force in any form of government existing in this age.

Having made war upon a nation so distant as that of China, disturbing so little the rest of the world by the movements of her people or the character of her Government, it scarcely becomes the English or European Governments to maintain the principles of absolute and perpetual power over their natural-born subjects, or the supremacy of municipal law against the laws of nations and the progress of civilization.

Of the Service due to Government.

It is not to be denied that there is between the Government and the subject an equitable and mutual interest; neither can it be denied that there is due from every citizen to the Government under which he lives certain obligations, and that the service which is implied by these obligations, whether or not supported by his oath, cannot be cast off without its consent. This is but a just return for the protection which he receives from the Government which attends him from his birth, and secures after death the preservation and disposition of his property according to his will so long as his name or race shall endure. This does not arise so much from any special or implied contract made in the organization of society as from the law of necessity and of nature. It is inherent in every form of civilized society, and is as apparent and as absolute in an unorganized company of individuals as it is in village, city, State, or nation. No man is permitted anywhere among civilized men to look with unconcern upon any outrage inflicted upon the persons or property of a company of which he is a member, without at least signifying to the extent of his ability his opposition to the wrong, and defeating it if in his power. This mutual obligation extends to the protection of property, the preservation of the public peace, as well as to the security of life. The same obligation rests upon a subject in regard to the Government under which he lives. He is bound to assist in its protection, to aid in its support by the contribution of his means or his labour, to maintain its honour unimpaired, to strengthen its capacity for usefulness by the performance of every duty which is necessary to the peace and prosperity of society, and to defend it in peril with his life if necessary. Failure in the performance of such duties is justly condemned and punished by all Governments. But the recognition of these varied and important obligations can in no wise be held to render such subjects and their descendants to the second and third generations perpetual prisoners of any association, society, or form of government. So long as they are of it they must fulfil their obligations, whatever they are. A mere contingent or possible obligation cannot rightly be made by construction, absolute and perpetual, controlling the actions and life of the subject from whom it is due wherever he may be found.

But if, from causes appertaining to the conscience or safety, the welfare of a subject or his family is to be improved by separation from that society of which he is a member, the laws of nature and the practice of all civilized nations, ancient and modern, justify him, within reasonable limits, in severing that connexion; otherwise, in a State which has an established religion, any citizen might be compelled to conform to its doctrines, and to leave his descendants to the same mental and moral servitude, deprived of the freedom of belief, and without that freedom of worship to which, according to the laws of nature and of God, every man is entitled. Society is necessary to the existence of man, and government indispensable to his civilization, prosperity, and power. But the perpetual subjection of every person born within its jurisdiction, without consent and in disregard of protest or removal, is not necessary in any form of political society. It does not rest upon any theory of justice, and the whole course of civilization disproves its justice or wisdom. It is a power that does not attach to a State which has for its object the welfare of all its members, but to a despotism that knows no duty and cares for no interest but to strengthen and perpetuate the power of rulers. The law of allegiance and of service is as essential to a republic as it is to a monarchy. It is not a mere matter of agreement, convenience, or utility; it is a necessity. Every form of government depends upon it, and dissolution awaits all forms of society to which it is denied.

But here the parallel ends. The authority of despotic governments is force; that of a State is the consent of its people.

The claim of indefeasible allegiance and perpetual service is the symbol of feudalism and force. The right of emigration and naturalization, where life or liberty is insecure, or where the prerogatives of conscience are violated, is wrought into the constitutions of all governments of choice. The feudal claim is as absolute over the mind as the body. It denies liberty of conscience and of thought by the same title that it proscribes the right of locomotion. It dwarfs human capacity and reason and corrupts the nature of man and society.

Of the Consent of Governments.

It may justly be conceded that the express or implied consent of both parties is necessary to the extinction of mutual obligations between a Government and its subject. But this does not justify the perpetual control of one by the force of the other. It assumes that it is the right and duty of the Government to so regulate the manner of separation as to secure in the highest degree the welfare of both. It is to this natural law that we refer the right to regulate, not defeat, emigration

and naturalization, which together constitute expatriation. But a Government cannot justly admit one and deny the other.

A subject may justly be held to the complete performance of all obligations actually due to the Government at the time of separation. In a period of war or when public peace is threatened, every form of political society is justified by natural as well as municipal law in holding its members to the fulfilment of their duties until the crisis is past. In moments of public peril it might with justice forbid emigration so long as the common danger continued. But this exercise of power must be continued as incident to a present exigency of the State. It cannot be just that a citizen who has withdrawn in a time of peace, with the actual or implied consent of the Government, is to be held, himself and his descendants, for ever responsible for the conduct of that Government or the perils which it may encounter; or that he is bound under such circumstances to render the same service in its defence or make the same sacrifice for its support which could have been demanded had its connexion remained unbroken.

The reciprocal protection which is the basis of the obligation due from a subject to the State is rightfully terminated by a permitted removal, and leaves no foundation for the subsequent claim of perpetual service. The State would be justified, in anticipation of immediate or approaching public peril, in prohibiting many acts threatening its present or its future safety. In this view the decree of Charles I. in 1637-38, denying the right of departure to "passengers" for New England "as idle and refractory persons whose only or principal "end is to live out of the reach of authority where they "take liberty to nourish and preserve their schismatical "factions," might be justifiable as defeating an organization detrimental, if not destructive, to his throne. In this he did not merely assert a right, but he averted by his acts an immediate danger. Whether the result was more fortunate for his crown than to have allowed these "passengers"—among whom were Pym, Hampden, and Cromwell—the liberty of emigration, and how far despotic rulers ought to take warning from the fatal consequences that followed the exercise of such power in this particular case, his successors may be called upon to determine.

Rule of International Law.

International law does not control nations in the conduct of municipal affairs. It leaves them to the good sense of every independent State. It does not, therefore, present any positive rule by which Governments are to be guided. Nevertheless the opinions of writers of recognized authority upon national and international law, whose judgments are universally respected, ought not to be without weight in this discussion. With few exceptions, and those least important, they favour the largest liberty consistent with public safety in emigration and naturalization, which, taken together, complete the act of expatriation:

"Since one is a subject in regard that he constitutes, with others, one republic, into which he willingly enters, it follows from thence that one ceases to be a citizen so soon as he willingly removes with that design from his native country and joins himself to another State, settling there his fortune and family, unless the laws forbid subjects to remove."—*Heinecius, B. 2, S. 230.*

"A man should not leave his country or the State of which he is a member in time of war or great distress, but in a time of peace he may do so if he pleases."—*Grotius.*

"Where the liberty of removal hath been promiscuously allowed, and the subject settles himself and his effects under the protection of a foreign State, the Commonwealth which he left hath no longer any authority over him."—*Puffendorf, B. 8, Ch. 11.*

"Every man is born free; and the son of a citizen, when come to the years of discretion, may examine whether it be convenient for him to join the society for which he was destined by his birth. If he does not find it advantageous to remain in it, he is at liberty to quit it on making compensation for what it has done in his favour, and preserving, as far as new engagements will allow him, the sentiments of love and gratitude he owes it. A man's obligations to his natural country may, however, change, lessen, or entirely vanish, accordingly as he may have quitted it lawfully, and with good reason, in order to choose another, or has been banished from it deservedly or unjustly in due form of law or by violence."—*Vattel.*

"In England the subjects are under a stronger and more particular obligation to the sovereign than elsewhere in virtue of a right which they there call allegiance; but this does not prevent the English from withdrawing from the kingdom without the permission of the king; and when they have established themselves elsewhere neither the authority of the king nor of the laws of the kingdom have any further power over them."—*Wicquefort*, section 11, book 1, Ambassador.

"It is a right inherent in all free people to have the liberty of removal if they think proper. When a person becomes a member of a State he does not thereby renounce the care of himself and his affairs. He may seek the necessaries and conveniences of life elsewhere. The subjects of a State cannot be denied the liberty of settling elsewhere in order to procure those advantages which they do not enjoy in their native country."—*Burlemaqui.*

"The particular duties of citizens terminate with the offices from which they flowed; but as to general duties, they subsist as long as one continues to be a citizen and until that character is lost. Now, a man ceases to be a citizen in one of these ways: 1. When he goes to establish himself elsewhere; 2. When he is banished; 3. In case of subjection to a foreign Power."—*Felice, Droit des Gens.*

"On the other hand, except in cases of great necessity, where it is intended to call out the strength of the society, the civil power, considered simply as such, has no right to restrain emigration and the disposition to settle elsewhere; this right not being necessary for the perpetuation of the body politic, and the inhabitants of a country being by nature sufficiently attached to it (if the government be tolerable) without being detained."—*Vicat.*

"Man, whose subsistence depends upon his industry, ought naturally to seek happiness wherever he can find it. Want and misery make the law for him in this respect. If his native country offers him resources it is his nature to be attached to it. If it does not, by what right—I will add with what motive—shall we seek to arrest and to punish him? May he not say, "Give me and my family assurance of support, or let me seek it elsewhere?" The law of nature, which is that of self-preservation, will be to eternity stronger than all the maxims and calculations which politics can present. We are wrong to say that this man injures his country by carrying his industry abroad. He may justly reply that his industry is his own, and that he has a right to carry it where it can furnish him subsistence."—*Raynewal.*

"In times of peace it would seem unjust and dishonourable to any State to hinder its citizens from selling their lands and removing to any other State they please, and freeing themselves from their former political relation. For the several subjects, by the taxes or tributes which they pay annually, compensate all the ordinary advantages which they receive from the community, and it would be unjust to hinder them from consulting better their own interest, if they can, elsewhere. Nor is there danger that any State will be deserted by many of its subjects unless it be either miserably constituted or administered, and in such cases the citizens have a better right to quit it and cannot be compelled to remain its subjects."—*Hutcheson's Moral Philosophy.*

"Men may relinquish their country from a sense of insecurity, oppression, annoyance, or inconvenience, and emigration ought neither to be prohibited nor discouraged."—*Paley's Moral and Political Philosophy.*

"Considered from an international point of view, the jurisdicton of a nation must be founded either upon the person or the property being within its territory; considered from a civil point of view, jurisdiction may be founded upon *natural* as well as *local* allegiance; in other words, every independent State claims to make laws perpetually binding upon its natural-born subjects wherever they may be. But natural allegiance or the obligation of perpetual obedience to the Government of the country wherein a man may happen to have been born, which he cannot forfeit or cancel, or vary by any change of time or place or circumstance, is the creature of civil law, and finds no countenance in the law of nations, as it is in direct conflict with the incontestable rule of that law. '*Extra territorium jus dicenti impune non paretur.*'"—*Twiss's Law of Nations*, page 231.

"Formerly it was doubted whether an individual had a right to quit his country and settle elsewhere without leave from his Government; and in some countries

he who did go had to sacrifice a part of his property.* At present such a right is very generally conceded under certain limitations. "The right of emigration," says Heffter, "is inalienable; only self-imposed or unfulfilled obligations can restrict it." The relation of the subject to the sovereign is a voluntary one, to be terminated by emigration; but a State is not bound to allow the departure of its subjects until all pre-existing lawful obligations to the State have been satisfied. Notice, therefore, may be required of an intent to emigrate, and security be demanded for the satisfaction of back-standing obligations, before the person in question is allowed to leave the country. †De Martens writes to the effect:‡

"It belongs to the universal and positive public law to determine how far the State is authorized to restrict or prevent the emigration of the natives of a country. Although the bond which attaches a subject to the State of his birth or his adoption be not indissoluble, every State has a right to be informed beforehand of the design of one of its subjects to expatriate himself, and to examine whether, by reason of crime or debt or engagements not yet fulfilled towards the State, it is authorized to retain him longer. These cases excepted, it is no more justified in prohibiting him from emigrating than it would be in prohibiting foreign sojourners from doing the same. These principles have always been followed in Germany. They have been sanctioned even by the federal pack of the German Confederation, as far as relates to emigration from the territory of one member of the Confederation to that of another."—*Woolsey's International Law*, page 142.

"While almost all the nations of Europe are ignorant of the constituent principles of society, and regard the people only as beasts of a farm, cultivated for the benefit of the owner, we are astonished, we are edified, that your thirteen republics should know at once the dignity of man, and should have drawn from the sources of the wisest philosophy the principles by which they are disposed to be governed."—*Abbe de Mably to Mr. Adams, Minister to Holland.*

"One of the principal objects of police is to hinder the subjects from emigrating in too great numbers. It is for the public, universal or particular, law to determine to what degree a sovereign is permitted to restrain the natural liberty of those subjects who wish to quit the territory for a long time or expatriate themselves entirely. A foreigner, as long as he remains so, and has not contracted debts or committed crimes, is entirely at liberty to quit the State when he pleases; it is only in case of collision, reprisal, or war that a state is justifiable in detaining a foreigner against his will. This liberty, founded on the universal law of nations, is confirmed and even extended by a great number of treaties,§ and accordingly it is rarely violated; but a foreigner, formally naturalized, has no more right to exemption from this restraint than those who are born subjects of a state, unless he made express or tacit conditions on the subject."—*Von Marten's Law of Nations*, 87.

"Citizenship ceases by penal or voluntary expatriation. In the first case the country renounces all its claims upon the subject; in the second he loses his privileges by voluntary separation from the country. But even when it is not permitted by law the bonds which unite the subject to his country are not indissoluble. Being wronged by his Government, compelled to seek in other lands the well-being (*bienestar*) and the happiness that he is not able to find in his own, he is allowed to abandon the association to which he belongs and to establish another elsewhere. This is a right of which the civil law cannot deprive him, and in the exercise of this right, as in all others, he is to decide for himself when to dissolve the ties which bind him to his country. It is, without doubt, possible for him to abuse it, but whether or not it is abused will be a difficult question for foreign nations to decide, as they are not competent judges of the facts."—*Bello, Derechos Internacional*, Paris, 1864, page 75.

Municipal Laws of European States.

The enlarged and just views of these and other authors as to the inalienable rights of man must, in good time, produce their proper effect upon the legislation of the world. But unhappily the ground of our present complaint is that the municipal legislation of European states is in conflict with the principles advocated by the most enlightened jurists, who have best studied the laws of nature and of nations.

In other relations of government great advances have been made. The great states of southern Europe have abandoned in their recent organizations the political philosophy of the middle ages. There are no longer sovereigns who govern for years without a parliament, like Charles I., and there are no archbishops who, like Laud, boast that they are not likely to hear "that noise" again. The consent of the people is now the first condition of permanent or peaceful Governments. The forms of the ancient monarchies only are retained. The popular power expands with every generation in the organization of states; but as to subjects the rigid traditions of feudal law are strictly preserved. Municipal government is unimproved. It confounds police regulations with natural law: local legislation with the law of nations.

Local Legislation of European States.

We have appended to this report a *resumé* of the laws of the several states of Europe, given by the principal cabinet officers in answer to inquiries presented by the American Government in 1849. It is but just to suppose that a statement of laws thus made by officers best acquainted with the course of legislation and administration will be more satisfactory than any cursory examination of the various statutes could give. The correspondence from which these expositions of European law upon the subject of expatriation are taken, is printed in Executive Document 38, first session Thirty-sixth Congress.

The doctrines of Great Britain, as represented by Lord Palmerston in a letter to Mr. Bancroft, are thus stated; that while it has never been denied by the British Government that emigrants leave their country by virtue of that rihgt which has been asserted to be the foundation of all liberty, the right of every reasonable being to seek a new country, and that by the laws of Great Britain no restraint can, except in very special cases, be placed upon the perfect liberty of every British subject to leave the realm when and for whatever period he chooses, yet this expatriation, in the sense of a voluntary abjuration of natural allegiance, cannot be sanctioned without the assent of the sovereign power; nor does it debar the return of the emigrant as a natural-born subject.

Count Walewski, for the Government of France, in a despatch to Mr. Calhoun, 25th November 1859, declares that French legislation does not permit a Frenchman to renounce his nationality, but he loses it by positive law when naturalized in a foreign country. A Frenchman who emigrates, and thus places himself out of the way of military service, would assuredly be punishable on his return to France although he should have obtained a foreign naturalization. (Article 230, *Nouveau Code Militaire*, 1859.)

The royal decree of the Spanish Government, 17th November 1852, declares that a Spaniard naturalized within the territory of another Power without the knowledge and authority of his Government shall not exempt himself from the obligations which were consequent to his primitive nationality. The same rule is applied to foreigners naturalized in Spain. (Serrano, to the Consul General of the United States at Cuba, 14th February 1860.)

Austria requires an emigrant to disengage himself from all obligations as an Austrian subject, and he is deprived by law of the right to dispose of or inherit property. It provides punishment for those who absent themselves without passports.

In Prussia a subject loses his nationality, first, by discharge at the subject's request; second, by sentence of competent authority; third, by living 10 years in a foreign country; fourth, by marriage, if a female, with a foreigner. Subjects who emigrate without obtaining a discharge are punished according to laws in that case provided, and if they return to Prussia are considered criminals, subject to punishment from which no citizenship of any nation can liberate them. The obligation to military service is not extinguished by time. After absence of more than ten years if he returns he is held to service. Emigration is not permitted except with express leave of the Government. (Baron Gerolt to Mr. Marcy, July 11, 1853; Baron Schleinitz to Mr. Wright, 6th January 1859.)

* By the *jus detractûs*, *droit de detraction*, property to which strangers out of the country succeeded was taxed. By an analogous tax, as the *gabelle d'emigration*, those who left a country were amerced in part of their goods, immovable or movable. Such odious rights, says De Martens (I. sec. 90.), although existing still, are very generally abolished.

† Heffter, sec. 14, 59.

‡ Precis, &c., (Paris edition of 1858,) sec. 91.

§ Almost all the treaties of commerce contain articles on this subject, and by the greatest part of them foreigners are permitted to quit the state even in case of rupture.

The constitution of the North German Union, 1st July 1867, makes every North German citizen subject to military duty. No substitute is received. Every able-bodied man is to serve three years in the field, four years in the reserve, and then five years in the militia. Colonization and emigration are regulated by the Legislature of the Union. (Executive Document 9, second session Fortieth Congress, pages 16–23.)

The laws of Hamburg make the denationalization of a subject dependent upon his obtaining a discharge from the Government, the payment of a specified sum of money, and evidence of the fulfilment of military service in person or by substitute. (Merg. Dr., June 21, 1850.)

The Grand Duchy of Baden requires an emigrant to obtain the authorization of the Government, to show that he leaves no debts, that the country to which he emigrates will receive him, and that his wife is in accord in regard to emigration. (Encyclo. 19, 19th Siecle. T. 11, p. 433.)

Bremen fully acknowledges her obligations to give protection to all American citizens, making no distinction between naturalized and native citizens of the United States. It holds that desertion from military service in any of the German States comes under that class of offences (crimes) which will justify the surrender; and that no State could complain on the ground that such deserter had become its citizen. It cites the law of the United States to support this view. It does not regard a deserter from military service in the light of a political refugee, nor his act a political offence; and claims that desertion would be a crime in native as well as naturalized citizens. (Mr. Schleiden, minister &c., November 21, 1859.)

The laws of Hanover allow emigration with parents of children to the age of 21 years; those who emigrate without parents, up to the year preceding that when conscription takes place, and even in that year, upon proof that the emigrant betters his condition. Those who are within the age of military conscription, not yet in military service, are allowed to emigrate when their departure does not endanger the rights of others liable to service, or who give security for a substitute, in case young men should be called into service. (W. Reitzenstein, minister, &c., August 20, 1859.)

The first article of the convention between the United States and the King of Wurtemburg, October 3, 1844, provides that "every kind of *droit d'aubaine*, *droit de* "*retraite*, and *droit de détraction*, or tax on emigration, "are and shall remain abolished between the two con- "tracting parties, their States, citizens, and subjects."

The convention with Saxony has the same provisions.

The treaty with Prussia, March 14, 1829, provides that the inhabitants of the respective States of the high contracting parties—

"Shall be at liberty to sojourn and reside in all parts whatsoever of said territories in order to attend to their affairs, and shall enjoy, to that effect, the same security and protection as natives of the country wherein they reside, on condition of submission to the laws and ordinances therein prevailing."

The Russian Government so far satisfies its subjects or so exercises its power as to restrain their emigration. In either case its municipal law is innocuous to other nations, and upon this subject at least does not materially affect the interests or rights of the United States. The same remark is substantially true of France.

Review of Foreign Municipal Legislation.

There is one element of harmony that pervades foreign legislation upon this subject. The emigration of a subject is held to depend upon the consent of his Government. But the practice of the Governments in this matter varies so much as to show a substantial difference of principle. It does not appear that the consent of Great Britain, express or implied, is actually withheld from the multitudes who emigrate from her shores, or that she makes any exertion to prevent their departure, while in some of the German states the regulations are such as to imply the consent of the Government to the large emigration which seeks, in the provident language of their rulers, to improve their condition by establishing a new home in other lands. Such especially is the fact in Baden, Bremen, Hanover, and perhaps other states.

The French decrees admit a favourable interpretation also. The decree of 1811 was a war measure, established when France was in contest with the whole of Europe, and that of 1859 when fighting for the unity and freedom of Italy. Considered as interpretations of the rights of nations in a period of war, they furnish no reasonable ground of complaint. There is nothing in them that compels the French Government to insist upon them in a period of profound peace. On the contrary, it is but just to assume that an enlightened ruler like the Emperor of France, who has so constantly appealed to the people as the support and authority of his Government, and who has so largely contributed to the late reorganization of the State system of Europe, which has been characterized by the most eminent opponents of the empire as the grandest revolution of modern history, will recognize the difference between a period of war, when nations contend for their existence, and a state of profound peace, as to the absolute power of the Governments of modern times over the rights of subjects. The reserved right of assent or dissent which European states claim ought to be considered, not upon the basis of the political systems of the middle ages, but in the light of modern ideas and necessities.

Effects of Emigration on Governments.

The history of the past twenty years has greatly changed the relations of nations to each other and those of Governments to their subjects; and among the active and powerful agents in this revolution none is to be compared in its results with that of emigration. Every State has participated in it, and the most important of them have sought and found in it security and relief. This is especially true of the English Government. India and America have borne from her millions of her surplus population. Colonization extended her power, and the independence of the States she planted contributed much to her commercial supremacy. It has not only strengthened her outward power, but relieved her of the evil of an overcrowded kingdom. She was taught by her own writers that her people would be too numerous for her means of support, that labourers would exceed the demand for labour. Nothing quieted this universal apprehension so much as plans for extensive emigration. Except in the case of her colonies the Government had done little directly to encourage it. Private enterprise had directed its movements and supplied its necessities. But it became necessary to elevate emigration from a private enterprise to a public and national measure. Committees were appointed by the House of Commons which recommended national systems of emigration; schemes of colonization like those practised by earlier nations, by which, for the relief and security of the empire, whole communities were to be deported at once and occupations and homes provided for them, were advocated in Parliament and by public journals. Advances for this purpose were proposed from public taxes to be repaid by emigrants. It was estimated in Parliament that an annual appropriation of 240,000*l.* would be required to carry off the surplus of unemployed people, who would otherwise be an intolerable burden to the Government. Although this was done under the pretence of colonization, it was in reality a plan of deportation or emigration, without special regard to the countries to which the emigrants should be carried. The famine of 1848 made it necessary that the excess of Irish population especially should be reduced by emigration. The officers of the Government were authorized to borrow money for the purpose of advancing loans to such emigrants, to be repaid in five or seven years, and immense sums were raised for this purpose upon this public authority. Under the influence of such measures emigration increased from the British empire from 83,000 persons in 1831 to 336,000 in 1857, and has continued to increase to this day.

The result was an immediate relief to the destitute, and increased work and wages for those in want. This was conspicuous in Ireland, where excess of population over the supply of food and of employment led to disorder, crime, and public discontent. "From Ireland," says an eminent authority, "the tide of emigration was "directed not so much to the colonies as to the United "States, which they seemed to consider as their home "next to their own island." The great emigration from 1846 to 1854, which alarmed English politicians and threatened to depopulate Ireland, it is said again, "only "redounded to the public advantage by raising wages "and improving the condition of those who remained." "Of all those who have left our shores none have been "so greatly benefited as the Irish, whose sole possession "and inheritance was the sad one of deportation. For "them no work was too arduous, no difficulty too "great; and in their new homes they roused themselves "like giants from the sleep of years."

This exodus of a nation accomplished all that was anticipated, and has been a subject of universal con-

gratulation among English statesmen. England profited by it in many ways. The money remitted by her emigrants in 10 years, from 1848 to 1858, through English commercial banking houses, upon their own statements to the Government, was about ten million pounds sterling (9,937,000*l.*), nearly fifty million dollars, or five millions yearly. These remittances have probably been trebled in the 10 years succeeding 1857. Thus the opponents of these Irish people found their deportation advantageous, while their friends were encouraged to hope for their speedy and complete regeneration.

The interest of the British Government in this national enterprise was beyond considerations of pecuniary advantage. Had she forbidden the emigration of her subjects, as she was bound in honour to do if she intended to enforce her claim to their service upon her theory of indefeasible allegiance, it would have added ten or twelve millions to the population of Ireland, and to that extent increased the evils of labour without employment, people without food, of misery and crime, the precursor of riot or revolution, and she would have been compelled to choose between a change of her policy towards Ireland or the extinction of an entire race of her people by violence. From such evils she has been preserved by the beneficial results of peaceful emigration to America. It was with good reason that Lord Ashburton described this emigration as "the " modern means by which the population of the world " found its level, for the benefit of all and eminently " for the benefit of humanity."

Emigration from the German States has been nearly in equal proportions, though prompted by very different motives. But it has been attended with equally beneficial results.

Europe has exported to the United States since 1790 6,640,000 of its subjects. They and their descendants now number more than twenty millions. She has received from them in remittances of money 50,000,000*l.* sterling. She monopolized the carrying trade which was thus created. Mr. J. J. Sturz, a German author, long connected with this interest, says that of 1,070 round voyages between Europe and North America made in 1865, by about 90 steamships belonging to 15 European steamship companies (ten English, three French, two German), there was but one voyage made under the American flag.* The same writer reported 22 new steamers on the stocks in Europe destined for this trade. A table from the Bureau of Statistics, appended to this report, shows that for the quarter ending September 30, 1867, the number of emigrants brought to the United States in European vessels was 86,797 (including 15,306 from British America, imported there in European vessels), and only 8,225 in American vessels. The character of the people gives another indication of the advantage that foreign Governments derive from this emigration. Steerage passengers crowd the vessels from Europe to America, but they take none back from America to Europe. And this is done under the eye of foreign Governments. Every possible aid, public and private, with statute regulations and official protection and subsidy, has been given to this work, so essential to public security and profitable for private enterprise.

It is, therefore, a continuing prosperity for Europe, political, economical, and financial. The disparity between European and American participation therein is likely to be perpetual. No preparation is made by American governments, state or national, or by her steamship owners or navigators, to share in this traffic, which numbers 350,000 passengers yearly, and is not unlikely, under the stimulus of public and private enterprise, to reach half a million.

In the presence of such facts is it to be asked whether European governments have "consented" to the exodus of these nations from her shores? Is an emigrant who came here in the steerage, and returns a regenerated man to the home of his fathers to be told that he "is a deserter," has been absent without consent and knowledge of his government, and is to serve the balance of his life in her armies or to work out his share of her debts incurred in his absence? Is a family of the second or the third generation—for such is the law—to be told that they, too, owe service to the government from which they escaped without leave, and can never return to the hearthstones or the graves of their ancestors? The pretension is preposterous, and the inquiry offensive to justice and decency. Every state is bound to know what is done within its jurisdiction, at least what it does, and to accept the legitimate consequences of its acts.

The emigrants of Europe it may be were sent here to die; but it was also possible they might live. There was at least a chance for that. Their return to a country which they had abandoned because of its excess of population and its scarcity of employment and food, could not reasonably have been expected. No stipulations were made of that character at least. It was possible that here in America they would find vacant space, comfortable shelter, healthy food, remunerative employment, and thus preserve, at least, the life God gave them —the only valuable thing they brought with them. Having escaped death by famine, and conquered for themselves a home and freedom, if not fortune and fame; having been counted among rulers in this country; who is able to satisfy them that they are here without authority, and that upon the theory of the oath made by the land barons to William the Conqueror and Charlemagne in the Middle Ages, they are yet subjects of the states they and their fathers abandoned because life was a burden, and now owe them service of mind and heart, of life and limb? Allegiance is not due to a state unable or unwilling to protect its subjects. Incapacity or disinclination is in itself an absolution from the obligation.

But it is not necessary to show the active participation of governments in this history to relieve emigrants from this bondage of feudal allegiance. It is a well settled principle of public law that sovereigns and subjects are bound by acts which receive their implied sanction. Silence in this case is the equivalent of express consent. It is implied when it is manifested by signs, acts, or facts, or by inaction or silence, which indicate consent. The law of nations is founded upon the general consent of nations, whether it be express, tacit, or presumed (Heffter, p. 3.) The sources of international law are conventions or treaties expressly or tacitly made. The latter have their origin in the actions or customs of states. (Klüber, pp. 5–183.) A nation can pledge its faith tacitly in making treaties as well as by express declaration. It is enough that its faith is given. The manner is unimportant. (2 Vattel, p. 231.)

When a nation is discontented with public administration it has a right to reform it. But if they are themselves silent and obedient they are judged to approve the conduct of their superiors, and a fragment of the people cannot resist it. (1 Vattel, 164, 199.) Blackstone says that "the consent of the crown to corporations which " exist by force of common law is implied. Kings are " presumed to have given their concurrence. The City " of London, which has long existed, is looked upon as " having the consent of the Crown; for though no " charter can be shown the law presumes one, and that " it may have been lost or destroyed." (3 Commentaries, 129.) The silence of a nation is received as its consent, when it has liberty to accord or refuse it." (Pinheiro Ferreira.)

This is universal law. To deny it would unsettle all compacts, public and private. If this doctrine be good against a people who have not power to control what they may dislike, or against defunct monarchs who cannot deny such presumptions, it is better against Governments who are present with power to inhibit and prevent acts which they do not approve. It will not be denied that emigration from Europe to the United States has been accompanied by the tacit consent, at least, of its rulers, and has therefore an authority in law as substantial as the convention and treaties to which public faith has been tacitly pledged, or the city of London, whose charter cannot be shown.

Great Britain has not for purposes of her own transplanted 4,000,000 subjects to this country, whom she could neither employ nor educate, nor feed nor govern, without knowing it; nor without knowing that when here they were likely to remain; that they were not to demand of her protection and support. She knew the separation was permanent, and she comprehended her interest in that fact. She could not doubt that being present residents they were likely to adopt the customs and become a part of the country. This was a result contemplated by Great Britain. It was the nature of the transaction. She was bound to take notice of the fact, because in recognizing the independence of the American States, she had been compelled to study the character of their Government. She knew, as they knew, that they would here find employment, become educated, possess land, create new industries, acquire wealth, obtain social distinction, receive important public commissions, participate in the Government, and be numbered among its rulers.

She knew this, because she had seen this history enacted by the colonists before the Revolution, and all along up to the war of 1812. Great Britain must have

* Suggestions for the Encouragement of Emigration, by J. J. Sturtz, Washington, D. C., 1866.

been conscious that when they came to prosperity and power they would cherish the memories of what they had enjoyed, and as well as what they had suffered. If she had capacity to consent to anything she consented to all this—emigration, naturalization, expatriation; and in absolving her Government from the burden of protection she abandoned all claim thereafter to their subjection or service. This is as clear as if done "with the united concurrence of her Legislature."

The Authority of Municipal Legislation.

Lord Palmerston, in his despatch to Mr. Bancroft, cites with admiration Mr. Justice Story as authority for the doctrine which "every nation has hitherto "assumed, that its laws extend to and bind natural-"born subjects at all times and at all places;" that "every nation has an exclusive right to regulate persons "and things within its own territory according to its "own sovereign will and pleasure;" and that "in "speaking of the right of a State to bind its own native "subjects everywhere, we speak only of its own claim "and exercise of sovereignty over them, and not of its "rights to compel or require obedience to such laws "on the part of other nations." And Lord Palmerston considered this exposition of public law as conclusive against the American theory of allegiance and the rights claimed for its naturalized citizens. Americans recognize the truth of these declarations of Mr. Justice Story; but they reject Lord Palmerston's deduction therefrom. What Americans claim is that a State which cannot employ, support, protect, and govern all her people, and for that reason regulates and accomplishes the deportation of that portion least able to support themselves, forfeits her right to govern them anywhere as exclusively her own subjects; and that in this case the doctrine of intrinsic and indefeasible allegiance comes to an abrupt and final termination by mutual consent and necessity.

American Law and Precedents.

Foreign Governments attach much importance to the fact that the laws of the United States, as interpreted by its judicial tribunals, sustain their claim to perpetual allegiance. This is one of many embarrassments that attend this difficult and delicate question. The President, in his last annual message, refers to this subject:—

"The attention of Congress is respectfully called to a singular and embarrassing conflict of laws. The executive department of this Government has hitherto uniformly held, as it now holds, that naturalization, in conformity with the constitution and laws of the United States absolves the recipient from his native allegiance. The courts of Great Britain hold that allegiance to the British Crown is indefeasible, and it is not absolved by our laws of naturalization. British judges cite courts and law authorities of the United States in support of that theory against the position held by the executive authority of the United States. This conflict perplexes the public mind concerning the rights of naturalized citizens and impairs the national authority abroad. I called attention to this subject in my last annual message, and now again respectfully appeal to Congress to declare the national will unmistakably upon this important question.—Page 32.

Yet, justly considered, the American interpretation of public law on this subject, elementary or judicial, adds nothing to the authority of Blackstone. The jurisdiction of courts does not extend to the enactment of laws. It is limited to their just interpretation. Judges are often governed less by reason than by precedents. "The doctrine of the law, then, is this," says Blackstone, "that precedents and rules must be followed unless "flatly absurd or unjust. If the reason of a decision "cannot be discovered, yet we owe such deference to "former times that we are bound to suppose they did "not act wholly without consideration." "I will "servilely follow in the footsteps of my predecessors," said one of the most eminent English judges. The obsolete claim of inalienable allegiance may well be sustained by such absurd doctrines of legal construction. There is no American authority which cites this doctrine that does not rest it upon English law. The common law of England at the American Revolution is by some authorities accepted as law in the United States until changed by legislation. There has been no legislation upon the subject of expatriation, because the Constitution of the Government rests for its authority avowedly upon the voluntary consent of its subjects. American law authorities, receiving the common law of England before the Revolution as American common law, as some jurists do, the theory of indefeasible allegiance might be considered as having some colour of law, because it was indisputably, at the time of the Revolution, a pretension of the common law of England. It is in this manner that it has been treated in this country. Elementary writers recognize this law because it is a part of our legal history; and a class of lawyers, who subordinate reason to precedent, and a few public men who have cited their views without indorsing them, have held that the English doctrine was law in this country, upon the theory, which has no just foundation, that everything that was law in England before, was law in America after the Revolution. But it has not been so authoritatively declared by the legislative, executive, or judicial officers of the Government.

"It is the doctrine of the English law," says Judge Kent, "that natural-born subjects owe an allegiance "which is intrinsic and perpetual, and which cannot be "divested by any act of their own." But he cites the writers on public law as generally in favour of an opposite doctrine. Suggesting that the better opinion is that in absence of any legislative act on this question the rule of common law prevails, he also declares that "some "relaxation of the old stern rule of the common law is "required and admitted under the liberal influence of "commerce."

Judge Story, in the case of the Santissima Trinidad, (7 Wheaton, 283,) evaded the question of expatriation, giving no decision thereon, but said, "it was perfectly "clear that it could not be done without a *bonâ fide* "change of domicile under circumstances of good faith." The references to this subject in American judicial decisions are chiefly in cases where the plea of naturalization or expatriation is fraudulently made to support unjust claims to property, or to justify acts of war against nations with which we were at peace. In the case of Williams, 1804, cited in 2 Cranch, 84, Chief Justice Ellsworth ruled that upon this subject the common law of the country remained as before the Revolution. But this was a case where a citizen of the United States, in evasion of its laws, accepted a French commission, and made war upon England, justifying his wrong by pleading naturalization in France. His defence was manifestly an evasion, and the just purpose of the court was to show that no such defence could be recognized for such purposes. "It was difficult," the Chief Justice said, "to restrain our own citizens from "acts which would involve us in war." Williams was justly convicted and imprisoned. The decision of the court maintained the integrity of the Government in its treaty stipulations with England at a time when she was at war, though we were at peace, and ought not to be cited by Englishmen against the principles of public law that lie at the foundations of American Government. But it has one important feature. It is a distinct recognition, even at that early day, that the emigration from Europe, and the expatriation of its citizens was with the consent of the European Governments. In countries so crowded with inhabitants, said the Chief Justice, there is necessity for emigration, while in America we have no inhabitants to spare. (Niles's Register.)

It will be difficult to find an authority of American law writers or a decision of American courts in which the doctrines of perpetual allegiance is recognized, except as a tradition of English law; or a case in which it has been regarded with favour, except for the purpose of preventing private injustice or the injury of the public peace. It has no authority in this country except as an element of English common law, existing at the time of the Revolution. There is nothing American in the oath of the land barons of England in 1086, nor in the feeble paraphrase of that obligation by Blackstone.

The opinion of American jurists and legislators on this subject is well expressed by Mr. Webster, Secretary of State, in a letter to Lord Ashburton, August 1842, upon the right of expatriation:—

"A question of such serious importance ought now to be put to rest. If the United States give shelter and protection to those whom the policy of England annually casts upon their shores—if, by the benign influences of their Government and institutions, and by the happy condition of the country, those emigrants become raised from poverty to comfort, finding it easy even to become landholders, and being allowed to partake in the enjoyment of all civil rights—if all this may be done, (and all this is done under the countenance and encouragement of England herself,) is it not high time, my lord, that, yielding that which had its origin in feudal ideas as inconsistent with the present state of society, and especially with the intercourse and relations subsisting between the Old World and the New, England should at length formally disclaim all right to the services of such persons, and renounce all control over their conduct?"

In this statement Mr. Webster regards the doctrine against which he protests not as American but as English law.

Effect of this Theory on the People of the United States.

The American people are perfectly conscious that every nation has a perfect right to frame its municipal laws to meet its own necessities. This municipal right is recognized, because it cannot be known otherwise what is required for the public safety. It has not, however, the same elevation as other branches of public law. It is in the nature of police regulations. But even in this view it is not entirely independent of public opinion and authority. Excessive cruelty or injustice in its provisions would justify interference. Every household has the same immunity, but its authority must be so exercised as not to impair the peace of other households; and the municipal legislation of a nation should be so framed as not to disturb, much less to impair or destroy, in others rights common to all nations. Legislation that does this—municipal or otherwise—is against the law of nations and of God. The municipal legislation of Great Britain has this effect upon the people of this country. Under such circumstances this Government is remanded to that general and permanent attribute of nations, denominated the right of self-preservation, which implies not only the right negatively of defence and security against external aggression, but positively of making such regulations generally as may maintain and promote the national welfare and prosperity. (Reddie's International Law, 190.) The authority for internal municipal legislation can never justify a state in disregarding the principles of universal law, public and private, the law of nations and of nature, when it operates, as in this case it does, to deprive a people of privileges conceded to the citizens of all civilized states.

The United States have a population of 35,000,000. The free people, in 1790, numbered 3,250,000. With an annual increase of births over deaths, estimated at one and thirty-eight hundredths per cent., they would now number 9,250,000; add 4,000,000 emancipated people, and the aggregate of the population existing in 1790, with their descendants, is 13,250,000. The balance of the people, 21,750,000, are emigrants and their descendants.

If this portion of our people—more than twenty millions—are subjects of the several States of Europe and service is due to them; if they have no right to defend themselves or their adopted country in the event of war with Europe; if, unstained by crime and free of all offence, they are in consequence of this claim of service debarred from travel and from intercourse with civilized nations; or subject to arrest and compulsory service in armies organized to fight against their own Government, then the United States has no independent existence. It may have numbers, industry, commerce, letters, science, invention, courage, enterprise, wealth, prosperity and power; but it is not independent.

Its dreams of equality are delusions and its sacrifices have been in vain. Every State in Europe will have its garrison if these claims are admitted in every part of the Union. The able-bodied portion of three-fifths of our population could be summoned to fight for Governments with which they have no connexion and against those with which their fortunes are indissolubly united, and they would be accounted traitors if found in the ranks of its armies. We have received, educated, employed, enriched, enfranchised that portion of the people of Europe which its rulers cast off, to find them in their strength incapable of defending their country or lawful resistance to public enemies.

They would be exposed to arrest and compulsory military service, or punishment, not only if found in their native country, but in any civilized nation with which their native Governments might have treaties of extradition. Martin Kozsta was a native of Hungary residing in Turkey with the consent of its Government; his surrender was demanded by Austria under an interpretation of treaties rejected by Turkey, and would have been surrendered and imprisoned but for the forcible intervention of the Government of the United States. The intimate association of those who are claimed as subjects of foreign Governments is such as to put in peril the rights or peace of all. Its absurdity if applied to this large portion of our people is palpable. But the injustice of its application to individuals is equal to the absurdity of its application to nations.

Remedies.

The injustice of this principle is more apparent than the remedy. But that there is a corrective for so great a wrong cannot be doubted. It is not in vain to labour for a reconsideration of this great question by European Governments more in the light of reason and less in the spirit of feudal philosophy. The solution of this important international problem belongs to men who have capacity to divine the right in law and the courage to assert its power. That such men are to be found among those who occupy the proud eminence of royal or popular favour cannot be doubted.

There is one quarter of the world to which we look with hope. Those who have evoked from the labyrinth of German politics, which have been to all students of history in one sense a mystery and in another a puzzle—who, from the elements of anarchy, have in an instant and by a word called into being a new creation already recognized as a permanent empire, and which promises at a day not distant to unite a race long divided, and to cement a power in central Europe long needed, that may number sixty million people: to those to whose genius and success is due the North German Union we have a right to turn for the justice we demand.

In the foundation of a new Power she has wisely submitted her plans to the approval of the people. She has made petty interests that formed petty governments subservient to great principles that are the only basis of great nations. She has united the people who speak the same language and who reverence the same historic past. She seeks to hold them together by consent, not by force. The constitution of 1867 is prophetic of the future. The Republic of the New World might adopt with profit many of its wise and just provisions. She knows how important emigration is to civilization and to liberty. She felt in the great struggle which terminated at Sadowa the priceless advantages of the Germanic emigration to the north which gave to her a friend and an ally in Russia. She counts not less than two million native-born children in the republican family of the United States, and of their descendants nearly six millions more. She will understand how dearly they cherish the glorious memories of the "Fatherland." She can comprehend the advantage of an ally and friend in the New World equal in spirit and strength to that which supports her in the Old. The concession we ask is not worth to her the parchment upon which it is written. Her conventions and treaties closely approach it. The legislation of some of the lesser German States, as interpreted by their rulers, require but the definition of a single word to secure to Americans all they ask of Germany.

But whatever may be her decision or that of other States, the point we make will be conceded. That the rights we claim can be permanently denied; that the question at issue will be settled against us; that it is to remain long unsettled is impossible.

The Committee on Foreign Affairs have entered upon the consideration of the question only by the direct order of the House. It has received the considerate attention which its great importance demands, and the result of its deliberations is embraced in a bill herewith submitted for the consideration of the House. Nothing can be more apparent than that legislation does not alone furnish a remedy for the evils of which the country complains. Local legislation is as powerless to effect the reforms we desire as it is to justify the wrongs inflicted upon American citizens by other nations. But it is indispensable as a first step that statute declaration of the rights we claim should exist. It is also important that distinct proclamation of the limitations to the rights we claim should be made. The project of a law which is submitted herewith seeks to accomplish this result. It also proposes that when all the resources of the Government shall have failed to produce a recognition by other Governments of the principles of public law so long maintained by this, in regard to the rights of naturalized citizens the President shall be invested with the same authority within our jurisdiction as to subjects of other Governments, that foreign States enforce upon American citizens within their jurisdiction. In case of collision, reprisal, or war, a State is justified in detaining a foreigner against his will. (Von Martens, Law of Nations, 87.) But it is not anticipated that such proceedings will be required. It cannot be that in this age, when all the political traditions of the middle ages are tumbling, that Europe will rush to extremities to sustain a claim repudiated by every authority of law, humanity, experience, civilization, and justice.

N.

Nationality Statutes.

25 Edw. III. Stat. 2. A.D. 1350.

A Statute for those that be born beyond Sea.

Our lord the king, at his parliament holden at Westminster at the Utas of the purification of our Lady, the year of his reign of England the five and twentieth, and of France the twelfth, considering the great mischiefs and damages which have happened to the people of his realm of England, as well because that the statutes ordained before this time have not been holden and kept as they ought to be, as because of the mortal pestilence that late reigned, and willing to provide, for the quietness and common profit of his said people, convenient remedy; therein, by the assent of the prelates, earls, barons, and other great men, and all the commons of his said realm summoned to the said parliament, hath ordained and established the things underwritten, *videlicet*.

Because that some people be in doubt, whether children born in parts beyond the sea, out of the ligeance of England, should be able to demand any inheritance within the same ligeance or not, whereon a petition was made heretofore in the parliament holden at Westminster, the seventeenth year of the reign of our said lord the king, and was not at the same time wholly assented; our said lord the king, willing that all doubts and ambiguities should be put away, and the law in this case declared and put in certain, caused the said prelates, earls, barons, and otherwise men of his council, assembled in this parliament, to be charged to deliberate upon this point; all of whom with one assent have said, that the law of the crown of England is, and always hath been such, that the children of the kings of England, in whatsoever parts they be born, in England or elsewhere, be able and ought to bear the inheritance after the death of their ancestors; which law our lord the king, the said prelates, earls, barons, and other great men, and all the commons assembled in the said parliament, do approve and affirm for ever.

And in respect of other children born out of the legiance of England in the time of our said lord the king, they be of one mind accorded, that [Henry, son of John de Beaumond, Elizabeth, daughter of Guy de Bryan, and Giles, son of Ralph Dawbeny, and others whom the king will name], which were born beyond the sea out of the legiance of England, shall be henceforth able to have and enjoy their inheritances after the death of their ancestors in all parts within the ligiance of England, as well as those born within the same ligeance. And that all children inheritors, which henceforth shall be born out of the ligeance of the king, whose fathers and mothers at the time of their birth be and shall be at the faith and ligeance of the king of England, shall have and enjoy the same benefit and advantage, to have and bear inheritance within the same ligeance as the other inheritors aforesaid in time to come; so always that the mothers of such children passed the sea by the licence and will of their husbands. And if it be alledged against any such born beyond the sea that he is a bastard, in case where the bishop ought to have cognisance of bastardy, it shall be commanded to the bishop of the place where the demand is, to certify the king's court where the plea thereof dependeth, as of old times hath been used in the case of bastardy alledged against them which were born in England.

7 Anne, Cap. V. A.D. 1708.

An Act for naturalizing foreign Protestants.

Whereas the increase of people is a means of advancing the wealth and strength of a nation; and whereas many strangers of the Protestant or reformed religion, out of a due consideration of the happy constitution of the government of this realm, would be induced to transport themselves and their estates into this kingdom, if they might be made partakers of the advantages and privileges which the natural-born subjects thereof do enjoy, be it enacted, &c.

All persons taking the oaths, and making and subscribing the declaration appointed by 6 Ann. c. 23, shall be deemed natural-born subjects (s. 1.) No person to have the benefit of this Act unless he have received the sacrament, &c. (s. 2.)

II. And be it further enacted by the authority aforesaid, that the children of all natural-born subjects born out of the ligeance of her Majesty, her heirs and successors, shall be deemed, adjudged, and taken to be natural-born subjects of this kingdom, to all intents, constructions, and purposes whatsoever. (See this clause explained, 4 G. II. c. 21.)

IV. And be it further enacted by the authority aforesaid, that all persons born out of the ligeance of her Majesty, her heirs or successors, who shall qualify themselves in the Courts of Chancery, Queen's Bench, Common Pleas, or Exchequer, within the kingdom of Ireland, or at some general quarter sessions of the peace, to be held for the county where he or they do or shall inhabit, reside, or settle within the said kingdom, in like manner as persons are by this Act required to do within the kingdom of Great Britain, all and every such persons shall be deemed, adjudged, and taken to be her Majesty's natural-born subjects of the said kingdom of Ireland, to all intents, constructions, and purposes, as if they, and every of them, had been or were born within the said kingdom of Ireland. (This Act repealed, 10 Ann. c. 5, except what relates to the children of her Majesty's natural-born subjects born out of her Majesty's allegiance.)

10 Anne. A.D. 1711.

An Act to repeal the Act of the seventh year of her Majesty's reign, intituled "An Act for naturalizing foreign "Protestants," (except what relates to the children of her Majesty's natural-born subjects born out of her Majesty's allegiance.)

Whereas an Act of Parliament was made and passed in the seventh year of her Majesty's reign, intituled "An Act "for naturalizing foreign Protestants:" and whereas divers mischiefs and inconveniencies have been found by experience to follow from the same, to the discouragement of the natural-born subjects of this kingdom, and to the detriment of the trade and wealth thereof; be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the Lords spiritual and temporal, and Commons, in this present Parliament assembled, and by the authority of the same, that the before-mentioned Act, and all the matters and things therein contained (except so much of the said Act by which the children of all natural-born subjects born out of the allegiance of her Majesty, her heirs, and successors are to be deemed, adjudged, and taken to be natural-born subjects of this kingdom), shall be and is hereby repealed, annulled, and made void, to all intents and purposes whatsoever; provided nevertheless, that such repeal shall not in any sort prejudice or impeach the naturalization of any person who have been or shall be naturalized at any time before the fourth day of February which shall be in the year of our Lord 1711, pursuant to the directions of the before-mentioned Act. (See 4 G. II. c. 21, which explains 7 Ann. c. 5, s. 2.)

4 Geo. II., Cap. XXI. A.D. 1731.

An Act to explain a clause in an Act made in the seventh year of the reign of Her late Majesty Queen Anne, for naturalizing foreign Protestants, which relates to the children of the natural-born subjects of the crown of England, or of Great Britain.

Whereas by an Act of Parliament made in the seventh year of the reign of her late Majesty Queen Anne, intituled, "An Act for naturalizing of foreign Protestants," it is, amongst other things, enacted, that the children of all natural-born subjects, born out of the ligeance of her said late Majesty, her heirs and successors, should be deemed, adjuged and taken to be natural-born subjects of this kingdom to all intents, constructions and purposes whatsoever: and whereas in the tenth year of her said late Majesty's reign another Act was made and passed to repeal the said Act (except what related to the children of her Majesty's natural-born subjects, born out of Her Majesty's allegiance): and whereas some doubts have arisen upon the construction of the said recited clause in the said Act of the seventh year of Her late Majesty's reign: now for the explaining the said recited clause in the said Act, relating to children of natural-born subjects, and to prevent any disputes touching the true intent and meaning thereof. May it please your most excellent Majesty that it may be declared and enacted, and be it declared and enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and the commons, in this present parliament assembled, and by the authority of the same, that all children born out of the ligeance of the crown of England or of Great Britain, or which shall hereafter be born out of such ligeance whose fathers were or shall be natural-born subjects of the crown of England, or of Great Britain, at the time of the birth of such children respectively, shall and may, by virtue of the said recited clause in the said Act of the seventh year of the reign of Her said late Majesty, and of this present Act, be adjudged and taken to be natural-born subjects of the Crown of Great Britain, to all intents, constructions, and purposes whatsoever.

II. Provided always, and be it further enacted and declared by the authority aforesaid, that nothing in the said recited Act in the seventh year of Her said late Majesty's reign, or in this present Act contained, did, doth, or shall extend or ought to be construed, adjudged, or taken to extend, to make any children born or to be born out of the ligeance of the crown of England, or of the crown of Great

Britain, to be natural-born subjects of the crown of England, or of Great Britain, whose fathers at the time of the birth of such children respectively were or shall be attainted of high treason, by judgment, outlawry or otherwise, either in this kingdom or in Ireland, or whose fathers at the time of the birth of such children respectively, by any law or laws made in this kingdom or in Ireland, were or shall be liable to the penalties of high treason or felony, in case of their returning into this kingdom or into Ireland without the licence of His Majesty, his heirs, or successors, or of any of His Majesty's royal predecessors, or whose fathers at the time of the birth of such children respectively, were or shall be in the actual service of any foreign prince or state then in enmity with the crown of England, or of Great Britain; but that all such children are, were, and shall be, and remain in the same state, plight, and condition to all intents, constructions, and purposes whatsoever, as they would have been in if the said Act of the seventh year of Her said late Majesty's reign, or this present Act had never been made; anything herein, or in the said Act of the seventh year of Her said late Majesty's reign, contained to the contrary in any wise notwithstanding.

III. Provided always, and be it further enacted by the authority aforesaid, that if any child, whose father at the time of the birth of such child was attainted of high treason as aforesaid, or was liable to the penalties of high treason or felony, in case of returning into this kingdom or Ireland without licence as aforesaid, or was in the actual service of any foreign prince or state then in enmity with the crown of England or of Great Britain (other than and excepting always out of this proviso all children of such persons, who went out of Ireland in pursuance of the articles of Limerick) hath come into Great Britain or Ireland, or any other of the dominions belonging to the crown of Great Britain, and hath continued to reside within Great Britain or Ireland, or other the dominions aforesaid, for the space of two years, at any time between the fifteenth day of November in the year of our Lord one thousand seven hundred and eight, and the twenty-fifth day of March in the year of our Lord one thousand seven hundred and thirty-one, and during such residence hath professed the Protestant religion; or, if any child, whose father at the time of his or her birth was within any of the descriptions before mentioned, hath come into Great Britain or Ireland, or any other of the dominions belonging to the crown of Great Britain, and professed the Protestant religion, and died within Great Britain or Ireland, or any other of the dominions aforesaid, at any time between the said sixteenth day of November in the year of our Lord one thousand seven hundred and eight, and the said twenty-fifth day of March in the year of our Lord one thousand seven hundred and thirty-one; or if any child, whose father at the time of his or her birth was within any of the descriptions before mentioned, hath been and continued in the actual possession or receipt of the rents and profits of any lands, tenements, or hereditaments in Great Britain or Ireland, for the space of one whole year, at any time between the said sixteenth day of November in the year of our Lord one thousand seven hundred and eight, and the said twenty-fifth day of March in the year of our Lord one thousand seven hundred and thirty-one, or hath *bonâ fide*, and for good and valuable consideration, sold, conveyed, or settled any lands, tenements, or hereditaments in Great Britain or Ireland, and any person claiming title thereto, under such sale, conveyance or settlement, hath been and continued in the actual possession or receipt of the rents and profits thereof for the space of six months, between the said sixteenth day of November in the year of our Lord one thousand seven hundred and eight, and the said twenty-fifth day of March in the year of our Lord one thousand seven hundred and thirty-one, every such child shall be deemed, adjudged, and taken to be and to have been a natural-born subject of the crown of England, or of the crown of Great Britain, to all intents, constructions, and purposes whatsoever; anything herein contained to the contrary thereof in any wise notwithstanding.

13 Geo. III. Cap. XXI. A.D. 1773.

An Act to extend the provisions of an Act made in the fourth year of the reign of His late Majesty King George the Second, intituled "An Act to explain a clause in an Act "made in the seventh year of the reign of Her late Majesty "Queen Anne, for naturalizing foreign Protestants, which "relates to the children of the natural-born subjects of the "Crown of England or of Great Britain, to the children "of such children."

Whereas divers natural-born subjects of Great Britain, who profess and exercise the Protestant religion, through various lawful causes, especially for the better carrying on of commerce, have been, and are obliged to reside in several trading cities and other foreign places, where they have contracted marriages and brought up families: And whereas it is equally just and expedient that the kingdom should not be deprived of such subjects, nor lose the benefit of the wealth that they have acquired; and therefore that not only the children of such natural-born subjects, but their children also should continue under the allegiance of His Majesty, and be intituled to come into this kingdom, and to bring hither and realize, or otherwise employ their capital; but no provision hath hitherto been made to extend farther than to the children born out of the ligeance of His Majesty, whose fathers were natural-born subjects of the Crown of England, or of Great Britain; May it therefore please Your most excellent Majesty that it may be enacted; and be it enacted by the King's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that all persons born, or who hereafter shall be born, out of the ligeance of the Crown of England or of Great Britain, whose fathers were or shall be, by virtue of a Statute made in the fourth year of King George the Second, to explain a clause in an Act made in the seventh year of the reign of Her Majesty Queen Anne, for naturalizing foreign Protestants, which relates to the natural-born subjects of the Crown of England or of Great Britain, intitled to all the rights and privileges of natural-born subjects of the Crown of England or of Great Britain, shall and may be adjudged and taken to be, and are hereby declared and enacted to be natural-born subjects of the Crown of Great Britain, to all intents, constructions, and purposes whatsoever, as if he and they had been and were born in this kingdom, anything contained in an Act of the twelfth year of the reign of King William the Third, intituled, "An Act for the further limitation of the Crown, "and better securing the rights and liberties of the subject," to the contrary in anywise notwithstanding.

II. Provided always, and be it enacted and declared by the authority aforesaid, that nothing in this present Act contained shall extend, or be construed, adjudged, or taken to extend to make any persons born, or to be born out of the ligeance of the Crown of England or of the Crown of Great Britain, to be natural-born subjects of the Crown of Great Britain, contrary to all or any of the provisoes, exceptions, limitations, and restrictions contained in the aforesaid Act, made in the fourth year of the reign of His said late Majesty, or to repeal, abridge, or alter the same; but all such clauses shall be, and remain in the same state, plight, and condition, to all intents, constructions, and purposes whatsoever as they would have been if this present Act had never been made.

III. Provided also, and be it further enacted by the authority aforesaid, that nothing in this present Act contained shall extend, or be construed, adjudged, or taken to repeal, abridge, or anyways alter an Act made in the fifth year of the reign of His late Majesty King George the First, intituled, "An Act to prevent the inconveniences arising from "seducing artificers in the manufactures of Great Britain "into foreign parts;" nor to repeal, abridge, or any ways alter, any law, statute, custom, or usage whatsoever now in force, concerning aliens' duties, customs, and impositions, nor to cause any privilege, exemption, or abatement relating thereto, in favour of any person naturalized by virtue of this Act, unless such person shall come into this realm and there inhabit and reside, and shall take and subscribe the oaths, and make, repeat, and subscribe the declaration appointed by an Act made in the first year of the reign of His late Majesty King George the First, intituled, "An Act for the "further security of His Majesty's person and government, "and the succession of the Crown in the heirs of the "late Princess Sophia, being Protestants; and for extin-"guishing the hopes of the pretended Prince of Wales, and "his open and secret abettors," in such manner and form, and at such place and places as are in and by the said Act directed, and also receive the Sacrament of the Lord's Supper, according to the usage of the Church of England, or in some Protestant or reformed congregation within this kingdom of Great Britain, within three months before their taking the oaths in the said Act mentioned; and shall, at the time and place of taking and subscribing the said oaths, and of the making, repeating, and subscribing the said declaration, produce a certificate signed by the person administering the said sacrament, and attested by two credible witnesses, whereof an entry shall be made of record in the court and courts respectively wherein such oaths shall have been taken and subscribed, without any fee or reward.

IV. Provided always, and be it further enacted by the authority aforesaid, that no person shall be enabled hereby to defeat any estate, right, or interest which upon the last day of this session shall be lawfully vested in any other person, or to claim or demand any estate or interest which shall hereafter accrue, unless such claim or demand be made within five years next after the same shall accrue.

ALPHABETICAL INDEX TO MEMORANDUM.

[*The Figures refer to the Pages.*]

A.

Abela, Grazia, 75.
Aberdeen, Lord, 70.
Acts of Parliament, 6, 7, 8, 9, 15, 60 (Addenda I.) 93, (Addenda N.), 107.
Act of Parliament. Naturalization by, 7, 8.
Act. United States' Non-Importation, 32.
Adams, Mr., 36.
Adams, Mr. C. F., 48, 49.
Adams, Mr. J. Q., 36.
Agents of naturalized British subjects. Protection to, 76.
Ali, Agha, 72.
Albert, Lucien (French conscription), 57.
Aliens Committee, 8.
Aliens in United States, 18.
Aliens liable to trial for treason, 40.
Aliens. Mexican, law, 70, 71.
Allegiance. British, 5, 14, 15, 37, 40, 41, 60, 72, 75.
Allegiance. British subjects taken prisoners in United States' service, 35.
Allegiance. Danish, 65.
„ Declaration of Prince Regent, 35.
„ Natural and local. Blackstone on, 14.
„ Oath at New Orleans, 43.
„ Opinions of Sir W. Scott, 32.
„ Opinion of Sir J. Nicholl, 32.
„ Proclamation as to, 1814, 37.
„ United States', 1783, 29.
Amiens, Peace of, 31.
Amthor (Renunciation of United States' naturalization), 57.
Ancram, Mr., 75.
Anderson, Mr. Percy, 43.
Anguila, 12.
"Ann," case of, 15, (Addenda C.) 86.
Antenati, status of, 1783, 29.
Antigua, 10,
Argentine Republic, 61. Laws, 62.
Arguimban, Messrs., 74.
Army Bill. French Debate on, 24.
Arrests in Ireland, 1848, 40.
Ashburton, Lord, 39.
Aslan, J., 76.
Aslan, T. G., 76.
Austria. Correspondence with Great Britain, 62.
„ Correspondence with United States, 56.
„ Naturalization, 25, (Addenda H.) 92.
„ Martin Kozta, 56.
Azeglio, Marquis, 70.

B.

Bahamas, 10.
Bancroft, Mr., 40, 41.
Banks, General, 51.
Barbados, 10.
Barker, Vice-Consul, 69.
Barnard, Mr., 52, 53.
Bates, Attorney-General, 17, 45, (Addenda E.) 87.
Bathurst, Lord, 35.
Bavaria. Laws, 26.
„ Correspondence with United States, 57.
Bayard, Mr., 36.
Behne, Mr., 53.
Belgium. Correspondence with Great Britain, 62.
Belgium. Laws, 27.
Benson, Dr., 47.
Bergen, Mr., 40.
Berlin Decree, 33.
Bermuda, 10.
Bernstorff, Count, 73.
Bigelow, Mr., 58.
Bischoffsheim Mr., 8.
Bismarck, Count, 54.
Black, Attorney-General, 57.
Blackwell, T., 48.
Blockades, 38.
Blockade-runners, 47.
Borgerbrev, 65.
Born, Mr., 53.
Bosdet, A., 68.
Bosdet, C., 68.
Boyer, Mr., 51.
Braga, Senhor, 66.
Brand, Mr., 53.
Bransby, Mr., 64.
Brazil. Correspondence with Great Britain, 63,
„ Laws, 63.
Bremen, Correspondence with United States, 56.
British-born sons of Americans, 47.
British Columbia, 10.
British Guiana. Militia in, 66. Naturalization, 10.
British Laws, 5–15.
Bruce, Sir F., 49.
Buchanan, Mr., 40.
Buchanan, Sir A., 71, 74.
Buchanan, President, 58.
Buenos Ayres. Correspondence with Great Britain, 61.
Buenos Ayres, 67.
Burgher-recht, 28.
Burghership, 68.
Burke, 49.
Burke, Colonel, 48.
Butler, General, 43.

C.

Caicos Island, 13.
Calimachi, Mr., 76.
Canada. Fenians in, 48.
„ Naturalization in, 10.
Canning, Mr., 33.
Cape of Good Hope, 11.
Casaubon, Mr., 68.
Cass, Mr., 54.
Cassaro, Prince, 69.
Cassavetti, Mr., 76.
Castlereagh, Lord, 34.
Cavesford, John, 48.
Census, United States, 18.
Certificates of British Naturalization. Restrictions in, 9; forms (Addenda I.), 95.
Certificates, United States' Naturalization (Addenda B.), 86.
Chanler, Mr., 51.
"Chesapeake." Affair of, 33.
Children of Aliens born in British territory, 47, 70, 71.
Chinese, of British origin. Distinctive dress to be worn in China, 64.
Christie, Mr., 61.
Cicero, quoted, 41.
Circulars, BritishPassports, and protection (Addenda K.), 96.
Citizenship, United Statds', 45.
Citizenship, Attorney-General Bates' Opinion on, (Addenda E.) 87.
Citizenship, State, 18.
Cittadinanza, 18, 28.
Civil Service. Employment in foreign, does not affect British nationality, 64.
Civil War in United States, 41.
Claimants, Venezuelan, 77.
Clarendon, Lord, 48, 67.
Clark, Mr., 48.
Clark, Elijah, 16.
Clay, Mr. C. M., 59.
Clay, Mr. H., 36.
Cochener, Mr., 58.
Code. Austrian, 25, (Appendix H.) 92.
Code. Italian, Revised, 1866, 27.
Code. Napoléon, 19, 20, 22, 61.
Coke, Lord, on Allegiance, 15.
Colombia. Correspondence with Great Britain, 64.
Colonial Naturalization, 10.
Colonial Naturalized Subjects. Issue of Passports to, Regulations, 13, 14,
Commissioners, British, at Ghent. Instructions to, 36.
Commissioners, United States', at Ghent. Instructions to, 36.
Common Law, 5, 6, 60.
Confederate States, 44, 46.
Confederate States. Circular to Consuls in, 43.
Confederate States. Consuls expelled, 46.
Congress, International, 51.
Congress. Proceedings in, 49.

Conscription. Argentine, 61, 62.
„ Austrian, 62.
„ Brazilian, 63.
„ Buenos Ayrean, 62.
„ Colombian, 65.
„ Costa Rican, 60.
„ Confederate (see Confederate States).
„ Danish, 59.
„ Dutch, 71.
„ French, 24, 57, 58, 68.
„ „ M. Treitt's Report, 21.
„ „ Debate on Army Bill, 24.
„ German States, 55.
„ Grecian, 69.
„ Guatemalan, 69.
„ Hamburgh, 68.
„ Italian, 27, 70.
„ Norwegian, 71.
„ Portuguese, 72.
„ Prussian, 25, 52, 73.
„ Spanish, 29, 59, 74.
„ Swiss, 75.
„ United States', 41, 43, 45.
„ Venezuelan, 77.
Conscripts. Forced, taken prisoners, 46.
Constitution. United States', 16.
„ Spanish, 28.
„ Brazilian, 63.
„ Venezuelan, 77.
Consuls in Spain. Circular to, 74.
Consuls. British resident abroad cannot be naturalized, 9.
Coppell, Mr., 44.
Corfu, 69.
Costa Rica, 60.
Costa Rica. Correspondence with United States, 60.
Costello, 49.
Cowley, Lord, 67.
Crampton, Sir J., 74.
Crossthwaite, Consul, 73.
Crowther, Mr., 71.
Crutchett, Mr., 46.
Cuba, 58.
Cuppa, Messrs., 76.
Cushing, Attorney-General, 17. (Report. Addenda A., 78.)

D.

Dale, Mr., 53.
Dale, Vice-Consul, 60, 71.
Dawkins, Mr., 62.
Debate in House of Representatives, 1814, 36.
Declaration of Independence, 29.
Declaration of Prince Regent, 1813, 35.
Decree, Berlin, 33.
Decrees, English and French, 33, 34.
Decree (French), 1811, 19, 22, 23.
Decree, Milan, 34.
Delpierre, Victor, 57.
D'Empaire, A., 77.
Denization, 8, 9.
Denmark. Correspondence with Great Britain, 65.
„ „ „ United States, 59.
Deserters, 34, 38.
Diamond, J., 49.
Dodgshun, Mr., 68.
Domicil, 30.
Doria, Mr., 62.

E.

Edwardes, Mr., 77.
Eggeston, Mr., 135–150.
Elliot, Mr., 70.
European Central Railway Company, 75.
Everett, Mr., 53.
Expatriation. Austrian, 25. (Addenda H., 92.)
„ Bavarian, 26.
„ Brazil, 63.
„ British, 14, 41, 75.
„ British Commercial, 15.
„ French, 19, 22. (Addenda D., 87.)
„ Italian, 28.
„ Prussian, 25, 55. (Addenda G., 91.)
„ Russian, 59.
„ Spanish, 28.
„ United States', 17, 40, 53, 54, 57. (Addenda A., 78.)
„ Wurtemburg, 26.

F.

Fagan, Mr., 77.
Faulkener, Mr., 58.
Fenians in Canada, 47.
„ Ireland, 48–50.
Foden, Mr., 47.
Forced Loans, 70.
Foreign Affairs Committee, Congress, 50–52. (Report of, Addenda M., 98.)
Foreman, W., 71.
Foster, Mr., 34.
Fournier, Messrs., 75.
Fox, Mr., 32.
France. Correspondence with Great Britain, 66.
„ „ „ United States, 57.
„ Laws of, 19–24.
Frankfort, 55–68.
French. British Guiana Militia, 66.

G.

Galatz, 76.
Gambier, Lord, 36.
Geneva, 75.
Germany. Correspondence with Great Britain, 68.
„ „ „ United States, 55.
Ghent. Negotiations at, 36–38.
„ Treaty of, 38.
Giro, Mr., 76.
Goldberg, B., 59.
Goulburn, Mr., 36.
Gray, Mr., 46.
Greece. Correspondence with Great Britain, 69.
Grenada, 10.
Grenville, Lord, 31.
Griffith, Mr., 64.
Grimm, Mr., 68.
Guatemala. Correspondence with Great Britain, 69.
Gutowsky, 63.

H.

Habeas Corpus. Ireland, 47.
„ United States, 42.
Hall and Hoare, Messrs., 70.
Hamburgh, Laws of, 27.
Hamilton, Mr., 46.
Hanoverians, 61–74.
Hansard, Mr., 46.
Hanse Towns, 68.
Harris, Admiral, 75.
Harrowby, Lord, 32.
Hawkesbury, Lord, 31–32.
Healey, John, 48.
Hesketh, Mr., 63.
Heslop, Mr., 47.
Hesse, 68.
Hill, Miss, 47.
Hofer, Mr., 54.
Honduras, 69. British, 11.
Hong Kong. 11.
Hood, Mr., 61.
Hornby, Sir E., 76.
Hostages, 35, 38.
Howard, Mr., 63.
Howard de Walden, Lord, 62, 72.
Howick, Lord, 31.
Hoy, Mr., 42.
Hudson, Mr., 70.
Hynes, T., 48.

I.

Illegitimate children, 70, 77.
Impressment, 1792, 1814, 30–38.
„ 1818, 38.
„ 1842, 39.
„ 73.
Indian Civil Service. Persons cannot be naturalized in order to enter, 9.
Intended citizens, 43, 45.
„ United States' Passports refused to, 42.
„ Martin Kozta, 56.
Ionian Nationality, 69, 77.
Ireland, 1848, 40.
„ 1866, 47.
Irish Laws, 7.
Italy. Correspondence with Great Britain, 69.
„ Laws of, 27.

J.

Jackson, Mr., 34.
Jacnel, 49.
Jamaica, 11.
Jefferson, President, 31.
Jenckes, Mr., 51.
Jenkins, Mr., 47.
Jerningham, Mr., 63.
Jews. British in Russia, 73.
Judd, Mr., 54.

K.

Keogh, Justice, 49.
King, Mr., 30.
Knocke, J., 52.
Kozta, Martin. Case of, 56.

L.

Landowners, 45.
Lawrence, Mr., 17.

Laws. Austria, 25. (Addenda H., 92.)
„ Bavaria, 26.
„ Belgium, 27.
„ Brazil, 63.
„ British, 5–8.
„ „ Present Law, 8. (Addenda I., 93.)
„ Columbia, 64.
„ Colonial, 10–13.
„ Denmark, 65.
„ French, 19–23.
„ Hamburgh, 27.
„ Irish, 7.
„ Italy, 27.
„ Netherlands, 26.
„ Prussia, 25. (Addenda G., 91.)
„ Russia, 26, 73.
„ Spain, 28.
„ Switzerland, 27.
„ United States, 16–18.
„ Venezuela, 78.
„ Wurtemburg, 26.
Le Coq, 53.
Levant. Protection to British subjects in, 76.
Liaño, Sabino de, 59.
Liston, Mr., 31.
Lopez Expedition, 58.
Lynch, R., 49.

M.

McCafferty, 49.
Macdonald, Æneas, 16.
McKirwan, 48.
McMahon, 49, 50.
Madison, Mr., 30.
Mahometan. Maltese girl become, 75.
Malet, Sir A., 68.
Manteuffel, Baron, 53.
Marcy, Mr., 56.
Maritime Rights, 39.
Marriage, 76.
„ at British Embassy, Paris, 68.
Marshall, Mr., 31.
Martial Law, 47.
Masulipatan Newal, 71.
Matchett, Mr., 46.
Mavrogodato, Mr., 76.
Merchant vessels. Extra-territorial, 32, 36, 40.
Merchant Shipping Act, 1854, 15, 76.
Mercier, Mr., 44.
Messina, 69.
Messina, Mr. Rosario, 70.
Mexico. Correspondence with Great Britain, 70.
Mexico. Laws, 70.
Meyer, Mr., 53.
Milan Decree, 34.
Military Labour, Forced, 44.
Military Service. Liability of aliens to, 73.
„ Treaty provisions, 66.
Militia. British, 73.
„ British Guiana, 66.
„ Dutch, 71.
„ Hamburgh, 68.
„ United States', 41, 43, 45.
Mines, British interests in, 70.
Minors, Alien, in France, 66.
Minors, born abroad, not naturalized by fathers Naturalization, 9.
Minor Children, 42.
Minors in United States, 47.
Mission, Lord Ashburton's, 39.
Mixed Jury. 49. (Addenda F., 90.)
Monroe, Mr., 31, 32, 36.
Monte Video, 71.
Montoya, Mr., 65.

N.

Nagle, W. J., 50.
Natal, 11.
Nationality. Brazil, 63,
„ British, 64, 67, 68, 70, 71, 72, 77, &c.
„ France, 19, 20, 77.
„ Italy, 27.
„ Sardinia, 70.
„ Spain, 28.
„ Statutes, (Addenda N.) 107.
„ Venezuela, 77.
Naturalization. Bavaria, 26.
„ Belgium, 27.
„ British, 5–14.
„ British, Acts of, 1844, 1847, (Addenda I.) 93.
„ British, Certificates of, 9.
„ British Colonial, 10.
„ „ „ Antigua, Grenada, St. Vincent, 10.
„ „ „ Bahamas, 10.
„ „ „ Barbados, St. Vincent, St. Lucia, Grenada, 10.
Naturalization. British Colonial, Bermuda, 10.
„ „ „ British Columbia, 10.
„ „ „ British Guiana, 10.
„ „ „ Canada, 10.
„ „ „ Cape of Good Hope, 11.
„ „ „ Honduras, 11.
„ „ „ Hong Kong, 11.
„ „ „ Jamaica, 11.
„ „ „ Natal, 11.
„ „ „ New Brunswick, 11.
„ „ „ Newfoundland, 12.
„ „ „ New South Wales, 12.
„ „ „ New Zealand, 12.
„ „ „ Nova Scotia, 12.
„ „ „ Prince Edward's Island, 12.
„ „ „ Queensland, 12.
„ „ „ St. Kitt's and Anguila, 12.
„ „ „ Sierra Leone, 12.
„ „ „ South Australia, 13.
„ „ „ Tasmania, 13.
„ „ „ Trinidad, 13.
„ „ „ Turk's Island and Caicos Island, 13.
„ „ „ Victoria, 13.
„ „ „ Western Australia, 13.
„ Denmark, 65.
„ France, 23.
„ „ Statistics, 24.
„ of Frenchmen abroad, 19.
„ Hamburgh, 27.
„ India, 14.
„ Ionian, 69.
„ Ireland, 7.
„ Italy, 27.
„ Netherlands, 26.
„ Prussia, 25, 73.
„ Russia, 26, 73,
„ Switzerland, 27.
„ United States', 16, 17, 42, 43, 60.
„ „ Present Laws, 16 (Addenda B.), 85.
„ „ Protection Act, 1868, 52.
„ „ Renunciation of, 57.
„ Wurtemburg, 26.
„ Draft Article in Treaty, 1818, 38.
Naturalized British Subjects. Protection to, 62, 68, 70, 76, &c. (Addenda K., 96.)
Naturalized British Subjects. Sons of, born in England, 65.
„ „ Children born at sea or abroad, 69.
„ „ Zwingers Marriage at Paris Embassy, 68.
Naturalized Seamen, 30–34.
Naval Service. Naturalization by, 76.
Netherlands. Conscription, 71.
New Brunswick, 11.
Newfoundland, 12.
New Granada. Correspondence with Great Britain, 64.
New Orleans. Oath, 43.
„ Police, 47.
New South Wales. 12.
New Zealand, 12.
Nicaragua, 69.
Nicholl, Sir J. Opinion, 32.
Norway. Conscription, 71.
Nova Scotia, 12.

O.

O'Leary, Mr., 64.
O'Malia, 48.
O'Mally, 48.
Orders in Council, 1807, 33, 34.
Ownership of British vessels, 15.

P.

Pacifico, Don, 69.
Palmerston, Lord, 40, 41, 61, 70.
Panama. Riot claims, 64.
Passports, 9, 73, 74.
Passports to naturalized British subjects, 9, 13, (Addenda K.) 96.
„ Limitations in, 9.
„ to naturalized Colonials, 13.
„ United States, 42.
Persia. Correspondence with Great Britain, 71.
Peru. „ „ 72.
„
Petition. Nagles, to Congress, 50.
Pierre, Mr., 58.
Piggott, Chief Baron, 49. (Addenda F., 90.)
Pile, Mr., 51.
Pinckney, Mr., 32.
Pitt, Mr., 32.
Pongoski, S., 59.
Portugal. Conscription, 72.
„ Correspondence with Great Britain, 72.
President, 34.

President's Message, 1812, 34.
„ „ 1813, 35.
„ „ 1860, 58.
„ „ 1867, 50.
Prevost, Sir S., 35.
Prince Edward Island, 12.
Prisoners. British Subjects taken in United States' service, 35.
Prize. Vessels of Frenchmen naturalized in United States captured as French, 31.
Proclamation. British, 1807, 33.
„ „ 1814, 37.
„ United States, 45.
Protection. Fraudulent Seamen's, 35.
Protection to British subjects engaged in commercial enterprises with foreigners, 70,
Protection to British Companies abroad, 75.
Protection to sons of British subjects born in foreign countries, 60, 61, 63, 69, 72.
Prussia. Correspondence with Great Britain, 73.
„ „ „ United States, 52.
„ Laws, 25. (Addenda G., 91.)
„ Treaty with United States, 1868, 55.

Q.

Queensland, 12.
Quezada, Messrs. 60.

R.

Rainals, Mr., 65.
Rawlinson, Sir H., 71.
Read, Sir T., 75.
Registration as British subjects, 72.
Renkewitz, Mr., 73.
Representatives. Debate in House of, 1814, 36.
„ „ 1867–8, 49–52.
Retaliation, 35.
Right of search for seamen, 31, 32, 36, 37.
Riotte, Mr., 60.
Robinson, Mr., 49.
Roach, Mr., 75.
Rodocanachi, Mr., 76.
Roon, Baron, 55.
Rush, Mr., 1818, 38.
Russell, Lord, 43, 67.
Russell, Mr., 34, 36.
Russia. Correspondence with Great Britain, 73.
Russia. Laws of, 26.
Ryan, Mr., 40.

S.

St. Croix, 66.
St. Kitts, 12.
St. Lucia, 10.
St. Petersburgh Factory, 74.
St. Vincent, Lord, 31.
St. Vincent, 10.
" Sally," Case of, 31.
Saltieri, Mr., 70.
Salvador, 69.
Sandt, H., 52.
Santillana, D. D., refused Naturalization as being resident abroad in consular service, 9.
Santillana, M., intrepreter at Tunis, given letters of denization, 9.
Sardinian Law, 27.
Saviñon, Señor, 71.
Saxony. Correspondence with Great Britain, 69.
Scarlett, Mr., 70.
Schilizzi, Mr., 76.
Scott, Mr., 45.
Scott, Sir W. Opinions, 32.
Seamen. (See Impressment.)
Seamen. Proclamation recalling, 1807, 33.
Seamen serving in United States' Navy, 35.
Seijas, M., 77.
Sellers, Mr., 44.
Seward, Mr., 42, 54, 55, 59, 60.
Shaver, Mr., 44.
Sheil, Mr., 71.
Sherman, Judge, 49.
Sherwin, Mr., 46.
Schneider, Mr., 58.
Sierra Leone, 12.
Smidt Boie, 59.
Smith, Mr., 34.
Smith, P., 70.
Sofio, R.E., 70.
Sons of naturalized citizens, 42, 43, 46.
South Australia, 13.
Spain. Conscription, 59.
„ Correspondence with Great Britain, 74.
„ „ „ United States, 58.
„ Laws, 28, 61, 62.
Spence, Mr., 63.
State citizenship, 18.
Statistics. France, 24.
„ United States, 18.
Story, Justice (quoted), 49.
Stratford, Mr., 77.
Stuart, Mr., 43. John and Benedict, 69.
Swan, Mr., 71.
Switzerland, 27.
„ Conscription, 75.
„ Correspondence with Great Britain, 75.

T.

Tasmania, 13.
Temple, Sir W., 69
Terry, James, 68.
Theologo, Messrs., 76.
Theologo, P., 76.
Theologo, S., 76.
Thile, Baron, 54, 55.
Thornton, Mr., 62.
Thrasher, Mr., 58.
Todry, Mr., 58.
Tolen, Ignacio, 59.
Toronto. Arrests at, 49.
Tousig, Simon (Domicil), 57.
Trade Laws. Denmark, 65.
„ Russia, 74.
Treason. Doctrine of, 40, 41.
Treaties. Clause in, as to military service, 66.
Treaty with United States, 1783, 29, 30.
„ „ 1794, 30.
„ draft, 1804, 32.
„ not ratified, 1806, 33.
„ of Ghent, 1814, 38.
„ draft, 1818, 39.
„ United States and Prussia, 1868, 55.
„ Italian, 70.
„ Swiss, 75.
Treitt, M. Report on French law, 21.
Trinidad, 13.
Tunis. Correspondence with Great Britain, 75.
Turkey. Correspondence with Great Britain, 76.
Turkish Rayahs naturalized in England. Protection in Egypt to, 76.
Turk's Island, 13.
Twiss, Sir Travers. Law of Nations, 17.
Two Sicilies. Laws, 27.

U.

United States. Laws, 16, 17.
United States. Correspondence with Great Britain, 29.
„ Correspondence with other countries, 52.

V.

Venezuela. Correspondence with Great Britain, 77.
Venice, 62.
Vertu, P. B., 70.
Victoria, 13.
Voters, 43, 44.

W.

Walewski, Count, 61, 66.
„ on effect of naturalization abroad on French conscription, 20.
Walewski, Julien Colonna, 67.
Walne, Mr., 76.
War proclaimed, 1812, 34.
Warren, 49.
Webster, Mr., 39, 53, 58.
West Australia, 13.
West, Mr., 47, 50.
Wheaton, Mr., 52.
Widows. Status of, 44, 73.
Wilson, Mr., 51.
Wisconsin. Conscription, 44.
Wissembourg. Judgment. Zeiter's case (Addenda D.), 87.
Wolff, Mr., 74.
Woodward, Mr., 51.
Wright, Mr., 53, 54.
Wyke, Sir C., 69.

Z.

Zeiter's case (French conscription), 21–58, (Addenda D.) 87.
Zwinger, Mr., 68.

APPENDIX No. II.

DISABILITIES OF ALIENS.—REPORTS FROM FOREIGN STATES.

The accompanying circular was sent from the Foreign Office to Her Majesty's representatives at European Courts and in the United States :—

" Foreign Office, June 16, 1868.

" I HAVE to instruct you to furnish me, with as little delay as possible, with a report for the Naturalization Commission, on the disabilities, if any, to which aliens residing in ——— are subjected by ——— law;" and the following despatches were received in reply :—

AUSTRIA.

MY LORD, Vienna, June 23, 1868.

IN compliance with the instructions contained in your Lordship's despatch of the 16th instant, I addressed a note to Baron Beust, copy of which I have the honor to enclose, requesting the information desired by Her Majesty's Government as to the disabilities of aliens, at the earliest convenience of the Austrian Government, but as some time will probably elapse before I shall receive an official reply, I instructed Monsieur Winiwarter, the legal adviser to Her Majesty's Embassy, to furnish me with the Austrian law on the subject.

I enclose a copy of Monsieur Winiwarter's reply.

I have, &c.

The Lord Stanley, M.P. BLOOMFIELD.
&c. &c. &c.

M. LE BARON, Vienna, June 22, 1868.

H. M. G. being desirous to obtain information for the use of the Naturalization Commission now sitting in London respecting the disabilities, if any, to which aliens residing in Austria are subjected by Austrian law, I have the honor to request your Excellency's good offices in procuring the information required as soon as it can be conveniently furnished by the Imperial Government.

I avail, &c.

(Signed) BLOOMFIELD.

H. E. The Baron de Beust,
&c. &c. &c.

YOUR EXCELLENCY, Vienna, June 22, 1868.

IN answer to the letter 21st instant your Excellency addressed me, I have the honor of submitting to your Excellency a memorandum containing the most important disabilities to which aliens residing in Austria are subject by Austrian law. I must state at the same time that no particular law exists by which all these disabilities could be ascertained.

There exist on the contrary many laws which prescribe that for certain professions, positions in life and occupations the Austrian citizenship is required. From these laws, which have been issued at very different periods, I have extracted the enumeration of cases in which aliens do not enjoy the same rights as the Austrian subjects themselves.

I might further state that my information holds only good for the so called German provinces, that is to say for the kingdoms and countries represented by the Reichsrath. With regard to Hungary I can only say that a new law regulating the position of the Hungarian citizen and of foreigners is to be discussed in the two houses, but has not yet passed.

I have, &c.

(Signed) D. WINIWARTER.

The Lord Bloomfield,
&c. &c. &c.

LEGAL ADVICE.

THE rights and the legal position of aliens residing in Austria are essentially regulated by § 33 of the Austrian Civil Code, which runs as follows :—

" Foreigners have in general equal civil rights and " obligations with the natives if the quality of a citizen is " not expressly required for the enjoyment of these rights. " Foreigners must also, in order to enjoy the same rights " as natives, prove in cases of doubt, that the State to which " they belong will likewise treat the citizens of this country " in regard to the rights in question like its own."

According to this law foreigners enjoy the same civil rights with the Austrian citizens, if for the enjoyment of a certain right the qualifications of an Austrian citizen are not expressly required. On the other hand they are subject to the same obligations as the Austrians. There is a fundamental exception from this general rule respecting the citizens of States which do not confer on Austrians the same rights which their own subjects legally enjoy.

A total enumeration of cases in which the Austrian citizenship is expressly required is hardly possible, and therefore I cannot guarantee that the following list of cases in which foreigners are not in possession of the same rights as Austrian subjects, will be complete. I can only say that no case of any importance has been overlooked. Foreigners cannot :—

1. Receive the appointment of public functionaries (official).
2. Nor those of advocates, notaries, or public agents.
3. Foreigners cannot be superiors of religious orders.
4. If a foreigner wishes to commence a public trade or business, it is not sufficient to give notice to the board of trade of his intended project, but a special concession of the home department is besides required.
5. Foreigners cannot be admitted to the military service.
6. They cannot be appointed guardians or committees for Austrian minors or Austrian subjects under committee.
7. They have not the right of constituency for the diets and the Reichsrath.
8. Nor have they the right of being elected as such deputies.
9. They cannot be admitted to the membership of political associations.
10. They are not authorized to act as undertakers, directors, or managers of public meetings, the object of which is the discussion of political affairs.
11. They have not the right of election for the common council and cannot be elected as such members.
12. They cannot obtain the position of a sworn broker (agent of exchange).
13. They cannot exercise the profession of hawker.
14. Physicians, surgeons, and midwives, as well as apothecaries if foreigners, are not admitted to the practice of their respective professions till they have passed the legal examinations of the country.
15. Foreigners cannot be directors of public schools or educational establishments as little can they become professors of a university or of any public institute.
16. The personal capacity of foreigners is in regard of their transactions to be judged of according to the laws of their own country, viz. :—although an Austrian has become of age by completion of his 24th year, a foreigner, however, of 24 years cannot be regarded as of age if the laws of his country requires a greater number of years. In this regard the foreigners may not be able to enjoy the same rights as the Austrians.

Vienna, 22nd June 1868.

(Signed) D. WINIWARTER.

BADEN.

MY LORD, Stuttgart, July 14, 1868.

IN conformity with your Lordship's instructions of the 12th June, I have the honour to inclose herewith translation of a note addressed by Baron Freydorf to Mr. Baillie containing information with respect to the position of aliens in the Grand Duchy of Baden, from which it will be perceived that aliens are practically subject there to no disabilities whatever, except exclusion from political and municipal rights.

I have, &c.

Lord Stanley, M.P. G. J. R. GORDON.
&c. &c. &c.

(*Translation.*)

Within the whole compass of private rights, especially in respect to the right of acquiring and possessing property of every kind, landed property included, aliens stand according to Baden law upon a footing of complete equality with native subjects.

As regards the right of settlement and of engaging in trade or industry, the Baden Government are entitled, if they please, to demand reciprocity as the condition of admission to such rights. They have, however, never as yet taken any advantage of their authority in this respect, so that in point of fact aliens residing in Baden are subject to no disabilities in regard to the right of settlement, or of engaging in trade or industry.

On the other hand, aliens are of course excluded from political rights, from offices in Church and State, and from such rights as appertain to persons as members of a corporate community.

I avail, &c.

(Signed) FREYDORF.

E. M. Baillie, Esq.
&c. &c.

&c. &c.

BAVARIA.

MY LORD, Munich, July 10, 1868.

MR. FENTON having, on the receipt of your Lordship's Circular Despatch, of the 16th ultimo, applied to the Bavarian Government for the information desired by your Lordship, for the use of the Naturalization Commission, on the disabilities to which aliens residing in Bavaria might be subjected, I yesterday evening received in reply from Prince Hohenlohe the note of the 5th instant and the memorandum of which I have the honour to enclose herewith copies and translations.

This memorandum contains such full particulars on the legal position of foreigners in Bavaria, that I have no occasion to add any further explanations on the subject.

Your Lordship will perceive that Prince Hohenlohe remarks in his note that as the principles of the Bavarian Poor Law and Communal Legislation are at present undergoing a legislative revision, it had been necessary to omit treating, in the memorandum, of the position of foreigners with respect to these two institutions.

I have, &c.

HENRY F. HOWARD.

The Lord Stanley, M.P.
&c. &c. &c.

(*Translation.*) Munich, July 5, 1868.

The undersigned has had the honour to receive the note of the 22nd ultimo, by which the Royal British Chargé d'Affaires ad interim, Mr. H. P. Fenton, requested communication of the regulations in force in the kingdom relative to the disabilities to which foreigners are liable in this kingdom. The enclosure contains a review of the legal provisions which are in force in this respect, and the only remark to be made is, that the principles of the Poor Law and of the Communal Legislation are at present undergoing a legislative transformation, on which account a discussion of the position of foreigners with regard to these two institutions has had to be omitted.

I have, &c.

(Signed) PRINCE HOHENLOHE.

Sir Henry F. Howard, K.C.B.
&c. &c. &c.

The Legal Position of Foreigners in Bavaria.

The general principle rules, that a foreigner enjoys equal rights with a native of the country, to which the only exception made is where such exception is legally enacted, or when a royal ordinance applies the principle of retaliation on account of disadvantages to which Bavarian subjects are liable abroad, as compared to persons belonging to the country which imposes the disadvantages.

The legal disabilities relate to :—

I. *The Domain of Civil Law and Civil Proceedings.*

Whilst a preference to native creditors or debtors is excluded by § 34 of the Code of Priority of the 1st of June 1822, in cases of bankruptcy, paragraph 8 I of the Code of Procedure of the 22d of July 1819, leaves it optional to the defendant, being a native of the country, to require of the foreign plaintiff, when he does not possess any estate situated in Bavaria, the deposit of a security for the future payment of the costs of the lawsuit. With regard to foreigners, and as is the case generally when there is the danger of loss, the Judicial Code affords the security of arrest, which likewise then determines the "forum arresti." In this respect, likewise, international treaties, as, for example, with Wurtemberg, have introduced milder enactments in favour of the subjects of the respective states. Moreover, article 76 of the introductory law to the German Commercial Code places the citizens of the states of the former German Confederation on an equality with natives of the country. Foreigners are likewise capable of acquiring real property on the condition of reciprocity.

II. *Penal Law and Penal Procedure.*

Foreigners are subject to the Bavarian penal jurisdiction when they have either committed a penal act in the country, or when they shall have been guilty beyond the Bavarian frontiers of such an act against the king, the Bavarian State, or a person belonging to it.—A. 12, Penal Code.

If a foreigner has been condemned in Bavaria on account of a crime, he will be expelled from the country after having undergone his punishment; the same takes place with regard to convictions on account of offences or contraventions in the cases determined by law.—Art. 43, *loc. cit.*

In actions for libel the demand of a security for the costs from a foreign plaintiff is optional, according to Art. 61, section 3, of the introductory law to the Penal Code.

In respect to foreigners, concerning whom well-founded doubts may be entertained of their appearing before the court if summoned to do so, preliminary arrest is moreover admissible according to Art. 41, section 3, *loc. cit.*, on account of any penal act.

III. *In the Domain of the Constitutional and Administrative Law the Foreigner is excluded.*

1. As not being in possession of the *Bavarian Naturalization* (Indigenat) *from all civil rights.*—§ 9 of the first Edict of the Constitution.

If he acquires the naturalization, it is only after the expiration of six years that he enters into the enjoyment of the above-mentioned rights. The foreigner, as such, is therefore excluded from the active and passive electoral franchise for communal, district, provincial, and parliamentary elections, from admission into State offices and the possession of benefices; he cannot be elected as a juryman, nor as a member of a committee of taxation. Crown and superior court offices, superior military posts, are closed to the foreigner, although it is not the possession of the fullest rights of citizenship, but merely that of naturalization, which gives a claim to many of the above-named rights.

2. *The Trade Law of the 18th of January* 1868 only reserves in article 2 the sanction of the State for foreign joint-stock companies, branch establishments and other companies established for trading purposes, inasmuch as the provisions of State treaties do not determine otherwise. Even § 21 of the ordinance relative to the hawking trade of the 28th of April of last year places foreigners on a complete equality with the natives of the country, excepting in cases of retaliation. Foreign medical men receive from the provincial governments or from the Ministry of State for the Interior the permission temporarily to practise in the country. Medical men who only sojourn temporarily in Bavaria, and who are entitled to practice in their own country only, have the right of giving consultations, not however that of ordinary practice.—§ 15, Ordinance of the 29th of January 1865, concerning the medical art.

3. Article 10, section 2, of the military law of the 30th of January of this year, prohibits the permanent residence in the kingdom, as foreigners, of those emigrants who have not yet attained their 32nd year.

4. Foreigners are permitted to reside in any commune of the kingdom when they can bring sufficient proof of their nationality and place of legal settlement, and when there is no legal impediment to their residence. The expulsion of a foreigner from a commune is only admissible on the same legal grounds (Article 45 of the Law of Settlement of the 16th April of this year) in virtue of which the expulsion of a Bavarian subject not having a right of settlement in the locality could likewise take place. It is only the Ministry of the Interior which, except in the aforesaid cases, is entitled to expel a foreigner from the country on grounds connected with the internal or external security of the State.

5. Only the person who posseses the Bavarian Naturalization can acquire a *right of settlement* in a commune of

the kingdom; foreigners are consequently excluded from it.—Article 1–10, *loc. cit.*

A foreign woman, however, who marries a Bavarian, acquires thereby the naturalization (Indigenat) and the settlement of the husband.—§ 3 of annex 1 to the Constitution, and Article 3 of the Law of Settlement.

6. Foreigners can likewise marry in Bavaria when they can prove to the respective district police authorities that, according to the laws in force in the country of the husband, the contracting of this marriage is admissible, and has the same effects as if it had taken place in that country.

If the future wife is a foreigner she has to produce a permission of emigration, if such a permission is necessary according to the laws of her own country for emigration. —Article 34, &c. and Article 39 of the Law of Settlement.

7. Foreigners, independently of cases of retaliation, and with the sole exception of those who carry on a wandering trade, or who belong to the class of journeymen, servants, and trade assistants, require no *permit for travelling.* —§ 2 of the Royal Ordinance of the 9th of December 1865 respecting passports.

BELGIUM.

No. 96.

My Lord, Brussels, July 4, 1868.

I have the honour to acknowledge the receipt of your Lordship's despatch circular of the 16th instant, instructing me to furnish you with a report on the disabilities, if any, to which aliens residing in Belgium are subjected by Belgian law.

The disabilities under which aliens labour in this country are so various that I found it necessary to apply to the Government for more details than I felt myself competent to afford, but as your Lordship desires that information on the subject should be supplied with as little delay as possible, I herewith transmit copies of two laws which bear directly upon the residence of foreigners in Belgium, and which may be considered as embodying the material features of Belgian practice towards aliens.

The first is a law which is renewed from time to time, the last renewal being on the 7th of July 1865, for a period of three years, investing the Government with the control over the residence of foreigners. The Government exercise the power of sending aliens out of the country in cases, 1st, of vagrancy, or when the resources for subsistence are not proved when required to be declared;

2nd. Of scandalous, immoral, or turbulent conduct offensive to the public.

3rd. Of political proceedings by agitation, writing, or conspiracy against the tranquillity of a friendly State in abuse of the hospitality here afforded them.

The second* law in question passed this year extends the power hitherto in force for the extradition of foreigners accused or guilty of crimes committed in their own countries, and constitutes the basis of the extradition treaties of which copies were forwarded in my despatch of January 20th.

Until April 1865, British subjects were not entitled to hold or inherit freehold property situate in Belgium. At present all foreigners in that respect are placed upon the same footing as Belgians. Further, distinctions between foreigners and natives are made in regard to judicial processes, for instance, in civil actions, a foreigner cannot obtain an order of provisional arrest either against a Belgian or another foreigner; in commercial actions he is under the same disability. But the Belgian can obtain an order of provisional arrest against a foreigner upon a simple petition through his "avoué" to the President of the Tribunal of Première Instance. In all tribunals except the Tribunal of Commerce he can be called upon at a stage of proceedings to give security for costs, unless he has letters of domicile from the King. For a foreigner to acquire the same civil position as a Belgian he requires a letter of domicile from the King. To acquire a position political as well as civil he requires an Act of Legislature. The letter of domicile confers on the foreigner the right of provisional arrest in all cases where a Belgian would have such rights. He cannot be called upon as plaintiff in any action to give security for costs; he is also exempt from provisional arrest except in such cases where a Belgian would not be exempt, for instance, in criminal or correctional proceedings.

The foreigner is not liable to the conscription for the army, nor is active service required of him in the Civic Guard, though, for the latter, he is called upon to contribute a pecuniary amount.

I have, &c.

Howard de Walden.

The Lord Stanley, M.P.
&c. &c. &c.

* Not printed for the Commission.

MINISTÈRE DE LA JUSTICE.

Loi relative aux Étrangers.*

Léopold, Roi des Belges, à tous présents et à venir, Salut,

Les Chambres ont adopté et Nous sanctionnons ce qui suit:—

Art. I. L'étranger résidant en Belgique, qui, par sa conduite, compromet la tranquillité publique, ou qui a été poursuivi ou condamné à l'étranger pour les crimes ou délits qui donnent lieu à l'extradition, conformément à la loi du 1 Octobre 1833, peut être contraint par le Gouvernement de s'éloigner d'un certain lieu, d'habiter dans un lieu déterminé, ou même de sortir du royaume.

L'arrêté royal enjoignant à un étranger de sortir du royaume par ce qu'il compromet la tranquillité publiqe sera délibéré en conseil des Ministres.

Art. II. Les dispositions de l'article précédent ne pourront être appliquées aux étrangers qui se trouvent dans un des cas suivants, pourvu que la nation à laquelle ils appartiennent soit en paix avec la Belgique:

1°. A l'étranger autorisé à établir son domicile dans le royaume.

2°. A l'étranger marié avec une femme belge, dont il a des enfants nés en Belgique pendant sa résidence dans le pays;

3°. A l'étranger décoré de la croix de Fer.

Art. III. L'arrêté royal porté en vertu de l'art. 1er sera signifié par huissier à l'étranger qu'il concerne.

Il sera accordé à l'étranger un délai qui devra être d'un jour franc au moins.

Art. IV. L'étranger qui aura reçu l'injonction de sortir du royaume sera tenu de désigner la frontière par laquelle il sortira; il recevra une feuille de route réglant l'itinéraire de son voyage et la durée de son séjour dans chaque lieu où il doit passer. En cas de contravention à l'une ou l'autre de ces dispositions, il sera conduit hors du royaume par la force publique.

Art. V. Le Gouvernement pourra enjoindre de sortir du royaume à l'étranger qui quittera la résidence qui lui aura été désigné.

Art. VI. Si l'étranger auquel il aura été enjoint de sortir du royaume rentre sur le territoire, il pourra être poursuivi et il sera condamné, pour ce fait, à un emprisonnement de quinze jours à six mois; et à l'expiration de sa peine, il sera conduit à la frontière.

Art. VII. La présente loi ne sera obligatoire que pendant trois ans, à moins qu'elle ne soit renouvelée.

Promulguons la présente loi, ordonnons qu'elle soit revêtue du sceau de l'Etat, et publiée par la voie du *Moniteur*.

Donné à Laeken, le 7 Juillet 1865.

Léopold.

Par le Roi:
Le Ministre de la Justice,
Victor Tesch.

Scellé du sceau de l'Etat:
Le Ministre de la Justice,
Victor Tesch.

* Chambre des Représentants. Session de 1864–1865:—Documents parlementaires. Exposé des motifs et texte du projet de loi. Séance du 17 Novembre 1864, p. 108. Rapport. Séance du 7 Juin 1865, p. 833–836. Annales parlementaires. Discussion générale. Séances des 22 Juin 1865, p. 1235–1246; 23 Juin p. 1247–1257; 24 Juin, p. 1259–1270; 27 Juin, p. 1271–1283; et 28 Juin, p. 1285–1296. Discussion des articles o adoption. Séance du 29 Juin, p. 1297–1311.

Sénat:—Documents parlementaires, Rapport, Séance du 30 Juin, 1865, p. lxxii. Annales parlementaires. Discussion générale, Séance du 4 Juillet 1865, p. 526–527. Discussion des articles et adoption. Séance du 5 Juillet, p. 529–530.

My Lord, Brussels, July 16, 1868.

With reference to my despatch of the 4th instant, I have the honour herewith to enclose a copy of a note which I have received from the Minister of Foreign Affairs, affording the information regarding the disabilities which affect aliens in this country, which was desired for the use of the Naturalization Commission in your Lordship's despatch of the 16th ultimo.

I have, &c.
Howard de Walden and Seaford.

The Lord Stanley, M.P.
&c. &c. &c.

My Lord, Bruxelles, 13 Juillet 1868.

Sous la date du 20 Juin dernier votre Excellence m'a exprimé le désir de recevoir des renseignements sur les incapacités legales auxquelles sont soumis, en Belgique, les étrangers qui y résident.

En ce qui concerne les droits politiques, my Lord, les étrangers en sont exclus. Ils ne sont ni électeurs ni eligibles pour la formation des corps politiques. Ils ne peuvent être nommés à des fonctions publiques ni être témoin dans un acte notarié. (Art. 9, L. 25 Ventose an XI.)

L'étranger naturalisé est assimilé au Belge. Toutefois la loi exige la grande naturalisation pour être électeur ou éligible pour la formation des Chambres Legislatives. (Art. 1 et 41 de la loi du 3 Mars 1831.)

Quant aux droits civils, l'étranger jouit en Belgique des mêmes droits que ceux qui sont accordés aux Belges par les traités de la nation à laquelle l'étranger appartient. (Article 11 du Code Civil.)

L'étranger qui a été admis par autorisation Royale à établir son domicile en Belgique y jouit de tous les droits civils tant qu'il continue d'y résider. (Article 10 du même code.)

En dehors et abstraction faite des cas prèvus par ces deux dispositions la condition des étrangers n'est déterminée par aucune règle bien certaine, et est diversement appreciée dans la doctrine et la jurisprudence.

Pour ce qui est des incapacités auxquelles ils peuvent être soumis la loi n'a expressément determinée que la suivante:

L'étranger demandeur dans un procés en matière civile est tenu de donner caution pour le paiement des frais et dommages-intérêts résultant du procès, à moins qu'il ne possède en Belgique des immeubles d'une valeur suffisante pour assurer ce paiement (Article 16 du Code Civil). L'étranger est passible de la contrainte par corps pour l'exécution de tout jugement de condamnation, conformé ment à l'Article 10 du 21 Mars 1859.

Aux termes de l'Article 11 de cette loi, il peut même être arrêté provisoirement avant le jugement de condamnation, en vertu d'une ordonnance du Président du Tribunal de Ire instance: mais la legislature se trouve actuellement saisie d'un projet de loi portant l'abolition de la contrainte par corps même à l'egard des étrangers.

L'étranger débiteur n'est pas admis au bénéfice de la cession de biens (Article 905, c. Proc. Civile).

Les étrangers ont le droit de succéder, de disposer et de recevoir de la même manière que les Belges dans toute l'étendue du Royaume. Dans le cas de partage d'une même succession entre des cohéritiers étrangers et Belges, ceux-ci prélèvent sur les biens situés en Belgique une portion égale à la valeur des biens situés en pays étrangers dont ils seraient exclus à quelque titre que ce soit en vertu des lois et coutumes légales. (Loi du 27 Avril 1867.)

L'étranger peut être expulsé du Royaume dans les cas prévus par la loi du 7 Juillet 1867 prorogée récemment.

Enfin l'étranger peut être extradét dans les cas prévus par la loi d'extradition.

Veuillez agréer, &c.
(Signé pour le Ministre absent)
le Secrétaire Général,
Baron Lambemont,

Lord Howard de Walden et Seaford, G.C.B.

DENMARK.

My Lord, Copenhagen, June 27, 1868.

With reference to your Lordship's despatch of the 16th instant, I have the honour to enclose a copy of a note which I have received from Count Frijs, in reply to my inquiries on the position of aliens in Denmark.

It appears from the statements of his Excellency that foreigners resident in this country enjoy the same private rights as natives. They are, however, entirely excluded from all political rights whatever, and are debarred from all employments, civil or military, under the crown. His Excellency's note passes in review these disabilities, and seems to contain all the information which I was ordered by your Lordship to procure.

I have, &c.
Charles Lennox Wyke.

The Rt. Hon. Lord Stanley, M.P.
&c. &c. &c.

Copenhague,
Monsieur le Chevalier, le 25 Juin 1868.

En vous remettant sous ce pli la circulaire dans laquelle Stanley vous demande des renseignements sur la position des étrangers établis en Danemark, j'ai l'honneur de vous informer que pour ce qui regarde les droits particuliers et privés il n'existe aucune différence entre la condition des étrangers domiciliés dans le pays et celle des nationaux. Par contre, les droits politiques sont réservés aux seuls nationaux. Pour entrer au service de l'Etat comme employé, pour prendre part aux élections des membres de la représentation nationale ou des conseils municipaux, enfin, pour siéger dans ces assemblées la qualité de national est indispensable. Cette qualité revient de droit à tout individu né dans le pays, quelle que soit la nationalité des parents, sauf les cas où le séjour des parents n'est que temporaire; autrement il faut qu'une loi spéciale et nominative accorde la naturalisation à celui qui veut l'obtenir.

Je crois devoir encore ajouter, pour compléter les informations dont il s'agit, que d'après les réglements des chapitres de chanoinesses fondés en Danemark la nationalité Danoise est de même requise chez les personnes qui désirent être admises dans ces établissements.

Veuillez agréer, &c.
À Sir Charles Wyke, (Signed) Frijs.
&c. &c. &c.

British Legation, Copenhagen,
My Lord, July 30, 1868.

As a supplement to my despatch of the 27th ultimo, on the position of aliens in Denmark, I have the honour to enclose herewith, at the request of the Naturalization Commission, the written opinion of Mr. Brock, a distinguished Danish lawyer, with reference:

1st. To the oath required of aliens entering on certain professions.

2ndly. Whether the birth in Denmark of the son of an alien constitutes a Danish subject?

Your Lordship will see by the enclosed document that:

1st. The "Borgherskab" or Burgherbur oath was abrogated in 1859. The oath now taken by brokers, translators, &c. is non-political, and limited to the faithful performance of their office.

2nd. The son of an alien born in Denmark is considered a Dane to all intents and purposes, so long as he remains in Denmark.

I have, &c.
The Lord Stanley, M.P. Charles Lennox Wyke.
&c. &c. &c.

Sir, Copenhagen, July 26, 1868.

Your Excellency has asked my opinion on the following questions:—

1st. Is the "Borgerbur" oath still required for entering on certain professions, and, if so, what professions?

2nd. Does the fact of birth in Denmark constitute a son of an alien a Danish subject?

Answer, 1st. The "Borgerbur" oath required by the Danish law for entering on professions of different kinds has been abolished by the law of December 29, 1857. The oath still taken by brokers, translators, and such persons of public trust, that they will faithfully perform the duties imposing on their office, has no influence upon their situation as subjects of the Danish Crown, and is no oath of allegiance.

2nd. The son of an alien, born in Denmark, is regarded a Dane, if he remains here.

I have, &c.
Sir Charles L. Wyke, K.C.B., Gustav Brock,
&c. &c. &c. Advocate of the Supreme Court.

FRANCE.

My Lord, Paris, June 29 1868.

I have the honour to inclose herewith a copy of a report by Mr. Treitt, legal adviser of this embassy, upon the disabilities to which aliens residing in France are subjected by law, which I requested that gentleman to draw up upon receiving your Lordship's despatch of the 16th instant.

I have, &c.
Lyons.

The Right Hon. Lord Stanley,
&c. &c. &c.

La question posée par le Foreign Office est la suivante:

"Quelles sont les incapacités auxquelles les étrangers "résidant en France sont sujets selon la loi de ce pays?"

Il y a une distinction à faire:

1°. Entre les étrangers résidant simplement en France, et

2°. Entre les étrangers admis par autorisation du Gouvernement à établir leur domicile en France.

La loi considère comme étrangers ceux qui sont nés de parents étrangers soit à l'étranger, soit en France, et qui n'ont pas été naturalisés.

La condition des étrangers a varié selon les diverses législations qui ont regné sur la France; mais dans le présent document, la position des étrangers est brièvement exposée, telle que la font les lois, la doctrine, et la jurisprudence actuellement en vigueur.

§ I. Des étrangers simplement résidant en France, et n'ayant ni demandé, ni reçu l'autorisation d'établir leur domicile en France.

Leurs capacités.—Tous les étrangers, sans la moindre restriction ont, en France, le droit de succéder, de disposer, de recevoir; il n'y a aucune distinction entre les biens meubles et les biens immobiliers; l'egalité entre les nationaux et les étrangers est *absolue*, que les étrangers soient en France ou hors de France. Cet état de choses existe depuis la loi du 14 Juillet 1819, qui a abrogé les Articles 726 et 912 du Code Napoléon, et aboli tous les droits qui frappaient les étrangers, tels que droits d'aubaine, &c.

Cependant cette loi contient une seule restriction qui est toute d'équité:

"Dans le cas de partage d'une même succession entre "des cohéritiers étrangers et Français, ceux-ci prélèveront "sur les biens situés en France une portion égale à la "valeur des biens situés en pays étranger, dont ils seraient "exclus, à quelque titre que se soit, en vertu des lois et "coutumes locales."

Les étrangers comme les Français peuvent acquérir des biens en France, les hypothéquer, les aliéner, et faire à leur égard tous les contrats permis par la loi.

Ils ont le droit de prescription.

Le commerce et l'industrie sont absolument libres pour les étrangers; ils exercent le droit industriel à l'égal les regnicoles et peuvent obtenir toutes espèces de concessions; même celle de mines.

La propriété industrielle, artistique et littéraire a été objet de traités internationaux.

Dans les communes où les étrangers résident, ils participent à certaines jouissances communales, telles que la vaine pâture, la distribution du bois des forêts appartenant aux communes, &c.

En un mot, on peut dire que, en ce qui concerne le statut réel et *le droit de propriété*, les étrangers sont dans une condition identique à celle des Français.

Quant au *statut personnel*, ils jouissent de tous les droits de famille comme père, fils, et époux.

Ils ont le droit de chasse et de pêche et de port d'armes.

Ils ont la liberté du culte et la liberté individuelle et impriment leurs opinions comme les Français eux mêmes.

Des auteurs accreditès soutiennent qu'ils peuvent se créer une famille légale par l'adoption d'enfants selon les lois de France, qu'ils peuvent être tuteurs et jouir de tous le droits dont la loi a entouré la protection de la famille.

Leurs incapacités.—Mais les étrangers sont exclus de toutes les fonctions politiques gouvernementales. Ils ne peuvent être temoins dans certains actes authentiques puisque la loi a dit: *Les temoins seront majeurs Français, du sexe masculin*, &c.

Ils ne peuvent être arbitres dans les litiges parceque l'arbitrage en fait des juges temporaires.

Il faut aux étrangers une autorisation spéciale pour exercer la pharmacie, la chirurgie, ou la médecine.

Les emplois publics, comme prêtres dans les divers cultes, comme directeurs de postes et d'autre positions, qui exigent un serment au chef de l'Etat, sont interdits aux étrangers; c'est pourquoi ils ne peuvent être ni avocats, ni notaires, ni avoués, &c., &c.

Ils ne font point partie de la garde nationale, ni de l'armée, ni d'aucun jury.

Si les étrangers sont demandeurs en justice, le défendeur peut leur demander la *caution judicatum solvi*, à moins qu'il ne s'agisse de matières commerciales, où cette caution n'existe pas. Avant la récente abolition de la contrainte par corps, les étrangers pouvaient être arrêtés préventivement.

En cas de faillite, les étrangers jouissent des mêmes droits que les Français, seulement ils ne sont pas admis à la cession de leurs biens à leurs créanciers pour se liberer ainsi de toutes leurs dettes.

D'éminents juristes pensent que même l'état de guerre ne suspend point contre l'étranger son droit d'actionner le Français devant les tribunaux de France pour des obligations, *même contractées à l'étranger*.

En matière civile, le tribunal Français peut refuser sa juridiction à deux étrangers, mais en matière commerciale, deux étrangers ont droit à la justice Française dans tous les cas.

Enfin la loi du 3 Décembre 1849 (Article 7) autorise le Gouvernement à expulser du territoire de l'Empire les étrangers qui y voyagent ou y résident.

Ce droit du Gouvernement est arbitraire et absolu.

§ II. Des étrangers domiciliés ou admis à l'exercice des droits civils par autorisation gouvernementale.

L'étranger, à moins d'obtenir des lettres de grande naturalisation accordées seulement à de grands services exceptionnels, ne peut être naturalisé en France qu'après un stage de dix* années qui courent du jour ou le Gouvernement lui a accordé le domicile.

L'admission au domicile fait cesser en faveur de l'étranger qui l'a obtenue certaines incapacités qui frappent l'étranger simplement résidant. L'admission au domicile n'enlève pas la qualité d'étranger, mais il donne aux enfants nés en France de parents étrangers, le droit de réclamer à leur majorité la qualité de Français, sans autre formalité que de se soumettre aux charges des lois françaises, tels que le recrutement, &c. (Article 9 du Code Napoléon.)

Les étrangers admis au domicile jouissent de tous les droits civils; ce sont les termes formels de l'article 13 du Code Napoléon; il en résulte que même, avant la loi du 14 Juillet 1819 ci-dessus rapportée, l'étranger domicilié était capable de recevoir, de disposer, &c., comme le Français lui-même; il peut procéder en justice sans être soumis à la caution *judicatum solvi*.

Il est admis au bénéfice de la cession de ses biens à ses créanciers pour se libérer de toutes ses dettes.

Avant l'abolition de la contrainte par corps, l'étranger domicilié n'y était sujet que dans les mêmes cas que le Français; et il pouvait lui-même exercer la contrainte par corps contre les étrangers.

Bref, sauf les droits politiques, l'étranger domicilié jouit des droits civils comme le regnicole; cependant comme il est toujours étranger, il ne peut être témoin dans certains actes authentiques ni être arbitre puisque l'arbitrage est une juridiction.

Le domicile acquis en France ne délie pas l'étranger des obligations que le statut personnel de son pays lui impose ni de ses devoirs envers sa mère patrie.

Le droit de domicile peut être retiré à une étranger par le Gouvernement sur un avis du conseil d'Etat.

Mais malgré l'admission au domicile le droit d'expulsion écrit dans la loi du 3 Décembre 1849 reste tout entier aux mains du Gouvernement.

Certains pays ont fait avec la France des traités particuliers pour la jouissance des droits civils. Ainsi un traité avec la Sardaigne du 24 Mars 1760 dispense les sujets Sardes de la caution *judicatum solvi*.

Il y a d'autres traités qui réservent à des pays étrangers le traitement de la nation la plus favorisée.†

Mais de pareils traités sont presque superflus, en présence du petit nombre d'incapacités qui frappent les étrangers en France et qui appartiennent presque toutes à l'ordre politique ou aux fonctions qui entrainent la prestation d'un serment au souverain, car de tout ce qui vient d'être dit on peut conclure que par suite des progrés de la législation et de la jurisprudence il n'y a plus guère de différence entre l'étranger *résidant* et l'étranger *domicilié*, si ce n'est que ce dernier n'est plus soumis à la caution *judicatum solvi*, et que ses enfants nés en France ont une plus grande facilité pour acquérir la qualité de Français.

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* Reduced to three years by the law of the 29th of June 1867 (Memorandum p. 49) C. S. A. A.

† Suisse, 12 Juillet 1828; Bolivie, 9 Décembre 1834; Porte, 25 Mars 1838; Mexique, 9 Mars 1839; Venezuela, 25 Mars 1843; Nouvelle Grenade, 28 Octobre 1844.

En résumé, l'état et la capacité de l'étranger sont réglés par les lois de son pays; son statut personnel l'accompagne partout; mais en France cet étranger est capable, comme le regnicole, de tout les contrats réels ou personnels reconnus par la loi française; au point de vue du *droit privé* la condition de l'étranger soit *résidant* soit *domicilié*, et la condition du Français ne diffèrent pas beaucoup aujourd'hui.

La jurisprudence tend incessamment à améliorer encore la condition des étrangers; on ne leur refuse plus que les droits qui leur sont expréssement deniés par des lois non encore modifiées; et ils jouissent d'une manière absolue de tous les droits que dérivent du droit des gens.

Fait à Paris le 28 Juin 1868.

(Signé) W. Treitt,
Avocat à la Cour Impériale,
Legal adviser to the British Embassy.

GREECE.

My Lord, Athens, July 16, 1868.

In compliance with the instructions contained in your Lordship's despatch, of the 16th ultimo, I have the honour to transmit herewith to your Lordship a copy of a report drawn up by the lawyer employed by this Legation, on the subject of the disabilities to which aliens residing in Greece are subjected by Greek law.

I have, &c.
E. M. Erskine.

The Rt. Hon. Lord Stanley, M.P.
&c. &c. &c.

Notice sur les Incapacités Légales des Étrangers en Grèce.

1°. En droit public:

Aux termes de l'Art. 3 du Code Civil Grec, les lois d'ordre public (de police et de sûreté) obligent tous ceux qui se trouvent en Grèce, par suite, les Grecs aussi bien que les étrangers. L'hospitalité, que l'étranger reçoit en entrant dans le pays, l'oblige à respecter les lois et les arrêtés de police.

Comme conséquence de ce principe l'Art. 37 du Code Pénal dispose que, dans tous les cas où les tribunaux de répression soumettait les Grecs à la surveillance de la police, les étrangers sont expulsés du territoire par l'autorité administrative.

Bien qu'en principe général le droit de répression ne puisse s'exercer qu'à raison d'actes commis sur le territoire hellénique, l'Art. 2 du Code d'Instruction Criminelle consacre une extension à cette règle à l'égard des étrangers qui peuvent être poursuivis, jugés et punis en Grèce: 1° pour crimes et délits commis à l'étranger contre un Grec, 2° pour crimes de haute trahison contre l'Etat, pour fabrication de fausse monnaie nationale, ayant cours en Grèce, pour contrefaçon de sceau de l'Etat, ou complicité à ces actes. Mais leur punition présuppose leur extradition ou leur arrestation dans le pays.

Les étrangers ne sont livrés à un Gouvernement étranger pour crimes et délits commis à l'étranger, que s'il y'a une loi spéciale ou un traité à cet égard.

2°. Quant aux droits politiques:

Comme on ne saurait avoir deux patries, on ne peut être citoyen de deux Etats; par conséquent l'étranger ne peut exercer en Grèce les droits qui présupposent la qualité de citoyen. Il ne peut donc être membre de la Chambre des Députés (Art. 70 de la Constitution), des conseils provinciaux (Art. 5 de la loi du $\frac{18}{30}$ Décembre 1836 sur les conseils provinciaux), ou municipaux (Art. 13 de la loi du 27 Décembre 1833 des Communes), ni se présenter aux assemblées électorales en qualité d'électeur (Art. 4 de la loi du 19 Novembre 1864 sur l'élection des députés) ni d'éligible (Art. 70 de la Constitution et même Art. 4 de la loi ci-dessus).

Ils ne peuvent être nommés aux fonctions publiques (Art. 3 de la Constitution) ni exercer la profession d'avocat que la loi hellénique y assimile (Art. 142 de la loi sur l'organisation des tribunaux et du notariat), ni celle de juré.

Aux termes de l'Art. 112 du Code de Procedure Civile, l'étranger ne peut être nommé arbitre.

Quand il s'agit de constater un fait on ne saurait choisir ses témoins; ils sont donnés par les circonstances de temps et de lieu, et tout témoin présent est nécessaire et capable, à moins qu'il ne soit sujet à quelque incapacité naturelle. Les étrangers sont donc admis à déposer comme témoins devant la justice. Il en est de même des témoins des actes de l'état civil. Ici aussi il s'agit de constater un fait: la naissance, le mariage ou le décès d'un individu. Toute personne qui a assisté à ces faits est admise à les constater.

Mais l'étranger ne saurait servir de témoin instrumentaire dans un acte authentique, contrat ou testament public. Ici, en effet, il s'agit moins de rechercher des preuves que d'en créer (Art. 179 de la loi sur l'organisation des tribunaux et du notariat). Les témoins participent ici à la confiance de l'Acte, et cette participation est un motif d'exclusion contre l'étranger qui ne peut remplir de fonctions publiques.

3°. En droit privé:

Nous considérerons l'étranger dans cette partie de notre travail sur deux points de vue: 1°, sous celui de statut personnel; 2°, sous celui de statut réel.

§ 1°. *Statut Personnel.*

La loi personnelle s'empare de l'homme à sa naissance pour ne l'abandonner qu'à sa mort. Elle lui donne un état, qui le suit en quelque lieu qu'il se trouve.

Ce principe est expressément consacré par l'Art. 4 du Code Civil de la Grèce, aux termes duquel le mariage, les rapports entre ascendants et déscendants, la tutelle et la curatelle sont réglés quant aux Hellènes, même résidant à l'etranger, par les lois helléniques, et, quant à l'étranger, par les lois de son pays.

D'après la première partie de cet article la capacité de l'étranger pour l'acquisition de droits ou pour l'exercice d'actes légaux en général, est jugée conformément à la loi de son pays, et en cela la loi hellénique a confirmé le principe généralement admis par les legislations des autres États de l'Europe, que l'état et la capacité des personnes sont régis par les lois de leur patrie. Mais le dernier § du 2me al. du même article consacre une exception au principe admis en faveur des étrangers. Dans l'intérêt des citoyens Hellènes, les étrangers qui, d'après les lois helléniques auraient la capacité nécessaire pour contracter une obligation, sont reconnus avoir la capacité nécessaire à la validité des contrats passés entre eux et les Hellènes en Grèce, bien que la loi de leur pays leur refuse cette capacité.

§ 2° *Statut Réel.*

Les immeubles font partie du territoire de l'Etat, et sont par conséquent régis par la loi hellénique. Les étrangers peuvent en devenir propriétaires même sans resider en Grèce, mais ils ne peuvent les acquérir ou en disposer que conformément aux lois helléniques. C'est la disposition formelle de l'Art. 5 du Code Civil. "La possession, la "propriété et les droits réels sur des meubles ou des im- "meubles situés en Grèce sont reglés par les lois hel- "léniques. La succession testamentaire ou ab intestat est "régie par les lois du pays du défunt, à moins qu'il ne "s'agisse d'immeubles situés en Grèce, lesquels sont, à cet "égard, régis par la loi hellénique."

Ainsi l'étranger est soumis à la loi hellénique pour tout ce qui concerne la distinction des biens en meubles et immeubles, la saisie immobilière, les hypothèques, la prescription acquisitive des immeubles ou celle extinctive des actions immobilières.

La succession ab intestat d'un étranger qui se compose d'immeubles situés en Grèce, sera également réglée, pour ce qui concerne ces immeubles, par la loi hellénique d'après l'Art. 5 du Code Civil.

Du reste, aux termes de l'article précité, les effets de la possession, de la propriété, des privilèges et des voies d'exécution sont régis par la loi hellénique même quant aux meubles.

Enfin un étranger ne peut être propriétaire d'un navire hellénique pour plus de la moitié (Art. 4 de la loi du $\frac{15}{27}$ Novembre 1836, de la navigation commerciale).

Droits privés de l'Etranger.

Aux termes de l'Art. 15 du Code Civil, l'étranger qui voudra se faire naturaliser, doit déclarer sa volonté à la municipalité du lieu où il veut établir son domicile, et habiter en Grèce pendant deux ans, s'il est Grec d'origine, et pendant trois ans, s'il appartient à toute autre nationalité. Passé ce délai et après qu'il aura été constaté que l'étranger ne s'est point rendu coupable de crime ou de l'un des délits prévus par l'Art. 22 du Code Pénal, il prétera par devant le Nomarque le serment de sujet Hellène.

L'étranger qui aura rendu des services importants à l'Etat, qui aura introduit dans le pays des inventions ou une industrie utiles, ou qui se distinguerait par des talents extraordinaires peut, dès qu'il aura fixé son domicile en Grèce, être naturalisé par une loi.

Pendant tout le temps qu'il sera nécessaire à l'étranger de resider en Grèce pour la naturalization, il pourra être admis par le Roi à la jouissance des droits civils, et dans ce cas il sera régi pour tous ses rapports légaux par les lois helléniques (Art. 16 du Code Civil).

Les étrangers peuvent contracter mariage avec des Grecs, soit en pays étranger soit en Grèce, en se conformant quant à la capacité aux lois de leurs pays, et quant aux formalités

soit à celles consacrées par la loi hellénique, soit à celles usitées dans le pays ou le mariage est contracté (Art. 4 et 7 du Code Civil).

Les mariages mixtes avec des personnes appartenant à une autre communion religieuse sont reconnus valables par la loi du $\frac{15}{27}$ Octobre 1861 sur les mariages mixtes.

L'étranger ne peut être appelé à la tutelle de mineurs Hellènes, ni faire partie d'un conseil de famille les concernant (Art. 30 et 49, § 6 de la loi sur la minorité, la tutelle, etc). Mais il peut être tuteur de ses parents mineurs étrangers comme lui. Peu importe que la loi hellénique considère l'office de la tutelle comme une espèce de charge publique, réservée aux Hellènes seuls. Ce n'est pas la loi hellénique qui défère la tutelle du mineur et qui la régit, comme elle régit tous les autres droits personnels et de famille.

Un étranger peut consolider par l'usucapion une acquisition d'immeuble. C'est un mode d'acquérir qui est permis à tout possesseur de bonne foi.

L'étranger peut stipuler à son profit hypothèque sur des immeubles d'un Grec et en consentir une sur les siens au profit de ses créanciers.

Tout jugement émané d'un tribunal hellénique au profit d'un étranger lui confère le droit d'hypothèque judiciaire sur les biens de son débiteur situés en Grèce. Mais le jugement émanant d'un tribunal étranger ne confère ce droit qu'après avoir été declaré exécutoire par le tribunal hellénique compétent.

Le mariage contracté entre une étrangère et un Grec donne à la femme un titre d'hypothèque légale pour garantie de sa dot qu'elle peut inscrire sur les immeubles de son mari.

La femme Grecque qui épouse un étranger a le même droit sur les immeubles de cet étranger situés en Grèce. Quant à ceux situés à l'étranger, les droits de la femme sont réglés par la loi du pays de son mari.

Un étranger ne peut être nommé capitaine ou officier d'un navire hellénique.

Les trois quarts de l'équipage d'un navire hellénique doivent être pris parmis les Grecs (Art. 5 de la loi du $\frac{15}{27}$ Novembre 1836, de la navigation commerciale).

Les matelots enrôlés en vertu de l'inscription maritime doivent être des sujets Grecs (Loi d'inscription maritime du 24 Octobre 1856).

Aux termes de l'Article 220 du Code de Procédure Civile et de l'Art. 2 de la loi sur le timbre, de 1867, les droits d'indigence sont accordés au plaideur qui, en vertu du certificat du Démarque de son domicile, constate un état d'indigence. Les étrangers ne sont point admis à jouir de ce droit, qui est considéré avoir été introduit par la loi hellénique en faveur des Grecs seulement (Circulaire du Ministère de la Justice du 8 Juin 1837).

Tout étranger peut être poursuivi devant tout tribunal hellénique sans distinction, pour des obligations contractées en Grèce ou à l'étranger envers un Hellène (Art. 28 du Code de Procédure Civile). Et *vice-versâ* l'Hellène peut être poursuivi devant les tribunaux helléniques pour les obligations contractées par lui en pays étranger envers un Hellène ou un étranger,

S'il n'y à point de stipulation contraire dans les traités, l'étranger demandeur qui intente une action contre un Hellène doit, aux termes des Art. 78 et 79 du Code de Procédure Civile, fournir, s'il en est requis, caution pour les frais du procès et les dommages-intérêts. Cette obligation n'existe point dans les affaires de commerce, ou lorsque l'étranger possède en Grèce des immeubles suffisants, ou que le defendeur reconnait une partie de la demande suffisante pour assurer le paiement des frais et des dommages-intérêts.

Tandis que le régnicole n'est soumis à la contrainte par corps que pour dettes commerciales, et, pour les dettes civiles, exceptionnellement en certaines circonstances de suspicion légitime, cette mesure peut être prise contre l'étranger débiteur soit comme mesure conservatoire, soit pour l'exécution d'un jugement même pour dettes civiles en général. Bien entendu qu'elle doit être invoquée par la partie et prononcée expressément par le juge (Code de Procédure Civile, Art. 999, § 1 et 1000).

La contrainte par corps n'est point prononcée dans les affaires civiles contre l'étranger qui possède en Grèce des immeubles suffisants pour assurer le paiement ou qui donne caution.

La contrainte par corps dont le but est de forcer le debiteur au paiement peut être évitée par le régnicole honnête mais malheureux, qui, faisant preuve de bonne volonté, et ne pouvant faire plus, abandonne tout son actif à ses créanciers, en recourant au bénéfice de compétence ou de la cession de biens. Cette mesure est refusée à l'étranger parce qu'il n'est pas possible d'en contrôler la fidélité. C'est la disposition formelle des Art. 688 du Code de Procédure Civile et 575 du Code de Commerce en vigueur en Grèce.

(Signed) G. A. Rhally,
Avocat.

HANSE TOWNS.

My Lord, Hamburg, June 26, 1868.

By your Lordship's despatch of the 16th instant, I am directed to report the disabilities to which aliens residing in the Hanse towns are subjected by the local laws. I have accordingly the honour to state as follows:—

The laws of Lubeck, Bremen, and Hamburg, prohibit aliens from exercising the ordinary rights of citizenship, except as undermentioned. They cannot hold any office under the State, nor can they acquire lands or houses in their own names within the territories of the State. Those privileges are reserved to citizens of the State, and to the subjects of the other States of the North German Confederation, who are on the same footing as Hanseatic citizens. But a foreigner can easily purchase land in the name of a citizen as his trustee, and this is not unfrequently done.

At Lubeck and at Bremen aliens are still restricted from carrying on trades unless they have first acquired the rights of citizenship. The Lubeck law of the 20th of November 1866 and the Bremen law of 15th February 1861 had for their object the abolition of guilds, and facilitated the admission of foreigners as citizens at less expense than heretofore. But the condition of citizenship was not removed by those laws.

At Hamburg, however, aliens are no longer under any disabilities in respect of the exercise of trades. A law issued on the 7th of November 1864 declares that trades and industrial occupations may be carried on by foreigners not subjects of the State; and it also reduces the cost of obtaining citizenship by those aliens who desire it. Another law, dated the 30th of December 1867 abolished the exclusive privilege of entering goods in transit, formerly reserved to Hamburg citizens. The alien merchant is, therefore, in as favourable a position as the citizen merchant in any line of business which he may think proper to enter.

There are residing at Hamburg a considerable number of persons who claim the rights of British subjects on account of their birth or descent, but who are Hamburg subjects by having acquired citizenship, or by being the children of citizens, or by having been born within the territory of the State. Such persons assert a double nationality, and appear in the character of a British subject or of a Hamburg citizen, as it suits their purpose. Ought they not rather to lose their British nationality so long as they are the voluntary citizens of a foreign State?

I have, &c.
John Ward.

The Right Hon. Lord Stanley,
&c. &c. &c.

ITALY.

My Lord, Florence, December 19, 1868.

With reference to Lord Stanley's despatch of the 16th of June last, I have the honour to enclose herewith to your Lordship a translation of a report which has been drawn up by Signor Corsi, legal adviser to this mission, relative to the disabilities to which aliens residing in Italy are subjected by Italian law.

I have, &c.
A. Paget.

The Right Honourable
The Earl of Clarendon, K.G.

Translation.

Memorandum on the Laws which regulate the Rights of Aliens in Italy.

The civil capacity of aliens in Italy in regard to their private rights is as follows:

As a general rule "The alien is admitted to the enjoyment of all civil rights accorded to the citizen" (Art. 3 of the Civil Code).

If a citizen has lost his nationality before the birth of a child, the latter is considered a citizen if born in the kingdom and resident there; but he can, within a year of

the attainment of his majority, determined by the laws of the kingdom, select the quality of an alien by making a declaration to that effect before the civil authorities of his domicile, or, if he is abroad, before the king's diplomatic or consular agents (Art. 5 of the Civil Code).

"A child born abroad of a father who has lost his nationality before his birth is reputed an alien.

"He can, however, select the quality of a citizen provided he makes a declaration to that effect in accordance with the foregoing dispositions, and provided he fixes his domicile in the kingdom within one year of such declaration.

"If, however, he has accepted state employ in the kingdom, or serves in the army or navy, or has otherwise complied with the terms of the conscription law, without invoking exemption therefrom on the plea of being an alien, he is considered a citizen without further formalities. (Art. 6 of the Civil Code).

"When the father is unknown, the child, born of a mother who is a native, is a citizen."

"If the mother has lost her nationality before the birth of her child, the dispositions of the two preceding articles apply."

If the mother be likewise unknown, the child born in the kingdom is a citizen (Art. 7 of Civil Code).

"A child, born in the kingdom, of an alien father who has been domiciled there for 10 years uninterruptedly is considered a citizen: residence on account of commercial affairs does not constitute domicile."

"He can, however, select the quality of alien, but the dispositions of the two first paragraphs of Art. 6 are applicable to this case (Art. 7 of Civil Code).

"An alien woman married to a citizen acquires citizenship, and retains it as a widow (Art. 9 of Civil Code).

"An alien can also obtain citizenship by naturalization granted by law or Royal Decree."

"The Royal Decree is not effective unless registered by the civil authority of the place where the alien intends to fix or has fixed his domicile, and unless he swears before the said authority to be faithful to the king and to observe the statute and the laws of the kingdom."

"The wife and minor children of an alien who has obtained citizenship become citizens, provided they have a fixed residence in the kingdom, but the children can select the quality of aliens by making the declaration mentioned in Art. 5 (Art. 10 Civil Code).

Citizenship is lost:

1st. By a person who renounces it by a declaration to that effect before the civil authority of his domicile, and transfers his residence to a foreign country.

2nd. By a person who, without the permission of his Government, has accepted employment from a foreign Government, or has entered the military service of a foreign power.

"The wife and minor children of a person who has lost his nationality become aliens, unless they continue to reside in the kingdom.

"They can nevertheless regain their nationality in the cases and manner described in the first paragraph of Art. 14 as regards the wife, in the first two paragraphs of Art. 6 as regards the children (Art. 11, Civil Code).

"The loss of nationality, as described in the preceding Art., does not imply exemption from the obligations of military service, nor from the penalties inflicted on those who bear arms against their native country (Art. 12, Civil Code).

"The citizen who has lost his nationality from any of the causes mentioned in Art. 11, regains it, provided:

"1. That he returns to the kingdom with a special permission from the Government.

"2. That he renounces his foreign nationality, the employment or military service taken abroad.

"3. That he declares before the civil authorities that he intends fixing, and really does fix, his domicile in the kingdom within the space of one year (Art. 13, Civil Code).

"A woman who marries an alien becomes an alien whenever by the fact of marriage she acquires the nationality of her husband.

"If left a widow, she regains her nationality if she resides in the kingdom, or if she returns there and declares in both cases before the civil authorities that she wishes to fix her domicile there (Art. 14, Civil Code).

"The acquisition or resumption of nationality in the preceding cases only takes effect from the day succeeding that on which the prescribed conditions and formalities are fulfilled (Art 15, Civil Code)."

The law of the 15th November 1865, for the regulation of the civil status, ordains:

Art. 44. "In the registers of citizenship are inscribed:

1°. "The declarations of a reputed alien who desires Italian nationality.

2°. "The declaration of a reputed Italian subject who selects the quality of an alien.

3°. "Declarations renouncing Italian nationality.

4°. "Declarations relative to fixing, or the intention of fixing, domicile in the kingdom.

5°. "Declarations relative to the transfer of domicile from one commune of the kingdom to another.

Art. 45. "In the said registers are transcribed the royal decrees conferring nationality.

Art. 46. "The declarations mentioned in Nos. 1, 2, and 3 of Art. 44, are received by the civil authorities of the domicile of the person making them, if he resides in the kingdom, and by the diplomatic and consular agents if abroad.

"The said agents transmit, within three months after the date given them, copy of the declarations they have received to the ministry of foreign affairs, whence they are forwarded to the civil authorities of the last domicile of the person making the declaration; or, in default of that, of the last known domicile of the father.

Art. 47. "The declarations mentioned in No. 4 of Art. 44 must be made before the civil authority of the place in which the person making the declaration resides, or intends residing.

Art. 48. "The declarations mentioned in Nos. 1 and 2 of Art. 44 must explain the circumstances of their origin.

"The person making the declaration must further prove, by the production of his certificate of birth, or of a notarial document, that he has attained majority according to the laws of the kingdom.

Art. 49. "The declaration contained in No. 4 of Art. 44 " must explain the motive of its origin and the object in " view.

"When a declaration is made by a widow in accordance with Art. 14 of the Civil Code, she must prove her widowhood by producing a certificate of the death of her husband.

Art. 50. "Before transcribing the decree conferring nationality, the civil authority must demand from the " alien an oath, according to the special rites of the religion " he professes, that he will *be faithful to the King and will* " *observe the statute and laws of the realm.*

"The fulfilment of this formality must appear on the register.

Art. 51. "If the civil authority is requested to register " said decree after a lapse of more than three months from " its date, he must refuse to accept the oath and to register " the decree."

With reference to the influence of foreign laws on personal capacity and family relations, Art. 6 of the law of the 25th June 1865 ordains: "The personal status and capacity and " family relations are regulated by the laws of the country " to which the persons belong."

As to matrimony, however, attention must be paid to the following articles of the Civil Code:—

Art. 100. "A marriage celebrated in a foreign country " between subjects, or between a subject and an alien, is " valid, provided it be celebrated according to the estab- " lished custom of that country, and provided the subject " has not contravened the dispositions contained in section " 2 of chapter I. on this matter.

"The marriage must be notified within the realm in accordance with Arts. 70 and 71. If the subject has not residence in the realm, the notification must be made in the commune of his last domicile.

Art. 101. "A subject, who has contracted marriage abroad, " must, within three months after his return to his native " country, cause his marriage to be registered by the civil " authority of the commune in which he takes up his resi- " dence, under pain of a fine to the extent of one hundred " lire (francs).

Art. 102. "The capacity of an alien to contract marriage " is determined by the laws of his country.

"But an alien is subject to the impediments contained in " section 2 of Chapter I. on this matter.

Art. 103. "An alien desirous of contracting marriage in " the realm must present to the civil authority a declaration " from the competent authorities of his country, proving " that according to the laws of his country there is no " obstacle to the intended marriage.

"If the alien resides in the realm he must further make the notification required by the dispositions of this code."

The influence of foreign laws of property is explained in Art. 7 of the said law of 25th June 1865 as follows:

"Personal property is subject to the law of the proprietor's country, unless the law of the country where it is situated disposes otherwise.

"Real property is subject to the laws of the place where it is situated.

Art. 9 of the same law refers as follows to the form of deeds:—

"The extrinsic form of deeds executed between living

persons, and of wills, is determined by the law of the place where they are made. The disposers or contractors may however adopt the forms of their own national laws, provided the latter are common to all the parties.

" The substance and effects of testamentary donations " and dispositions are considered as being regulated by the " laws of the disposer's country. The substance and effects " of obligations are considered as being regulated by the " law of the place in which the deeds were drawn, and if " the contracting aliens belong to the same country, by " their national laws. In every case the proof of a contrary " desire holds good."

Alien successions are regulated by Art. 8 of this law, as follows:—

" Legitimate and testamentary successions, however, " whether with reference to the order of succession, or " with regard to succession rights, and the intrinsic " validity of the dispositions, are regulated by the law of " the person deceased, whatever may be the nature of the " property, and without regard to the country of its " situation."

For the forms of procedure, and the influence of foreign sentences in the realm, Art. 10 of the same law ordains:—

" The competency and the forms of procedure are regu- " lated by the law of the place where sentence is given.

" The proofs of obligation are determined by the laws of " the place where the deed was drawn.

" The sentences pronounced by foreign tribunals in " civil matters will be executed in the realm, if declared " capable of execution according to the forms established " by the code of civil procedure, and if not opposed to " international stipulations.

" The manner of execution of deeds and sentences is " regulated by the law of the place where execution " ensues."

A general clause, placed at the end of this law (Art. 12), prevents a too extensive application of its various dispositions from clashing with the laws in force in the realm, and says:—

" Notwithstanding the stipulations of the preceding " articles, the deeds and sentences of a foreign country, as " well as private dispositions and agreements, can in no " case be derogatory of the prohibitive laws of the realm " which concern persons, property, or deeds, nor of the " laws which in anyway regard public order and morality."

The mode of citing aliens before the tribunals is traced in the following articles of the Code of Procedure:—

Art. 105. " An alien who has no domicile in the realm " may be cited before the judicial authority of the realm " even when absent from it.

1°. " In a question regarding real or personal property " situated in the realm.

2°. " In a question of obligations arising out of contracts " or deeds executed or to be executed in the realm.

3°. " In every other case in which there is reciprocity.

Art. 106. " Besides the cases indicated in the preceding " articles an alien can be cited before the judicial autho- " rity for obligations contracted abroad.

1°. " If he has his residence in the realm, though not " actually there.

2°. " If he happens to be in the realm, though having " no residence there, provided he be personally cited.

Art. 107. " When an alien has no residence, dwelling, or " chosen domicile in the realm, and no place has been fixed " on for the execution of the contract, *personal or real* " *action as regards personal property*, (*l'azoine personales* " *d' reale su beni mobili*), takes place before the judicial autho- " rity of the place in which the plaintiff has his residence " or domicile."

With reference to commercial relations, the stipulation of Art. 3 of the civil code above cited, which concedes to aliens the same rights as to subjects, independently of political treaties, is to be observed.

Anonymous foreign commercial companies carrying on business in the realm must be authorized by the Government like Italian ones.

A law of the 20th October 1860, allows French anonymous companies recognized in France to operate in Italy, and to have legal standing without any special authorization.

Two diplomatic conventions concluded on December 5, 1867, with England, and on December 8, 1867, with Russia, repeat similar dispositions as regards English and Russian commercial companies, but in the Russian convention insurance companies are excluded.

A French decree dated in September 1860, and the above-mentioned conventions grant full reciprocity to Italian companies in those States.

These and in general all other foreign commercial societies (accomandite collective), must publish their charter in the chancery of the tribunal of commerce of the district in which they choose a domicile.

With reference to questions of criminal law the Sardinian code has hitherto been applied in all parts of the realm except Tuscany.

The above-mentioned law of the 25th June 1865, in Art. 11, contains the following general dispositions: criminal laws, and those of police and public security, are binding on all persons who may be within the territory of the realm.

The criminal code contains the following dispositions:

Art. 5°.—" The native of the kingdom who commits on " foreign territory a crime against the security of the " realm, or who forges the seal, the monies, bank notes, " obligations of the state or documents of public credit " equivalent to money, is to be tried and punished in the " realm according to the provisions of the present law."

Art. 6°.—" The native of the kingdom who commits on " foreign territory a crime against another native of the " kingdom, or against a foreigner, when he returns to the " realm, is to be judged and punished according to the " penalties established by the present law, which, however, " may, according to circumstances, be diminished by one " degree.

" The same rule will be applied to the native of the " kingdom who commits on foreign territory a crime " against another native of the kingdom, provided the " injured party commences an action against him.

" The same rule will also apply if the crime be committed " on foreign territory against a foreigner, provided that in " the country to which the foreigner belongs the same " treatment is extended to inhabitants of the kingdom."

Art. 7°. " The foreigner who on foreign territory com- " mits a crime against the security of the state, or forges " the seal, the monies, bank notes, obligations of the state " or documents of public credit equivalent to money, and " who is arrested within the realm, or is given up by " foreign governments, is to be judged and punished " according to the provisions of the present law."

Art. 8°. " The foreigner who commits on foreign terri- " tory, either against a native of the realm or against " another foreigner, any of the crimes indicated in Articles " 596—600 exclusively, if arrested in the realm or given " up by other Governments, is to be judged and punished " according to Art. 6, provided the crime shall have been " committed within half a miriametre of the frontiers of " the realm, or, in case the crime has been committed at a " greater distance from the frontiers, when the culprit " brings into the realm monies or effects which he has " stolen."

Art. 9. " Besides the cases mentioned in the preceding " article, the foreigner who on foreign territory commits a " crime against a native of the realm and then enters the " royal states, is to be arrested, and the authorisation of " the king's government having first been obtained, an " offer of his surrender is to be made to the Government " within whose jurisdiction the crime has been committed, " in order that he may be tried there. But if that Govern- " ment should refuse to receive the culprit, he is to be " judged and punished in the royal states, according to " Art. 6.

" The same rule applies to crimes committed by a " foreigner against an inhabitant of the realm in a foreign " country, when under similar circumstances an inhabitant " of the realm would be punished in the country to which " the foreigner belongs, except in case of civil actions."

Art. 10.—" Articles 6, 8, and 9 are not to be applied " when the culprit shall have been tried and sentenced in " the country where the crime has been committed, and in " case of his having been condemned, shall have there gone " through the term of punishment."

Art. 11.—" No culprit can be surrendered to any state " without the order of the king's Government."

In the Tuscan provinces, where, as has been already said, there still exists the penal code promulgated by the Grand Ducal Government in 1853, the regulations respecting foreigners are as follows:

Art. 3.—" 1. Whoever commits a crime on Tuscan " territory, whether he be a Tuscan subject or not, is pun- " ishable according to the provisions of the present law."

2. " However, soldiers in the service of the state do not " come under the above head, insomuch as crimes com- " mitted by them are punishable according to the military " laws."

Art. 4.—" A Tuscan subject is punishable according to " the present law also for crimes committed out of the " Tuscan territory.

" (*a.*) Against another Tuscan;

" (*b.*) Against the internal or external security of the " state;

" (*c.*) Forgery of monies or documents of public credit " having legal or commercial circulation in " Tuscany;

" (*d.*) Forgery of the seal of a public authority or of a " public office of the Grand Duchy, or of the " instruments used in making it."

" The same rule applies to crimes committed by Tuscans " out of Tuscany against a foreigner; but in such cases

" (*a.*) For the punishment of death is substituted im- " prisonment (' ergastolo ');

" (*b.*) For imprisonment (' ergastolo ') is substituted the " penitentiary (' Casa di Forga ') for 20 years;

" (*c.*) The penitentiary can be reduced within the legal " limits; and

" (*d.*) If the crime is punishable with less than the " penitentiary, not only may the punishment be " diminished, as laid down under letter *c*, but " moreover the person injured must bring the " action against the culprit."

Art. 5.—" When arrested in Tuscany, or given up by " other Governments, a foreigner is liable to punishment " under the present law, when beyond the limits of the " Tuscan territory he has been guilty of a crime

" (*a.*) Against the internal security of the state;

" (*b.*) Forgery of monies or of public papers of credit in " Tuscany; or

" (*c.*) Forgery of seals of a public authority, or of a " public office of the Grand Duchy, or of the " instruments for making them."

" The same rule applies to crimes committed by foreigners " out of Tuscany against a Tuscan; but in such cases are " applied the limitations laid down in sec. 2 of the preceding " Article."

Art. 6. " In the cases foreseen in sec. 2 of Art. 4, and " sec. 2 of Art. 5, acts are not to be punishable which, al- " though punishable in Tuscany, are not liable to punish- " ment in the country where they are committed."

Art. 7. " If the Tuscan subject, as mentioned in Art 4, " or the foreigner as mentioned in Art. 5, has, beyond the " Tuscan frontiers, suffered the punishment inflicted by law " on his crime, no criminal proceedings can be taken against " him in the Grand Duchy."

" But if, condemned out of Tuscany, he has not gone " through his punishment, or has only done so in part, he " is liable to be tried again in Tuscany, but at his trial the " amount of punishment he may already have gone through " will be taken into consideration."

Art. 8. " The rules laid down in Arts 4 and 5 are to be " observed in every case where there are no others laid " down by special public conventions between Tuscany and " other states."

Art. 9. " No Tuscan subject can be given up to another " state for any crime whatever, whether committed in Tus- " cany or elsewhere."

As regards criminal proceedings, the following are the provisions of the various articles of the code applicable to foreigners.

Art. 34. " For crimes and offences punishable according " to Articles 5, 6, 7, 8, and 9 of the Criminal Code in the " kingdom, the place of domicile, or of arrest, or of surren- " der of the accused determines the competency of the " court, and a preventive arrest may be made" ("E si fa " luogo a la Prevenzione)."

" However, the court of appeal may, on the demand of the public ministry or of the other parties, send the affair before the court or tribunal nearest to the place where the crime or offence has been committed."

Art. 35. " The court or tribunal competent to take cognizance of the crimes mentioned in the preceding article, may make use of acts made abroad.

" These acts may moreover serve to determine the indemnity due to the injured party in the case of crimes committed abroad which are not punishable in the kingdom." (C. S. 33.)

Art. 36. " Whenever a judge receives notice of an action or a denunciation about a crime committed abroad, which can be adjudicated on in the kingdom, he must give notice of it to the ' Procureur du Roi,' who will call upon the ' Procureur Général ' under whom he is placed." (C. S. 34.)

Art. 853. " When in criminal proceedings it is necessary to proceed to the examination of witnesses or to the drawing up of deeds with foreign judicial authorities, or to demand the arrest and extradition of a criminal who may be in a foreign country, the person drawing up the accusation must inform the court (' Sezione d'accusa ') to which he belongs, and the court where necessary will make the demand in the customary form, and will forward it through the public ministry, with the necessary documents, to the Ministry of Grace and Justice, in order that it may ensure the carrying out thereof.

" The extradition of an accused person may also be " demanded directly by the Government of the King."

" When the extradition of an accused person can be ob- " tained from a foreign Government only on sworn testimony, " the judge who hears the case may examine on oath the " witnesses whose depositions are required; of these depo- " sitions a separate volume is to be made which will serve " for the demand of extradition. At the trial, however, " these witnesses must again be sworn in the manner laid " down by the law." (C. S., 832.)

Art. 854. " When in criminal matters it is necessary to " draw up acts of accusation at the request of foreign " judicial authorities, it shall be done by the Court of " Appeal in the ' Sezione d'accusa,' and by the judge " appointed by it.

" In such case witnesses may, if required, be examined " on oath." (C. S., 833.)

Art. 855. " No alteration is made in the rules in force " for communications between the authorities of the " kingdom and those of foreign Governments on matters " concerning criminal jurisprudence, and the special con- " ventions now in force are to be observed." (C. S., 834.)

" In the cases in which, according to the provisions of " the criminal code, the tribunals of the state are compe- " tent to take cognizance of crimes committed by subjects " in foreign countries, when they return home, the act of " accusation and the documents necessary to prove and " maintain the guilt of the accused may be drawn up; but " he cannot be summoned or arrested until he returns into " the country."

In the International Treaties there are special dispositions respecting the enjoyment of civil rights accorded to the subjects of each contracting state separately; but, if exception is made of the stipulations exempting foreigners from any forced loans which may be raised in the kingdom, it may be said that they have been placed there more to satisfy the contracting powers than because they were necessary, for the provisions of law, as above explained, are framed on the most liberal principles of international law.

Such are, both in matters of private and of criminal law, the rules affecting foreigners in Italy.

(Signed)

Avo. Corsi.

Florence, December 10, 1868.

NETHERLANDS.

My Lord, The Hague, July 10, 1868.

On receipt of your Lordship's despatch of June 16, I lost no time in soliciting of this Government full information respecting the disabilities, civil and political, under which aliens resident in the Netherlands labour.

M. Roert Van Limburg in his reply, copy of which I have now the honor to enclose, makes frequent reference to the "Code Civil" and to the "Code de Procedure Civil" in force in this kingdom. Of these works no translations from the Dutch exist, a want that, however, is the less felt as the whole body of Statute law of this country is based on the "Code Napoléon" promulgated in 1810.

Of the recent Dutch legislation on this subject to which M. Roert Van Limburg calls attention, I have appended translations of those laws and articles the bearing of which upon the condition of an alien in Holland is not sufficiently explained in the text of his Excellency's despatch.

In the event of the members of the "Naturalization Commission" requiring further information on this subject, I would venture to refer them to M. de St. Joseph's "Concordances entre les Codes Civils Étrangers et le Code Napoléon," a work published at Paris in 1856, and furnished with an excellent index, showing at a glance the divergencies of legislation in different countries on any given point.

I have, &c.

E. A. J. Harris.

The Lord Stanley, M.P.

La Haye, le 7 Juillet 1868.

Monsieur le Ministre,

En réponse à votre office de 20 Juin dernier, par lequel vous avez exprimé le désir d'être renseigné au sujet des incapacités (disabilities) dont la loi frappe les étrangers résidant dans les Pays Bas, j'ai l'honneur de porter à votre connaissance que ces incapacités sont de deux espèces, et concernent, les unes l'exercice des droits politiques, les autres la jouissance des droits civils.

Quant aux droits politiques, les étrangers n'en ont pas la jouissance. Ils ne peuvent être nommés à des fonctions publiques qu'exceptionnellement conformément aux dispositions de la loi du 4 Juin 1858. Ils peuvent même lorsqu'ils résident dans le Royaume, sans avoir été assimilés aux Néerlandais en vertu de l'Article 8 du Code Civil, être extradés (voyez l'Art. 19 de la loi du 13 Août 1849). Enfin la loi du 14 Mars 1819 établit une distinction entre les Néerlandais et les étrangers par rapport à la délivrance des lettres de mer. Toutefois l'étranger qui a habité le pays pendant un an, est, aux termes de l'Art. III. 2°, assimilé à cet égard aux Néerlandais.

En ce qui concerne l'exercice des droits civils, les étrangers sont, au contraire, assimilés en général aux nationaux. L'Art. 9 de la loi, contenant des dispositions générales de législation, déclare le droit civil du royaume applicable aux étrangers comme aux Néerlandais, pour autant que la loi n'établit pas expressément le contraire. Cette restriction s'appliquant aux étrangers en général rend toutefois nécessaire de distinguer entre les exceptions qui s'appliquent à *tous* les étrangers, par conséquent aussi à ceux résidant dans le royaume, et celles qui ne sont applicables qu'aux étrangers ne résidant pas, ou n'ayant pas de domicile connu dans les Pays Bas.

À la première catégorie de ces exceptions appartiennent celles d'après lesquelles un étranger n'est admis à succéder soit par le testament soit ab intestat, ni à acquérir par voie de donation que pour autant que les mêmes avantages sont assurés aux Néerlandais par la législation du pays de cet étranger (Articles 884, 957 du Code Civil); et en outre celles résultant de l'Art. 152 du Code de Procédure Civile, d'après lequel tous étrangers, demandeurs principaux ou intervenants, sont tenue, si le défendeur le requiert, avant toute exception, de fournir caution de payer les frais et dommages-intérêts auquels ils pourraient être condamnés, et de l'Art. 155 du même code, lequel exclut du bénéfice du prodéo les étrangers indigents, à moins qu'une convention spéciale ne leur assure ce bénéfice.

Les exceptions de la seconde catégorie résultent des Art. 127 (relatif aux citations), 585 10° (relatif à la contrainte par corps), 710 1° (qui exclut les étrangers du bénéfice de la cession de biens), et 768 à 770 (relatifs à l'emprisonnement pour dettes et à la saisie des biens) du Code de Procédure Civile. Aucune de ces dernières exceptions ne s'applique toutefois aux étrangers assimilés aux Néerlandais conformément à l'Art. 8 du Code Civile, à l'égard desquels la règle posée par l'Art. 9 précité de la loi contenant des dispositions générales de législation est en tous points applicable en ce qui concerne l'exercice des droits civils.

Espérant, Monsieur le Ministre, que les renseignements qui précèdent pourront suffire au but qu'à en vue votre Gouvernement, je saisis cette occasion pour vous renouveler l'assurance de ma haute considération.

(Signé) Roest Van Limburg.

Vice-Admiral Harris,
&c. &c. &c.

(Translation.)

Law of June 4, 1858.

We, William III. &c.,

Having considered Article 6 of the Constitution, and consulted our Council of State, and deeming it desirable to determine the eligibility of aliens to Government employ, whether civil or military, have decreed as follows:—

Article I.

Aliens are eligible for Government employ, as—

a. Consul-General, Consul, or Consular Agents.
b. Chancelier or servant in missions, Consulates General, and Consulates.
c. Chief, subordinate, teacher, or official in the Government establishments for education, arts, and sciences.
d. Official in the Telegraph department.
e. Official connected with steam machinery.
f. Employé in mines.
g. Director and Commissary of Government entrepôts.
h. Controller and Inspector of Small Arms.
i. Die-sinker at the Mint and Government offices.
k. Engraver for any Government department.

Article 2.

Aliens who have served or are serving in the army or the navy, may, if furnished with an honourable discharge, after 12 years actual service, be appointed clerk, skipper, or guager, in the Revenue department, watcher, porter, or boom-closer in fortresses, toll-keeper, sluice-keeper, employé in military hospitals, and in the clothing, camp, equipments, commissariat, or military baking departments.

Article 3.

Aliens in Civil Government employ at the time of the coming into operation of this law are likewise eligible for appointment to any office mentioned in Article 2.

Article 4.

Aliens appointed previous to this law's taking to effect any office or employ other than those mentioned in Article 1, may retain such office or employ, but may not receive advancement in the public service unless naturalized according to law.

Given at the Loo, June 4, 1858.

(Signed) William.

(Countersigned) J. K. Van Goldstein.

(*Translation.*)

Article 19 of the Law of August 13, 1849.

The enactments of this law are not applicable to aliens who, under Article 8 of the "Code Civil," are assimilated to Netherlands subjects; and, with reference to this law, those aliens are considered admitted to Netherlands citizenship who are domiciled within the kingdom and married to Netherlands women, or who having been married to Netherlands women have by them had issue born within the Netherlands.

(*Translation.*)

Extracts from Code of Civil Procedure.

No. 127. An alien may, even when not domiciled in the Netherlands, be cited before a Netherlands tribunal for crimes committed by him against a Netherlands subject either within or without the limits of the kingdom.

No. 585.—10°. Aliens not domiciled within the Netherlands are liable to imprisonment for debt for any debt contracted with a Netherlands subject.

No. 710.—1°. Aliens not domiciled within the Netherlands are excluded from participating in the advantages of cession of property.

No. 768. Aliens not domiciled within the Netherlands may, without sentence in a court of justice, be seized for debts due to a Netherlands subject on an order of the justices of the arrondissement.

No. 769. Bail (on good securities for both debt and costs) may be accepted.

No. 770. Aliens, non-domiciled, are liable to seizure for debt, if payment of a debt on application is not made in eight days.

(*Translation.*)

Article 8 of the Code Civil.

Aliens are assimilated to Netherlands subjects in the two following cases:—

1°. When, in virtue of permission from the King, they have established their domicile in the kingdom, and made the communal administration acquainted with such permission.

2°. When after having established their domicile in a commune of the kingdom, and retained it in the same commune for six years, they shall have announced to the communal administration their intention to establish themselves in the kingdom.

PORTUGAL.

My Lord, Lisbon, August 22, 1868.

In reply to your Lordship's despatch of the 16th of June, I have the honour to inclose copy and translation of a note dated the 8th instant, and of its inclosure, addressed to me by the Minister of Foreign Affairs, in answer to my application to him for information as to the disabilities of aliens in this country.

In the inclosure above referred to, your Lordship will find a statement of the rights as well as of the disabilities of aliens in Portugal.

I have, &c.

Ch. A. Murray.

The Rt. Hon. Lord Stanley, M.P.
&c. &c. &c.

Foreign Department, Lisbon, August 8th, 1868.

MOST ILLUSTRIOUS AND EXCELLENT SIR,

IN addition to the note which my predecessor addressed to your Excellency on the 16th of July last, I have the honour to forward to your Excellency the inclosed copy of the report made by the Councillor and Assistant Attorney General to the Crown attached to the Department of the Interior, wherein the rights and powers to which foreigners are entitled in Portugal are summarily stated.

Having thus complied with the wish expressed by your Excellency in your note dated the 24th of June last,

I am, &c.

(Signed) CARLOS BENTO DA SILVA.

Copy.

Rights and Powers enjoyed by Foreigners in Portugal.

1. All foreigners residing or travelling in Portugal possess the same rights and are subject to the same civil duties as Portuguese citizens, as far as regards any acts which are to be carried into effect in this country, except in such cases in which either an express law or a special treaty shall provide otherwise (Civil Code, art. 26).

2. The status and civil capacity of foreigners are to be regulated according to the law of their own country (art. 27th).

3. If met with in these realms they can be sued before the Portuguese justices on account of any engagements entered into with Portuguese in a foreign country—the case of any special treaty excepted (arts. 28 & 30).

4. They can be sued by other foreigners before the Portuguese justices for any engagements entered into in this country, if met with there—the aforesaid case excepted (arts. 29 & 30).

5. Any judgments given in foreign courts of justice upon any civil rights between foreigners and Portuguese can be carried into execution before the Portugese tribunals (art. 31), provided they are examined and confirmed in any of the Tribunals of 2nd Instance of the kingdom, after hearing the parties, and in the presence of the representative of the Crown, unless there should be a treaty stipulation providing otherwise, or whenever the parties expressly consent to the execution of such judgments by a written agreement signed by them before the proper judge; namely that of the domicile of the person against whom judgment is to be carried out, and in his absence that of the place where the property is situated ("Reforma Judiciaria," Judicial Reform, art. 567 and respective paragraph).

6. Foreigners can become naturalized if they are of age, both by the law of their country and by Portuguese law, provided they are able to maintain themselves either by the work of their hands or by any other means of subsistence, and shall have resided during one year in Portugese territory, unless they should be the descendants of Portuguese blood, and should have come for the purpose of establishing their domicile in this kingdom; because in such a case one year's residence is not requisite, which may also be dispensed with by the Government in the case of a foreigner married to a Portuguese woman, or in the case of any one who shall have performed or may be called to perform any important service to the nation (Civil Code, arts. 19 & 20).

7. Letters of naturalization are granted by the Executive Power (Constitutional Charter, Art. 75, § 10), but are only valid after being registered in the Municipal Chamber of the district where a foreigner shall have established his domicile (Civil Code, Art. 21).

8. All foreigners who are naturalized are Portuguese citizens (Constitutional Charter, Art. 7, § 4), enjoying as such all the political rights appertaining to them, such as voting at elections, &c. (Art. 63 of the Constitutional Charter). They cannot, however, be elected deputies (Art. 68, § 2), nor succeed to the Crown (Art. 89), nor be a Minister of State (Art. 106), nor a Councillor of State (Art. 108).

Lisbon, July 29th, 1868.

CONTO MONTERO.

True copy.—OLIMPIO JOAQUIM OLIVEIRA.

True copy.—Department of State for Foreign Affairs, 8th of August 1868.

(Signed) EMILIO ACHILLES MONTEVERDE.

PRUSSIA.

MY LORD, Berlin, October 17, 1868.

I HAVE the honor to transmit herewith the translation of a note, dated the 7th instant, from Baron Thile, enclosing a report which I was instructed by your Lordship in your despatch of June 16th to furnish for the use of the Naturalization Commission, on the disabilities to which aliens residing in Prussia are subjected by Prussian law.

A translation of this report, by Mr. Harris, Lord Brabazon, and Mr. O'Conor, is likewise enclosed.

I have, &c.

The Lord Stanley, M.P., &c. &c. &c. AUGUSTUS LOFTUS.

(*Translation.*)

Berlin, October 7th, 1868.

In compliance with the desire expressed in his Excellency Lord A. Loftus' note of June 20th of this year, the undersigned has the honor to transmit herewith a summary of the principles applicable to foreigners as regards their legal status in the Prussian territory.

The undersigned avails himself, &c.

(Signed) THILE.

(*Translation.*)

Summary of the Principles applicable to Aliens as regards their legal status in the Prussian Territory.

According to the provisions of the General Prussian Body of Laws, the laws of this country are applicable to aliens living or carrying on business in Prussia in the same manner as to the Prussians themselves.

§§ 34. 22 of the introduction to the General Common Law. Ministers and residents of Foreign Powers, as well as those employed in their service, are excepted; for whom are reserved the immunities which belong to them by international law, and by the existing Conventions with different Courts. Page 36, as above cited.

The provisions relative to the application of this principle in criminal or civil suits will be hereafter stated.

The exceptional position of the "personnel" of a Legation has reference only to their exemption from the jurisdiction of the native penal and civil tribunals, and to the obligations which the laws of the country impose on aliens, not, however, to the rights which aliens can generally acquire within this country. In this respect the "personnel" of the Legation is in a similar position to other aliens.

Aliens enjoy all the privileges of Prussian subjects in the carrying on of business duly authorized.

(§ 41 of the Introduction to the General Body of Law.)

Whenever the respective Foreign State has not, to the disadvantage of aliens generally, or to the subjects of this State in particular, imposed burthensome regulations.

In this case retorsion can occur, from which aliens cannot escape by the abandonment of their rights to natives.

§§ 43 and 44 of the Introduction to the General Body of Law.

The right to retorsion becomes especially applicable whenever in the bankruptcy in the State to which the foreign creditor belongs similar privileges to those enjoyed by its own subjects are not accorded to subjects of that State (s. 3. Statute respecting bankruptcy, of May 8, 1855).

A. Whenever aliens and natives have put an attachment on the estate of their debtors, and that attachment gives in the country of the aliens an advantage to the latter.

S. 87. Part I. Title 29 of the general statute respecting tribunals.

The right of retorsion must not be put into operation by the Courts of the First Instance without the sanction of the legally appointed authorities.

S. 44 of the Introduction of the General Body of Law.

I. The entry of aliens into the Prussian dominions, their residence therein, or their departure therefrom, is not restricted by any burthensome formalities.

§ 2 B. of the law respecting passports for the North German Confederation.

They are authorized to take up their abode without being naturalized (§ 13 of the law respecting the acquisition and loss of the quality of a Prussian subject, of the 31st of December 1842, Law Collection of 1843, page 15), but in this case they can be required to state the period during which they may continue in their previous relations as subjects.

§ 14. Above cited.

II. Aliens are limited in the exercise of political rights.

A. They cannot take part in the representation of the country.

§ 7 of the regulations for the formation of the 1st Chamber (House of Lords), of the 12th of October 1854 (Collection of Laws 541), and § 8 of the regulations respecting the selection of Deputies of the 2nd Chamber

(House of Deputies), of the 30th May 1849 (Collection of Laws, 205).

B. With respect to the political municipal privileges, the principle prevails according to the municipal laws prevalent in different parts of the country, that—

a. In towns the acquisition of citizenship, *i.e.*, the right of participation in the municipal elections, as well as of the qualifications for undertaking unpaid posts in the municipal representation, is dependent upon the qualification as a Prussian; on the other hand, aliens can on the same presumption as natives, *i.e.*, by the acquisition, for instance, of a local domicile, become municipal members without the right of citizenship, and thereupon take equal part in all the affairs and duties of the municipal members, with exception of the before-mentioned rights consequent on citizenship.

In the towns of the Duchy of Holstein (Holstein municipal regulations of the 11th of February 1854), aliens, on the same condition as natives (independence, respectability, and settlement in the town), are capable of acquiring the right of citizenship, provided the permission of their residence is not forbidden for police reasons, and that they have complied with the special existing regulations respecting the establishment of aliens. These regulations tend to the effect that aliens arriving in the country should not merely apparently and temporarily, but really settle down in the place. He (the alien) must not retain his own residence in another place, and must, when married, establish his household in the place, together with his wife and children, so that he (as the royal statute of the 23rd September 1796 says) can "be looked upon as our own subject."

Aliens who are unmarried and without a household establishment must as a security that they intend to remain in the place, and before receiving the right of citizenship, deposit 200 thalers as bail, which will be returned to them only after a lapse of five years, provided they have during the interim resided in the place and followed a civil calling; otherwise it goes to the municipal fund.

Besides this, the special regulations specified by the charter of the 5th of November 1841 (Chronological Collection of the Sleswig-Holstein Ordinances of 1841, page 243), with respect to the settlement of aliens, must be complied with.

The right of citizenship qualifies forthwith for every kind of civil employment in the place, also for the municipal elections, the municipal offices and duties (mandate), and compels the acceptance of the latter.

Residents in a municipality but without the right of citizenship are (Schutznerwanth) under the especial protection of the Government.

These enjoy such municipal privileges as are not exclusively attached to the right of citizenship, and are obliged to pay the municipal taxes (and by statute not at a less rate). Aliens can only become (Schutznerwanth) under the especial protection of the Government when they have complied with the above-mentioned special regulations respecting domicile in a place. In the Holstein country towns the same principles essentially prevail as in the towns and country towns of Sleswig.

b. Also in the country municipalities (Landgemeinde) the general principle prevails, according to the municipal regulations existing in the different parts of the country, that aliens can only obtain complete municipal rights after they have first obtained the right of citizenship. In the municipality of Hanover, however, owners of property, farms, and dwelling houses in general, can exercise the right of municipal electors, and so also, if they are aliens, without being settled there when they have acquired the right to reside in the respective municipality, which again presupposes the acquisition of the rights of a subject.

In the municipalities of the Sleswig-Holstein Duchies, by the decree of the 22nd of September of last year (Law Collection, page 1,603), relative to the right of election, the local regulations existing in each municipality are in the bulk maintained. These local regulations rest mostly on custom.

C. Relative to participation in the provincial and district representation, the qualification of being a Prussian on the part of an owner of landed property is not required.

The Royal Order in Council of the 28th of May 1809, which is in force in the eight older provinces, with the exception of the Rhine Province, makes the acquisition of nolle property and manor houses by aliens subject to a special concession from the Minister of the Interior, which is dependent upon taking an oath of allegiance. By Royal Order in Council, also, of February 15, 1858, it is ordered in accordance with the Decree of March 28, 1809, that the acquisition of a Rittergut by an alien must, before a special permission can be accorded, be subject to this condition, that the owner of the property must only exercise the rights appertaining to the same, especially that of attendance at Quarter Sessions, by means of a delegate who is to be chosen from these privileged owners of property (Rittergutsbesitzer) accustomed to the personal exercise of these rights. In the Rhine Provinces the Royal Order in Council of May 31, 1847, only states that aliens who possess land in the Rhine Provinces are not permitted to exercise the rights of privilege attached to the property until they have taken the oath of allegiance. With regard to capability of election, actively and passively, to the Circuit, Communal, and Provincial Sessions in towns and parishes, the condition of being a Prussian subject is in general attached, in accordance with II. B. of the above-cited Regulations, as such capability is made subject to the possession of right of citizenship or membership of the parish.

In the Regulations issued in the year 1867 for the newly acquired provinces respecting the Circuit and Provincial Constitutions, there exist no express provisions touching the necessity of being a Prussian subject in order to exercise the rights of landownership in regard to electing and being elected.

As far as our laws are silent upon this subject, aliens may be looked upon as authorized to exercise these rights. Without doubt those who are in a similar position to natives in respect to being large landed proprietors are not compelled to obtain a special concession or to take the oath of allegiance.

D. Aliens, having powers of policial supervision, are not permitted to exercise their authority in person, but must appoint a native delegate to superintend the police of the place (§ 7 of the law respecting the rural local magistracy in the six old East Provinces of April 14, 1856. Collection of Laws, 354). The appointment to situations under the State and also to the post of consul.

§ 6. Statute of December 31, 1842. Legal Code for 1843, page 15. Royal Order of Oct. 17, 1847, page 375. Royal Order of Jan. 27, 1862, p. 95.

§ 7 of the law on the organization of the consulates of the Confederation of November 8, 1867.

Federal Laws, page 137.

The right to act as jurymen in criminal suits.

§ 62, Decree of Jan. 3, 1849, Legal Code, 14.

Art. 56, Law of Dec. 3, 1852, p. 209.

The right to act as arbitrators in civil suits is not attached to domicile (Indigenat), but is nevertheless not allowed to persons living abroad.

§ 41. Introduction to General Statute respecting tribunals.

III. Aliens, with the exception of the Corps Diplomatique, are subject in like manner as natives to the indirect taxes, as also to the land tax payable on lands and houses appertaining to them in this country.

They are liable to the class and income taxes, subject to the modifications mentioned above in § 6 and 18 of the law of May 1, 1851. Legal Code, 193.

In regard to their legal rights in private affairs, aliens are permitted in Prussia to acquire both personal and real property, as also to carry on business of all kinds. As participators in an inheritance within this country they possess equal rights with natives. No deduction shall be made from inheritances falling to aliens, unless the Government of the alien raises a like tax on inheritances accruing to aliens.

Royal Order of April 11, 1822. Legal Code, page 181.

With reference to the acquisition of property by aliens, the three following limitations are in force:—

I. Donations, inheritances, and legacies cannot be left to foreign corporations and public institutions without royal permission.

5. 11. Law relating to donations and bequests to institutions and companies, of May 13. Collection of Laws, page 49.

2. Foreign corporations and other authorized persons, especially joint stock companies, are not permitted to acquire real property within the Prussian State without royal permission.

Law of May 4, 1846. Collection of Laws, page 235.

3. Estates and manor houses belonging to the nobility cannot be acquired by foreigners without the permission of the Minister of the Interior. Royal Decree of March 28, 1809, page 7.

With regard to real property situated in Prussia, it is subject to the laws of the jurisdiction in which it may be placed, without regard to the person of the proprietor.

§ 32. Introduction to general body of law.

Every negotiation thereon must consequently be carried out in the form required by the laws of this country.

§ 115. I. 5. Body of law.

The personal qualifications and rights of foreigners (*jura status*), are generally judged in accordance with the laws of their country.

§ 23. Introduction to body of law.

If, however, that law should as regards competency to enter into relations under the cognizance of the law differ from the Prussian law, then the competency of the contracting parties with respect to such relations entered into in these countries, and with respect to the concluding of contracts, shall be determined by the law with which the subject shall the best comport.

§ 26, 35. Introduction to body of law.

Especial regulations apply to the following cases:—

1. Foreigners who are desirous of contracting a marriage in Prussia, either with a native or a foreigner, must in addition to fulfilling the other legal requirements prove by a certificate, properly attested by the local authorities of their home, that they are permitted by the laws of their country, without hindrance to their state allegiance, to contract a marriage abroad, or that they have received in accordance with these laws the necessary permission for the contracting of the proposed marriage.

The ministers of justice, religion, and the interior are nevertheless empowered, as well in particular instances as with regard to the legislation of particular States, to permit to their subjects generally the production of such a certificate.

§ 1 and 2. Law of March 13, 1854.
Collection of Laws, p. 123.

2. The carrying on of business is usually permitted to aliens as well as to natives, but—

a. The right of owners of mercantile ships to hoist the flag of the North German Confederation is confined to those foreigners who are naturalized.

§ 1. Law of October 28, 1867.

Confederation Laws, p. 35.

General Order of March 25, 1868, relative to keeping the ship's log. Judicial Ministerial Paper, p. 95.

b. Aliens must obtain permission of the minister in order to carry on through agents in Prussia insurances and emigration undertakings.

§ 2. Law of May 14, 1853.
Collection of Laws, p. 293.
§ 7. Law of May 7, 1853.
Collection of Laws, p. 430.

C. Foreign agents in default of an international treaty can only carry on a permanent trade with the permission of the Minister of Commerce; likewise—

D. In accordance with § 12 of the law of hawking, of April 28, 1824, the alien is in general only allowed to carry on the trade of the pedlar under greater restrictions than the native.

3. Foreigners can only be appointed guardians to native wards with the consent of the Minister of Justice, when in all matters relating to the trusteeship, with the permission of their own foreign law, they have submitted to the authority of the courts exercising jurisdiction over guardians and wards.

§ 156, 157. Part II. 18 Common Law.

V. With reference to the administration of the civil and criminal code, the jurisdictional stipulations concluded with separate States come next into operation.

Apart from such stipulations the following principles are in force:—

A. In criminal cases.

a. Foreigners are subject to the Prussian criminal code, if they commit in Prussia a crime, misdemeanor, or excess, or abroad an action which in the Prussian code would come under the heads of high treason or false coinage.

§ 3 and 4. Criminal Code of April 14, 1851.

b. There is this particular difference between the punishment of a native and a foreigner, that in those cases in which a native would be sentenced to police supervision, a foreigner would be banished from the country (§ 29 in book above cited), and the return of an alien thus banished is punishable with three months to two years imprisonment.

§ 115, as above cited.

c. Aliens who fail to pay the fine affixed to smuggling are at once arrested, if they are found in the country, and the punishment of imprisonment fixed by law is carried into effect if they do not at once pay or find security, whilst the alternative punishment of imprisonment is only enforced against a native when the amount of the fine has not been procured by means of an execution on the property of the defrauder.

§ 54, 55. Law of January 23, 1838.
Collection of Laws, p. 89.
§ 24. 25. Law of July 29, 1867.
Collection of Laws, p. 1275.

d. With regard to procedure, the same regulations apply to aliens and natives; but in cases in which a private suit is instituted for examination and punishment, alien private suitors must pay higher fees than natives; if in their native state foreigners and natives are not placed on the same footing.

§ 492 of the law of June 25, 1867, touching the laws relating to penal punishment and procedure in those portions of the country annexed in the year 1866.

In time of war aliens are subject to the jurisdiction of courts-martial in two cases.

aa. Foreign officers attached in time of war to the Prussian army, and their suite; and

bb. All aliens who by traitorous conduct at the seat of war bring danger or hurt to the Prussian troops; but in this latter case this extraordinary tribunal only comes into operation when the king or the general in his name gives the order for the assembly, and makes it publicly known.

§ 18. Nos. 2 and 4 of the martial law of April 3, 1845. Collection of Laws, 333.

E. In accordance with the principles of extra territoriality, the ambassadors accredited to this court, the chargé d'affaires, their wives, and persons belonging to the missions accredited to this court, and their servants, are free from all examination and arrest, except sentence is passed on them by the highest state authority. Courts of justice and police authorities are bound to take every precautionary measure to hinder the accomplishment by any of these persons of a meditated crime.

§ 251, 253, 258. Criminal Code of December 4, 1805.

B. In civil suits.

1. Aliens have the same powers as natives asserting their private claims as plaintiffs before the courts of justice.

There are two exceptions to this principle within the jurisdictional limits of the general statute respecting tribunals.

a. According to the regulations of the general statute respecting tribunals, natives as well as aliens are bound to give security to the defendants in cases where the matter cannot be at once settled. But the defendant can only refuse in a suit with a foreigner to go into court, or to allow the suit to continue if the plaintiff cannot find security.

§ 13. I. 21.

b. Aliens can only obtain the arrest of another alien.

aa. When the summons has reference to a contract concluded or to be carried out in this country.

bb. When the debtor in the deed by virtue of which the arrest is sought has made himself liable either to payment, or arrest in any place.

cc. When the summons originates in a bill of exchange which has fallen due, and the drawer is a merchant who visits the fairs and markets of this country.

§ 88. I. 29. General statute respecting tribunals.

1. According to the regulations of the Hanoverian law in force in the province of Hanover, only aliens are bound as plaintiffs to provide security for the payment of legal costs, in accordance with § 54, 55 of the Hanoverian statute of November 8, 1850 (Hanoverian Code of Laws, page 341).

2. With reference to the obligations of aliens to appear as defendants before the courts of this country, a difference of procedure prevails in the provinces where the civil code or general statute respecting tribunals or where the common law is in force.

a. Within the judicial limits of the civil code, according to Art. 14, every alien, even if he does not live in the country, can be cited before the courts of the country on account of obligations entered into with a native either in this country or abroad.

b. There is, however, a difference in the working of the general statute respecting tribunals which depends upon this, whether personal or real law be put in force against the alien.

1. A personal forum (the forum domicilii) belongs to foreigners in Prussia whenever they have settled there, or are staying in Prussia with that intention. After the cessation of (eximirten) legal status they can be cited on personal matters before the tribunals of the districts in which they have settled, or have declared their intention of settling.

Section 26, 27. I. 2. General Statute respecting Tribunals. Section 1 and 23, Decree of January 2, 1849.

2. Foreigners travelling through Prussia have here generally no personal forum; accordingly they can only be cited before the tribunals of this country in those cases in which a native could be cited before another tribunal as constituting his personal forum.

This is the case:—

a. Whenever plaint is made respecting the completion or cessation of a contract which was concluded in this country,

or should be here carried out, the plaint can be instituted just as well before the tribunals of the country of the concluded contract as of the place for its carrying out; but that forum is only established whenever the defendant allows himself to be met with there, *i.e.*, whenever the plaint can be served upon him within the jurisdiction of any such tribunals.

Sec. 148–51. I. 2. General Statute respecting Tribunals.

The last restriction does not apply in plaints respecting bills of exchange. These can be instituted at the place of maturity against any persons responsible for bills.

Sec. 6. Law of February 15, 1850.

Collection of Laws, page 53.

b. Claims arising out of an administration can be presented before the tribunal at which anyone shall have administered a foreign real or personal estate, until the administrator has wound up the administration.

Sec. 154, 155, I. 2. General Statute respecting Tribunals.

c. If anyone has had an attachment served for damages, he must free himself before the judge of the place where the attachment arises, and if he be a foreigner, must on that account give security.

§ 120, I. 2. General Statute Tribunals.

§ 546, I. 14. General Body of Laws.

This regulation has been recently extended to the case of foreigners injuring natives in this country.

§ 8. Supplement to General Statute Tribunals.

d. In the case of attachment.

The order of attachment rendered necessary as security of the plaintiff's claim is admissible before every tribunal within whose jurisdiction the defendant lives or where goods of his are to be found. The hearing of the chief claim belongs to the judge of the personal forum of the defendant whenever he has a personal forum in his native country. With respect to foreigners, the forum determines the attachment as well as the hearing of the chief claim.

§ 179. I. 2, § 76, 88–90. I. 29. General Statute tribunals.

§ 201, 212. Supplement to General Statute Tribunals.

E. In the case of voluntary (declared or tacit) prolongation.

§ 160–165. I. 2.

In the case of obligatory prolongation this takes place—

aa. When aliens cite a native within his jurisdiction in this country, then they can be sued in the same forum (forum reconventionis) by the accused on account of all counter claims, and also when it arises from a claim in a real action relative to a moveable or immoveable property, whereas natives can in this case be sued only in the real forum.

§ 16, 17, and following, I. 19.

bb. In the case of actions for defamation.

When aliens pretend to a claim against a native they can be accused by the latter upon the hearing of their pretended right, which subjects him to the prejudice of a judgment against the pretension before the court to which the hearing of the case would belong.

§ 4. I. 32. General Statute Tribunals.

G. A divorce suit against an alien can in this country only be instituted when an alien who has no house elsewhere, or who conceals such house, has during his residence in this country married a native woman without acquainting her that he did not intend to remain in this country.

§ 129. I. 2. General Statute respecting Tribunals.

§ 38. Supplement to General Statute respecting Tribunals.

B. The real forum is open against natives or aliens possessing moveable or immoveable property for all causes of action having a real right for their basis.

§ 107, 116. I. 2. General Statute Tribunals.

a. In the provinces where the (Landfassinit)? is in force, the bringing forward of personal plaints in foro rei sitæ against an alien proprietor is permissible. Apart from this, even personal claims which arise out of the possession of landed property or out of transactions which in his quality as landed proprietor he had undertaken, can be instituted against the possessors of immoveable property in foro rei sitæ.

§ 112. I. 2. General Statute respecting Tribunals.

Under that head the following cases are included; when a landed proprietor refuses—

a. To fulfil his obligations contracted with his farmer or agent, or

b. To allow compensation for loans and materials employed for the improvement of the estate, or when a proprietor.

c. Disturbs his neighbour in possession.

d. Or sets up a false claim to the actual rights of the adjoining property, or when he in part or wholly alienates landed property, and does not fulfil his contract, or does not give the due quiet possession.

§ 131, as above cited.

B. These legal regulations are extended in favour of Prussion subjects, so that they can raise claims against any alien living in the country and possessing moveable or immoveable property, before the tribunal under whose jurisdiction the property is situated, on account of personal claims, with the object of obtaining payment out of the property he owns in the country.

§ 34. Supplement to General Statute respecting Tribunals.

4. In the courts having cognizance of inheritance there can be instituted against foreign co-heirs—

a. Claims of legatees and of creditors of the testator's estate.

§ 121–4. I. 2.

b. Claims on account of inheritance so long as there remains a portion of the inheritance.

§ 125, as above cited.

5. On requisition of the Prussian courts, execution decreed by foreign courts of law will be carried into effect when there is no doubt as to their competence, or as to the affair in question.

§ 30. I. 2.

Such doubts especially occur whenever the period shall have expired within which, according to the laws of this country, execution by decree can be sought.

§§ 2, 3. I. 24.

Or whenever a kind of execution inadmissible by the laws of the land is sought.

6. The §§ 292–6 of the Bankruptcy Decree of May 8, 1865, contain special regulations for the procedure with respect to native property of a foreign insolvent debtor.

Thus, merchants who have a commercial establishment in this country can obtain an insolvency (particular concurs) in respect of property here; and any other insolvent co-debtor is subject, upon petition of the creditors, to the bankruptcy procedure, which allows the appearance of foreign creditors. The balance remaining after the conclusion of the insolvency or the bankruptcy, as the case may be, is delivered to the foreign bankruptcy judge after the consent of the Minister for Foreign Affairs and the Minister of Justice shall have been obtained.

7. Envoys, chargé d'affaires, and residents of foreign powers accredited to this Court, and the persons in their service, are exempted from the jurisdiction of the tribunals of this country.

§§ 62, 63, 64. I. 2.

If, however, such persons possess real property in this country, they are subject to the regulations under Z. A. But inquiries must be made at the Ministry for Foreign Affairs before the summons is issued, whenever it is not a question of an essentially real action, and whenever the envoy, chargé d'affaires, or his wife even, is the possessor.

This exemption applies to Prussian subjects who enter the service of the envoy during the period of his service; also to Prussian female subjects who shall marry, after compliance with the requisite conditions, with the foreign envoys, or with persons of the higher rank in their suite. The exemption applies to the wives of servants of an envoy only whenever such persons are also in the service of the envoy, or reside with their husbands together in the envoy's house.

§§ 67, 68. I. 2.

C. The above-mentioned regulations, which are in force within the jurisdiction of the "General Decree for the Administration of Justice," come into operation also in those territories in which the Hanoverian "Decree respecting actions at law," of November 8th, 1850, and the common law obtains. The Hanoverian "Decree respecting actions at law," however, recognizes, in accordance with the Common Law, the forum contractus, even when the defendant is, at the time of drawing up of the suit, not within the district of the tribunals.

§ 10, as above cited.

The civil suit respecting forbidden acts belongs unconditionally to that tribunal in the district of which the act occurred.

§ 12, as above cited.

Lastly, the forum reale is recognized only on behalf of such real actions respecting possession, boundaries, and partition, as have for their subject immoveable property; and, further, on behalf of all actions against the possessors of immoveable property considered as such.

Executions arising from judgments passed abroad, and from decisions in arbitration, take place according to the Hanoverian "Statute respecting actions at law," page 533, with the same exceptions which are valid in the case of native subjects; and, further, that statute lays down in a similar manner to the Prussian statute respecting "bankruptcy," at page 605, that a special bankruptcy can be obtained, and the balance of the estate paid over to the

foreign tribunal, in respect of native property of the foreign bankrupt, upon petition of the interested creditors.

RUSSIA.

My Lord, St. Petersburgh, July 1, 1868.

With reference to your Lordship's despatch of the 16th instant, instructing me to furnish information for the use of the Naturalization Commission, as to disabilities to which aliens residing in Russia are subjected by Russian laws, I have the honour to enclose herewith a statement on the subject which I have received from Mr. Roebuck, the consulting lawyer of Her Majesty's Embassy, and I also enclose a translation by Mr. Michell, of the law promulgated on the 22nd of February 1864, relative to foreigners residing in Russia who may wish to become Russian subjects, or who, having done so, may wish to resume their original nationality.

I have, &c.
Andrew Buchanan.

Opinion of Mr. Josiah Roebuck, sworn advocate at St. Petersburgh, respecting the disabilities to which aliens residing in Russia are subjected by Russian laws:—

Several restrictions and disabilities with regard to the enjoyment of civil and political rights to which foreigners in Russia were formerly liable, have been abolished since 1860, and the rights and prerogatives of foreigners have since been greatly extended.

Foreigners are thus allowed to trade without taking the oath of allegiance.

They can hold landed property, and as landholders are eligible as members of the rural provincial assemblies, with right of vote.

A foreigner may hold a commission in the Russian army, and take the several ranks in it, and having the rank of Lieutenant General or full General, or of Field Marshal, may be appointed Senator and member of the Council of the Empire.

The disabilities to which foreigners are still subject in Russia are the following:—

1. They cannot acquire the right of hereditary nobility.

2. They cannot hold the office of judge, magistrate, justice of the peace, advocate, or usher of a council of law, nor serve on a jury.

3. Foreigners are not allowed to enter the civil service. An exception is, however, made in favour of professional and scientific men, such as physicians, surgeons, apothecaries, architects, engineers, professors and teachers of the arts and sciences, who may acquire in the service of the state the ranks attached to their respective capacities, and receive decorations which they may acquire, do not confer on them the rights and prerogatives enjoyed by national-born subjects.

N.B. Aliens of the Jewish persuasion are subject to very serious disabilities.

(Signed) J. Michell.

Law of 10-22 of February 1864, relative to Foreigners in Russia.

1. A foreigner must be domiciled in the empire before he can be admitted as a Russian subject.

2. A foreigner wishing to become domiciled in Russia must inform the Governor of the Province in which he wishes to reside of his desire to do so, explaining the nature of his occupation in his own country and the pursuits he proposes to follow in Russia.

On the receipt of such declaration the petitioner is considered to be domiciled in Russia, but will nevertheless be accounted a foreigner until he take the oath of allegiance.

3. Foreigners already resident in Russia, distinguished in art, trade or commerce, or in any other pursuit, may prove their domiciliation by other means than those mentioned in § 2.

4. A foreigner, after being domiciled five years in Russia, may apply to be admitted to Russian allegiance.

5. Foreign married women cannot become Russian subjects without their husbands.

6. The allegiance when sworn to is merely personal, and does not affect children whether of age or minors previously born. Those born after the adoption of Russian nationality are acknowledged to be Russians.

7. Specifies rules to be observed in petitioning the Minister of the Interior to be admitted to Russian allegiance (documents and declarations required).

8. It is optional with the minister to grant the above petition or not.

9. An oath to be taken.

10. Mode of taking oaths.

11. In special cases the period requisite to constitute a domicile may be shortened.

12. Children of foreigners not Russian subjects born or educated in Russia, or if born abroad, yet who have completed their education in a Russian upper and middle school, will be admitted to Russian allegiance should they desire to do so, a year after they have attained their majority.

13. The children of foreigners wishing to become Russian subjects will be admitted on the same terms as their parents.

14. Foreigners in the Russian military or civil service, or ecclesiastics of foreign persuasion will be admitted to Russian allegiance without period of domicile.

15. A Russian subject marrying a foreign husband, and therefore considered a foreigner, may on the death of her husband or in case of her divorce return to her former allegiance.

16. The children in the above case are treated as in § 12.

17. Foreign women marrying Russian subjects and the wives of foreigners who had become Russian subjects are admitted as Russian subjects without taking oaths of allegiance. Widows and divorced wives retain the nationality of their husbands.

18. Special enactments relative to colonists, foreign agricultural labourers, Bulgarians, etc., remain in full force.

19. Foreigners admitted to Russian nationality are placed in repect to their rights and obligations on a perfect equality with native Russians.

20. Provides for the speedy transaction of business in connection with the adoption of Russian nationality.

II. Transitional Measures.

1. Foreigners who shall have already adopted Russian nationality may return at any time to their former nationality on payment of all claims against them (government, private, and other claims).

2. Those who throw off their Russian allegiance may either quit the country or remain in Russia, enjoying equal rights with other foreigners; they must provide themselves with national passports if in European Russia and belonging to a country in Europe, within a year; if residing in Siberia or having to obtain such passports from any other quarter of the globe, within two years.

On the lapse of such dates, without production of passports the foreigner must either leave the country or resume his Russian nationality.

3. Exception in cases of desertion and

4. Annuls all enactment compelling Russian women married to foreigners to sell their immoveable property in Russia, with the exception of certain kinds of property which as foreigners they still have no right to possess. With respect to the enactment concerning the payment of three years' dues and export duties by foreigners wishing to leave their Russian nationality, that law is abrogated in respect to those countries which shall adopt a reciprocity in such matters.

III. Abrogating law obliging foreigners to take oaths of allegiance prior to marriage with Russian women and requiring them to ask permission of the Emperor to contract marriage with a Russian woman of the orthodox faith.

SAXONY.

No. 39.

My Lord, Dresden, September 4, 1868.

With reference to your Lordship's circular despatch, of the 16th June last, directing me to report on the disabilities to which aliens residing in Saxony are subjected by Saxon law, I have the honour to inclose in copy and translation the information which has been kindly furnished me on the subject by the Saxon Government.

I have, &c.
J. Hume Burnley.

The Lord Stanley, M.P.
&c. &c. &c.

(Translation.)

In reply to the note of H.B.M.'s Chargé d'Affaires of the 22nd June last relative to the disabilities to which aliens residing in Saxony are subjected, the undersigned has the honour to make the following communication.

The exercise of political rights in Saxony in their immediate relation to the State, as, for instance, the right of voting and being elected for the Diet as well as to the Municipalities, as, for instance, the right of election of representatives for town and country implies Saxon citizenship.

For the exercise of certain professions such as that of a lawyer, a notary public, and medical practitioner, it is likewise necessary to be a Saxon subject.

The regulations of our legislature respecting penalties to which aliens are subject as regards the civil law may be seen from the annexed document, which is a summary of the regulations respecting aliens contained in the Civil Code, concerning the acquisition and the laws of citizenship in the kingdom of Saxony of the 2nd July 1852, as well as in the Penal Code.

To obviate mistakes it is to be observed that the 12th paragraph of the Civil Code has been left out because it does not bear on the question, as it only prescribes that the mother of an illegitimate child may enforce her rights for the support and education of the child, although the conception may have taken place in a country the laws of which do not recognize such claims.

With respect to civil proceedings at law, aliens are only in the following cases placed on a different footing from the natives.

1.

Claims which by mutual agreement are to be settled in the country, or which it would be difficult to prosecute abroad, may in default of payment be recovered by the native from the alien who has no landed property in the country, either by arrest, inhibition of passport, or seizure of an adequate portion of the alien's property, provided the claim is to a certain degree established, and provided the alien does not voluntarily enter into recognizances. On the other hand the arrest of a native supposes a greater risk of losing his claim and lays him under the stricter obligation of proving it.

(See the order of process of 1622. Title II. § 1.)

2.

As a general rule the plaintiff, after having obtained a legal sentence against the defendant for the recovery of his claims, before his claims are actually satisfied, is not liable to an action which the defendant may bring against him, n order to get the sentence annulled, nor can the course of law be checked by such a counter suit.

If, however, the plaintiff who has obtained a legal sentence against the defendant, and is prosecuted by the latter for the recovery of what he has been sentenced to pay him, be an alien, the defendant, not to run any risk of loss, is entitled to demand a temporary deposition of the sum in question, making the alien liable to the action brought against him.

(See the order of process explained of the year 1724. Tit. 6, § 1.)

3.

Aliens possessing landed property in this country may, though not resident on it, be prosecuted for the recovery of all personal claims at the place where their property lies.

(See the article for the greater expedition of lawsuits of the 16th June 1583.

Order of process of the year 1622. Tit. 4, § 3.

Order of process explained of the year, 1724. Tit. 4, § 2.)

Whereas natives cannot be cited before the law court of the district in which his property lies unless other circumstances should declare the competency of such a tribunal.

4.

Aliens may for certain claims have recourse to the Elbe Courts, whereas the competency of such Courts respecting the claims of natives depends on certain contingencies.

The mode of proceeding against aliens for such claims has to be simplified and the case to be sooner decided.

(See Regulations concerning the competency of the Elbe Courts of the 11th September 1863. Law Gazette and Ordinances of the year 1863, p. 722 and following.)

5.

Finally, one of the regulations of the law to be noticed is contained in the order of process of the year 1724, according to which regulation the plaintiff is obliged in more important cases to give a security of 30 thalers, with a view of paying the costs arising from the suit.

From this obligation, however, are exempt such as possess anded property in the country, or exercise a trade, or own a mercantile establishment.

It is a question whether any difference should be made between a native and an alien, and whether the same regulation should not also be applied to a Saxon subject who possesses landed property or carries on some mercantile business abroad. In other respects the alien is placed on the same footing as the native respecting civil suits. Regulations such as that contained in the general mining law of the 16th of June of this year, § 16, in virtue of which the alien who owns a mine in this country has to appoint an assignee in the country in order to receive the summons of the respective court of law, have been omitted here as well as other similar regulations, as they are only intended to facilitate transactions between inland courts and aliens.

The Undersigned avails himself, &c.

(Signed) Von Bose,
Acting Foreign Minister.

Dresden, 17th August 1868.

Abstract from the Civil Code.

§ 6. The laws of the country are applicable in the country in as far as public rights, especially public treaties, and the following regulations allow.

§ 7. The enjoyment of rights and liberty of action of a person depends on the laws of the state to which he belongs.

§ 8. The liberty of action of a foreigner is subject to the home laws if his actions render him accountable.

§ 9. The form to be observed in legal transactions is regulated by the laws of the place where the contract is drawn up.

It suffices, however, to observe the laws of the place where the business is to be carried on.

§ 10. The rights to movable and immoveable property as well as the right of possession depends on the laws of the place where such property lies.

§ 11. Aliens are to be judged by the laws of the place where they are to be settled.

§ 13. Marriage and divorce are subject to the laws of the husband's country.

§ 14. Marriage settlements are subject to the laws in force at the husband's domicile at the time of the marriage contract. Such rights are not altered by a change of residence.

Donations between husband and wife are regulated by the laws in force for the time at the place where the husband resides.

§ 15. Paternal authority follows the laws of the country to which the father belongs.

§ 16. Guardianship is subject to the laws of the minor's country.

§ 17. Inheritance is decided by the laws of the place at which the testator last resided. In case of several residences the laws of the last are to be observed.

§ 18. In as far as rights depend upon the option of the parties, they are allowed to avail themselves of other laws than those immediately applicable.

§ 19. Foreign laws are not admissible if they are excluded explicitly or implicitly by the laws of the country.

§ 20. In case the laws of a foreign state make a difference between natives and aliens, this difference is to be taken into account with respect to aliens by the laws of this country if special regulations are not against it. Such reciprocity cannot be evaded by ceding one's rights to another.

§ 1878. An alien, being a minor, and having immoveable property in the country, has to appoint a guardian for it. The foreign guardian of the minor may act as such.

§ 1879. If a foreigner who has a guardian abroad or is under the parential care of a foreigner requires a guardian in the country for some legal purpose or lawsuit, such a guardian may be appointed by the courts of the country.

Abstract from the Penal Code.

Art. 3.

Foreigners who have committed a crime, and are to be tried by a tribunal of the country, are subject to the penalties of this code with the exception of the case mentioned in Art. 8.

Art. 4.

Trial of a foreigner for a crime committed.

(*a.*) Foreigners enjoying the rights of extra territoriality.

Art. 5.

(*b.*) With respect to other foreigners, those who are guilty of a crime are likewise to be tried only by order of

the ministry of justice if the crime has been committed abroad; but even in this case the order is not requisite.

1st. If the crime has been committed against a state, its authorities, or subjects, or persons who live under its protection or were in Saxony at the time of the crime;

2ndly. If the criminal has settled in Saxony.

Art. 8.

Foreign Penal Laws.

If an offence has been committed abroad by a foreigner, or is, according to Articles 4, 5, 6, brought before a tribunal, he is to be judged by the laws of the country where the offence has taken place, provided it be known or can be proved that the culprit would, according to these laws, either not be punished at all or less severely than by the Saxon laws, or only upon indictment, with the exception of the cases mentioned in Art. 5, No. 1, as well as of offences committed against the king and the royal family, in which cases the present penal code has to be enforced; if in conformity with the above regulations the judge has to refer to a foreign penal law, and this law inflicts upon the culprit a punishment which is inadmissable according to the present law, he cannot go beyond the wording of the law.

Art 9.

Foreign Punishment.

In case the culprit has already been punished for his offence by a competent tribunal of another state he cannot be punished again for the same offence by a tribunal of this country, unless he has at the same time made himself guilty by violating certain obligations incumbent on him towards the country, its sovereign, and his subjects, and then his previous penalty is to be taken into account even in the case of a sentence pronounced by an incompetent foreign tribunal.

Art. 312.

Trade Marks.

Whoever counterfeits with the intention to deceive the peculiar marks of merchants and manufacturers is liable to be imprisoned for a term not exceeding four months, and if the imprisonment is only for two months he has to pay a fine up to 200 thalers; the counterfeiter, however, can only be indicted by the merchant or manufacturer whose trade marks he has forged.

Complaints of foreign merchants and manufacturers respecting such counterfeits can only be attended to if they can prove reciprocity on the part of the state to which they belong.

(Extract from the law respecting the acquisition and loss of Saxon citizenship of the 2nd July.)

§ 9.

Obligation requiring Naturalization.

Every foreigner in the Kingdom of Saxony who desires (*a*) to become possessed of landed property in town or country, with personal residence;

(*b.*) or to obtain naturalization according to the forms of municipal law; or

(*c.*) to exercise in the country a trade or profession which in a town would require naturalization; or

(*d.*) to hold a municipal office or some other employment in church or school which is not under Government patronage is obliged previously to become a Saxon subject.

Persons mentioned under "*d*" may apply for it to the respective authorities in whom the patronage is vested.

§ 10.

There is no necessity for naturalization

(*a.*) for such as hold landed property in Saxony on which they are not domiciled and which is under foreign management;

(*b.*) for foreigners who acquire landed property in Saxony with habitual residence but usually reside abroad, as long as they continue abroad;

(*c.*) when a wholesale business or manufacture is established in the country by a foreigner residing abroad.

In the cases *b* and *c*, on condition that the obligations of citizenship which are attached to a property or undertaking are fulfilled by a proper native representative.

Foreigners under § 10 (*a*, *b*, *c*) participate in the privileges and duties of a Saxon subject only as far as the nature of their property or trade may admit or be sanctioned by the law.

The rights of political honours in Saxony cannot be exercised by them.

SWEDEN.

My Lord, Stockholm, July 31, 1868.

I have the honour to enclose copy of a letter I have received from Count Wachtmeister, forwarding for the information of Her Majesty's Government a memorandum of the disabilities to which foreigners residing in Sweden are subjected by the Swedish laws.

I have, &c.

The Lord Stanley, M.P. J. Pakenham.
&c. &c. &c.

Monsieur, Stockholm, le 27 Juillet 1868.

Par une note du 24 du mois dernier, M. le Ministre d'Angleterre s'est adressé à M. le Baron d'Ugglas, faisant alors les fonctions de Ministre des Affaires Etrangères, avec la demande d'obtenir pour le compte du Gouvernement Britannique des renseigneme nts complets sur les disqualifications ("disabilities") auxquelles a loi Suédoise assujettit les étrangeres residant en Suède.

Je me vois maintenant à même de fournir ces renseignements, et je m'empresse de vous les transmettre en joignant ci-près le mémoire élaboré sur ce sujet au Ministère de la Justice.

Veuillez, &c.

Mr. Pakenham, (Signé) Wachtmeister.
&c. &c. &c.

(*Translation.*) P. M.

Relative to the disqualifications to which foreigners settled in Sweden are subject, on the ground of existing Swedish statutes.

Swedish subjects only are eligible for election to the "Riksdag" (the Swedish Legislative Chambers). (*See* § 22 of the "Riksdag" Regulations.)

It does not appear, either, that foreigners are entitled to take part in the election of members of the "Riksdag," or of members of the municipal administrative bodies. (*See* § 8 of the statute relative to municipal administration in the rural districts; § 10 of the statute relative to municipal administration in towns; § 4 of the statute relative to church vestries ("Kyrkoråd") and school committees ("Skolråd"); §§ 3, 5, and 7, of the statute relative to the "Lands Ting" (boards elected in provincial districts for the management of local communal affairs), all of the 21st day of March 1862, compared with §§ 6 and 14 of the "Riksdag" Regulations.

Offices of trust and service under the Government may as a rule, only be filled by natural-born Swedish men.

Foreigners may notwithstanding, in certain cases, be called and appointed:

Firstly. To the posts of professors or teachers at the Universities, with the exception of posts for theological instruction; they may also be appointed teachers, or in any other capacity, at other scientific, industrial and artistic institutions, and also to the medical profession.

Secondly. To military posts; not, however, to that of commander of a fortress.

(*See* § 28 of the Constitution, "Regerings Formen.")

Foreigners belonging to countries in which Swedish subjects are entitled to inherit property also possess the same right in Sweden (*see* chap. 15, § 2, of the Statute of Inheritance, "Arfda Balken"), so that they may thus become the holders of real and personal estate in the kingdom.

Foreigners may not otherwise hold real and personal estate in Sweden, without the special permission of the King (*see* the Royal Proclamation of the 3rd October 1829); but there appears to be no legal hindrance to foreigners possessing the usufruct of real and personal estate on lease or otherwise.

Foreigners may not act as the guardians of minors or others. (*See* chap. 20, § 8, of the Statute of Inheritance "Arfda Balken.")

With reference to the right of foreigners to exercise trade and industry in this country:

Foreigners are permitted to be part owners of vessels registered either for home or foreign trade; but they may not possess more than one-third of the tonnage of Swedish vessels, nor be the managing owners.

Foreigners who have obtained permission of the King to dwell in the kingdom may also, after special inquiry in each case, obtain permission to exercise trade, manufactures, mechanical employments, or any other calling. (*See* the Royal Statute of the 18th June 1864.)

It should be specially observed that the King possesses he prerogative of adopting foreigners as Swedish subjects y act of naturalization. (*See* § 28, sect. 2, of the Constiution, "Regerings Formen.")

The manner of such naturalization, and its conditions, re determined by the Royal Statute of the 27th February 858, which enacts generally:

That the rights of Swedish subjects may, on application o the King, be obtained by foreigners who have attained he age of 21, are of good repute, have resided in the ingdom for three years, and who possess the means of upporting themselves.

That such application shall be accompanied by a certifiate of the age of the candidate, the country to which he elongs, the time when he arrived in the kingdom, his haracter, and the religious faith he professes.

And that the candidate, provided the application be ranted, shall, within the term prescribed by the King, and efore the proper authorities, attest that he has ceased to be subject of the foreign power to which he formerly belonged, r otherwise resign, in writing, all the political privileges nd rights he may possess in the said foreign country; nd the candidate shall also take the oath of allegiance to he King as a Swedish subject.

Thus naturalized foreigners enjoy the same rights and rivileges as natural-born Swedes, except in so far that hey cannot be appointed members of the Council of State "Statsråd").

In fidem
GEORGE FRENDBERG APGEORGE,
Sworn Translator.

Stockholm,
30th July 1868.

SWITZERLAND.

MY LORD, Berne, July 4, 1868.

IN obedience to the instructions contained in our Lordship's despatch of the 16th ultimo, I have he honour to enclose herewith, copy of a note dated he 26th ultimo, from the Federal Council, giving an ccount of the disabilities to which aliens residing in witzerland are subjected by law.

I have, &c.
J. SAVILE LUMLEY.

To the Right Hon. the Lord Stanley, M.P.
&c. &c. &c.

Berne, le 26 Juin 1868.

EN réponse à la note que M. le Ministre de sa Majesté ritannique lui a adressée le 19 courant, le Conseil Fédéral l'honneur d'annoncer à son Excellence que les étrangers ésidant en Suisse ne possèdent aucuns droits politiques, u'ils sont exclus du service militaire, et que, s'il n'existe as des traités, ils ne peuvent dans différents cantons cquérir des propriétés foncières sans la permission du ouvernement Cantonal ou même du Grand Conseil.

Des citoyens Suisses naturalisés ne sont, à teneur de Art. 64 de la Constitution Fédérale éligibles au Conseil ational qu'après cinq ans de possession du droit de cité.

Le Conseil Fédéral, etc. etc.
(Signé) Au nom du Conseil Fédéral,
Le Président,
DUBS.
Le Chancelier,
SCHIESS.

A son Excellence M. Lumley,
&c. &c. &c.

UNITED STATES.

MEMORANDUM by Mr. Carlisle, Counsel to H.M.'s Legation at Washington.—Capacity of Aliens to hold Lands in the United States.

Aliens are expressly made capable of taking, olding, and transmitting lands without residence or ther condition in the States of Ohio, Michigan, and llinois [see Ohio, Rev. St. 1841, ch. 3. Michigan, ev. St. 1837, 8, p. 266, § 26. Illinois, Rev. St. 833, p. 626, § 38]. In other States they are habiliated upon conditions or with modifications. Thus esidence in the State is required in New Hampshire (Rev. St. ch. 120, § 4), and in Missouri (Rev. St. 1845, ch. 6). Residence and the oath of allegiance are required by the constitutions of Vermont (§ 39), and of North Carolina (§ 40), and by a statute of South Carolina (Stat. 1799, 1 Brevard, Dig. 236, Vaux *v.* Nesbitt, MacCord, ch. R. 362). In New Jersey it is required to be an alien friend at the time of taking (Elmer's Dig. p. 6, Stat. March 13, 1845). So it is in Pennsylvania, but his right to hold by purchase and transmit to heirs is restricted to 5,000 acres, statute of March 24, 1818, Purdor's Digest, p. 57, though the right to take and hold by descent, which is given by an earlier statute is without restriction (Statute, Feb. 23, 1791, Purdor's Digest, 56). A person's declaration of intention to become a naturalized citizen, pursuant to the Statutes of the United States, is required by the laws of Connecticut, Maine, Delaware, Maryland, Virginia, Tennessee, Arkansas, Indiana, and Missouri. In Connecticut a residence of one year in the State is also a pre-requisite (Stat. 1845, ch. 3), but a special capacity may be granted by chancery after a residence of six months (Rev. St. 1838, tit. 36). In Delaware (Rev. St. 1829, p. 33, 202) and in Tennessee (Stat. 1839. ch. 3, § 1) and in Indiana (Rev. Stat. 1843, p. 414), residence in the United States is required, but without any definite time. In Missouri (Rev. St. 1845, ch. 6) it is sufficient if the party is resident in the United States. In Arkansas (Rev. St. 1837, ch. 7) residence in the State is required in order to take by purchase, but residence elsewhere in the United States is sufficient in order to transmit by descent. In Maine (Rev. St. ch. 91, § 2; ch. 93, § 5, 6, 7), Maryland (Stat. 1814, ch. 79, Dorsey's ed. 625), and Virginia (Stat. 1813, ch. 25, Tate's Dig. p. 24), the title is not complete unless the party's naturalization is subsequently completed. But in Maine his heirs may take by descent if the ancestor dies before the time for being naturalized has arrived. In New York an alien resident anywhere within the United States is enabled to take and hold in fee, and to sell, assign, mortgage, and devise real estate, but not to lease or demise the same, provided he shall have made oath before any officer authorized to take proof of deeds, that he is a resident of and intends always to reside in the United States, and to become a citizen thereof as soon as he can be naturalized, and that he has taken the incipient measures required by law for that purpose, which deposition must be filed in the office of the Secretary of State.

This power to alien and convey is to continue for six years after making and filing such deposition, but no such alien can take or hold lands descended, devised, or conveyed to him previous to him having become a resident of the United States, and having made the above-mentioned deposition. And if he dies within the six years, his heirs being inhabitants of the United States, may take by descent as though they were citizens (N.Y. Rev. Stat. 1846, vol. 2, p. 4, § 16, 17, 18, 19). And by subsequent statute any alien resident in the State of New York, on making and filing the oath above mentioned, is rendered fully capable of taking, holding, and conveying real estate as a citizen (Ibid. p. 56, § 26, 37), and see Kent. Com. 69, 70. Under these statutes the widow of an alien grantee is considered as a purchaser, and is therefore entitled to dower (Sutliff *v.* Forgey, 1 Cowan 89, 5 Cowan 713, Priest *v.* Cummins, 16 Wend. 617).

MY LORD, Washington, July 14, 1868.

IN the absence of Mr. Carlisle, the legal adviser of this Legation, and in order to comply with the instruction contained in your Lordship's Despatch of the 16th ultimo, I desired his partner Mr. McPherson to make a report as to the disabilities of aliens in this country; and I have now the honour to enclose copy of a letter he has addressed to me with the report in question, in which he states that more time would be required to draw up a complete report upon the subject; but I believe that the enclosed document contains nearly all that is required by the Royal Commission.

I, however, add a pamphlet* which was in the archives, containing extracts from the laws of the State of New York relative to the tenure of real estate by aliens, and a collection of the enactments of all the states as to the right of aliens to vote, hold office, &c.

I have been unable as yet to procure another copy of this pamphlet, and am therefore obliged to transmit the only one existing in the archives of this Legation.

I have, &c.

EDWD. THORNTON.

The Right Hon. Lord Stanley, M.P.
&c. &c. &c.

436, D. Street, Washington,
July 13, 1868.

IN compliance with your request I present herewith a report on some of the principal disabilities under which aliens residing in the United States are now labouring. It consists almost exclusively of a reference to the legislation of the United States on the subjects of shipping, patents for inventions, and public lands, and a synopsis of the legislation of the several States in regard to the holding and disposition of real estate by aliens.

There are several other less important branches of the subject which the time limited for the preparation of this report does not permit me to explore, as the law must be looked for in the voluminous statutes of thirty-seven different States. The legislation thus omitted is that in regard to the elective franchise and the holders of office, admission to the bar, acting as executors and administrators, and perhaps some other matters.

I cannot flatter myself that what I here present is without error, but I have availed myself of the best means to make it correct, and have spared no effort on my part to make it so.

I have, &c.

(Signed) J. D. MCPHERSON.

E. Thornton, Esq.
&c. &c. &c.

Ships of the United States.

No vessel is entitled to be registered as a vessel of the United States, or enjoy privileges as such, unless wholly owned by citizens of the United States, and commanded by a citizen.—Act of Congress of 31st December 1792, chap. 7.

This excludes foreigners from the coasting trade and fisheries, as only vessels entitled to registry can be engaged therein.—Act of Congress of February 18, 1793, chap. 8. Also Act of March 1, 1817, chap. 31.

Patents for Inventions.

Aliens may take out patents for inventions. By the Act of Congress of July 4, 1836, the fee required of citizens and aliens who had resided in the United States one year, and declared their intention to become citizens, was thirty dollars; that required of British subjects, not so qualified by residence and declaration of intention, five hundred dollars, and of other aliens not so qualified as aforesaid, three hundred dollars.—Acts of 1836, chap. 357.

But by the Act of March 2, 1861, all laws discriminating as to fees between the inhabitants of the United States and those of foreign countries which shall not discriminate against the inhabitants of the United States are repealed. —Acts of 1861, chap. 88.

Aliens taking out patents in the United States are required to put the article on sale on reasonable terms. —Acts of 1836, *ubi supra.*

Aliens, unless they have resided one year in the United States and made declaration of intention to become citizens, cannot file caveats to protect inventions not matured, or take out patents for designs.—Acts of 1836, *ubi supra;* Acts of August 29, 1842, chap. 263.

Public Lands.

Public lands may be purchased by aliens, but will be granted as homesteads, gratuitously, only to citizens, or aliens who have made their declaration of intention to become such.—Acts of May 20, 1862, chap. 75; March 21, 1864, chap. 38; June 21, 1866, chap. 127.

* The substance of this pamphlet is given in Part I. of Mr. Abbott's Memorandum.

Disabilities with regard to Real Estate.

The right of aliens to hold real estate depends on the *lex rei sitæ*, and that is the law of the state wherein the land lies. In all the states of the Union, except in Louisiana, the common law has prevailed, and aliens are under all common law disabilities, except so far as they have been modified by statute in the respective states.

In two cases questions have arisen as to whether the Federal authority could control or override the laws of the states in this matter:

1. As to the effect of conveyances by the United States to aliens of public lands lying in the states. On this point there has been no adjudication, but it has arisen incidentally in the administration of the land laws, and has been considered as if the right of aliens to hold, after having purchased from the United States, was subject to the state law.—Opinion of Attorney-General Butler of April 18, 1836, 3 Opin. 90; Opinion of Attorney-General Cushing of July 28, 1855, 7 Opin. 351.

2. The second case in which the power of the Federal Government over the matter came in question was under certain treaties, now expired, giving to the citizens of the two contracting governments certain rights of disposition of real estate.—*See* the Treaty with Great Britain of 1794, and the Treaty with France of 1800.

The existence of any such power in the Federal Government was denied by Attorney-General West in an official opinion given July 30, 1819 (1 Opin. 275). And when the treaty with Bavaria, of January 21, 1845, was submitted to the Senate of the United States for ratification, the Senate refused its assent, unless real property were excluded from the operation of the third Article, which provided that "the "citizens or subjects of each of the contracting parties shall "have power to dispose of their real and personal property "within the states of the other," &c. &c.—*See* 9 Statutes, 827; Wheaton's Int. Law, p. 168, note.

In the seventh Article of the treaty with France, of February 23, 1853, any such power in the Federal Government seems to be disclaimed.—10 Statutes, 996; *see* further on this subject, Wheaton's Int. Law, p. 168, notes.

In 1857 Attorney-General Cushing asserted the power to exist in the Federal Government (8 Opin. 411), but in 1859 the same question being suggested in the Supreme Court of the United States, though not being directly involved in the decision of the same, the Court stated the question to be one of great magnitude, and abstained from considering it.—*Fredericksen & al.* v. *The State of Louisiana*, 23 Howard, 445.

With these preliminary remarks, I submit the following synopsis of the legislation of the states.

In making it I have taken the latest compilations and codes of the several States, but have not searched the subsequent statutes for recent modifications, the time allowed for the work not being sufficient for the purpose.

It must be borne in mind that the late seceded states, Virginia, North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Louisiana, Texas, Arkansas, and Tennessee are either now engaged in remodelling their constitutions, or have very recently completed their work. These new constitutions I have not seen.

VERMONT.

In this state no statutory provisions on the subject of alienage have been made, and the common law rules of disability concerning the holding or transmission of real estate prevail.

NEW HAMPSHIRE.

Any alien resident in this state may take, purchase, hold, convey, or devise any real estate, and the same may descend in the same manner as if he were a native citizen.—Revised Statutes, 1842, title xv. ch. 129, § 4; Compilation of Statutes, 1853, c. 135, § 1.

MASSACHUSETTS.

Aliens may take, hold, convey, and transmit real estate. March 5, 1852; Laws, 1852, ch. 29. No title to real estate shall be invalid on account of the alienage of any former owner or holder thereof, provided that nothing herein contained shall defeat the title to any real estate heretofore conveyed or released by the commonwealth, or by the authority of the same.—March 31, 1852; Laws, 1852, ch. 86; *vide* Gen. Statutes, 1860, c. 91, § 38.

CONNECTICUT. — (Compilation of 1854, p. 630, Title XXIX., § 6. Revision of 1866, page 537.)

Aliens resident may hold and transmit real estate.

Any alien who is a resident of this state or of any of the United States may purchase, hold, inherit, or transmit real estate in this state, in as full and ample a manner as native-

born citizens; and the wife of any alien capable of holding land in this state may take and hold land in this state by devise or inheritance, and shall be entitled to dower in the land of her deceased husband, and the children and other lineal descendants of any person capable of holding land in this state may take and hold such land as heirs-at-law of such ancestor.—Connecticut Law of 1848.

§ 7.

Transfers to and by aliens before 1846 confirmed.

All conveyances and transfers of real estate, or of any interest therein, by deed, devise, or otherwise, hereafter made to any foreigner not authorized by law to hold real estate, and all conveyances and transfers of the same by such foreigner, are confirmed to such foreigner, his heirs or assigns, and made effectual to all intents and purposes, as though such foreigner had been a native-born citizen.—Connecticut Law of 1846, *vide* Revision of 1866, page, 537, Title XXXVII.

Connecticut Law of 1857.

Aliens non-resident may acquire real estate for mining purposes, &c.

Any alien, not a resident of this state or of the United States, may by deed or otherwise acquire and hold any real estate in this state, for the purpose of quarrying, mining, dressing or smelting ores on the same, or converting the products of such quarries and mines into articles of trade and commerce; but if any real estate so held by any non-resident alien for the purposes aforesaid shall remain without being worked or used for said purposes for a period of 10 consecutive years, all the right and title of any such alien in and to such real estate shall be forfeited to the person or persons from whom the same was last acquired, or his or their heirs, if resident within the United States, and if not so resident, then to the state of Connecticut; but if hostilities shall break out between the United States and the country of which such alien is a resident, or the friendly relations of the two countries shall be suspended, then the time of the continuance of such hostilities, or the suspension of such friendly relations, shall not be computed in making up said period of 10 years.—Revision of 1866, Title 37, § 8, p. 537.

Aliens non-resident may transmit real estate to acquired.

Any real estate, held by any non-resident alien, pursuant to the provisions of the next preceding section, may be transmitted by such alien by deed or otherwise, and inherited from him in the same manner as though he was a native-born citizen; but no alien not a resident of the United States shall acquire any greater title to the said real estate by such transmission or inheritance than he would acquire by virtue of the preceding section.—Law passed in 1857, *vide* Revision of 1866, Title 37, section 9, page 537.

Rhode Island.—(Revised Statute of 1857, page 351, Title 23, chap. 151, sect. 21.)

Such courts (courts of probate) shall have power to grant petitions of aliens for leave to purchase, hold, and dispose of real estate within their respective towns, providing the alien petitioning shall, at the time of his petition, be resident within this state, and shall have made declaration according to law of his intention to become a naturalized citizen of the United States.

Maine.—(Act of 1854, chap. 64; Laws of Maine, 1854, page 79.)

All conveyances and transfers of real estate, or any interest therein, by deed, devise, or otherwise, heretofore made to or by any alien not authorized by law to hold real estate, are hereby confirmed and made effectual to such alien, his heirs or assigns, to all intents and purposes as though such alien had been a native-born citizen; any such alien, his heirs or assigns, so holding real estate as aforesaid, may sell, convey, and assign any such real estate, or any interest therein, to any citizen of the United States, in the same manner and to the same effect as native-born citizens might do.

An Act additional to this Act was passed on February 9th, 1856, as follows:—

Aliens may take, hold, convey, and devise real estate within this state; and all conveyances and transfers of any interest in such estate, heretofore made by or to any alien, are hereby confirmed and made effectual to all intents and purposes as if made by or to a citizen of this state. —Laws of Maine, 1856, chap. 198, page 231. *Vide* Revised Statutes of Maine, 1857, Title 7, chap. 73, sect. 2, for abstract of the same.

New York.

When aliens may hold.

Any alien who has come, or may hereafter come, into the United States may make a deposition or affirmation in writing before any officer authorized to take the proof of deeds to be recorded, that he is a resident of and intends always to reside in the United States, and to become a citizen thereof as soon as he can be naturalized, and that he has taken such incipient measures as the laws of the United States require to enable him to obtain naturalization, which shall be certified by such officer, and be filed and recorded by the Secretary of State in a book to be kept by him for that purpose, and such certificate or a certified copy thereof shall be evidence of the facts therein contained. And any alien who shall make and file such deposition shall thereupon be authorized and enabled to take and hold lands and real estate of any kind whatsoever, to him, his heirs and assigns for ever, and may during six years thereafter sell, assign, mortgage, devise, and dispose of the same, in any manner, as he might or could do if he were a native citizen of this state or of the United States, except that no such alien shall have power to lease or demise any real estate which he may take or hold by virtue of this provision until he becomes naturalized.—Act 1834, chap. 272, sect. 15 and 16.

May dispose of lands acquired, but not lease until he is naturalized. 20 Wendell, 230, 216-59

Act of 1845, Lands acquired before qualifying.

Any alien resident to whom real property has or shall be conveyed or devised, before he has made the deposition required by the revised Statutes may, on making such depositions, hold as if he were at the time of the conveyance or devise a citizen.

Laws of 1845, 94, chap. 115, § 1.

The wife of an alien and any woman who has or shall marry a citizen are entitled to dower.

Ibid. § 2.

Heirs, devisees, and grantees of deceased aliens may take, provided that if of full age they make a deposition.

Ibid. §§ 4, 5.

Alien residents may take by grant and devise of alien residents on same conditions.

Ibid. § 6.

Disabilities of alien women are removed by the eighth section, and former grants, devises, demises, leases, or mortgages by aliens are confirmed by ninth section, but such aliens are incapable of voting at any election, or of being elected or appointed to any office, or of serving on any jury.

Ibid. § 12.

This Act extended, 2 Laws, 1857, 229, chap. 576.

Pennsylvania.

From and after the passage of this Act, it shall and may be lawful for all and every foreigner and foreigners, alien or aliens, not being the subject or subjects of some sovereign state or power which is or shall be, at the time or times of such purchase or purchases, at war with the United States of America, to purchase lands, tenements, and hereditaments within this commonwealth not exceeding 5,000 acres, and to have and hold the same to them, their heirs and assigns, for ever, as fully to all intents and purposes as any natural-born citizen or citizens may or can do.

All purchases of real estate made by emigrants resident within this commonwealth, previous to declaring their intentions to become citizens of the United States, and who since purchasing the same have been naturalized in conformity with the laws of the United States on that subject, shall be as valid to all intents and purposes, and shall be construed to vest the title to the said real estate in the purchasers as fully and absolutely as if they had been citizens at the time they purchased the same.

In all cases where aliens have purchased real estate within this commonwealth, and have sold the same, the said sales shall be valid to all intents and purposes, and shall be construed to vest the title to the said real estate as fully and effectually as if the said aliens had been citizens at the time of purchasing the same; and in all cases where any alien residing in this commonwealth who shall have purchased or held real estate therein, and shall have died without having been naturalized, the title thereof is hereby confirmed to his heirs who in case he had been a citizen would have inherited the same, and there shall be no escheat by reason of such alienage: Provided that nothing herein contained shall in any wise affect or impair the vested rights of other individual or individuals.—Dunlop's Laws of Pennsylvania, page 325.

New Jersey.

Any alien not the subject of any power at war with the United States may purchase lands, tenements, and hereditaments within this state, and shall hold the same to him or her, and his or her heirs and assigns, for ever, as fully to all intents and purposes as any natural-born citizen of the United States may or can; but shall not on that account be entitled to vote or to hold any office of trust or profit in this state.—1846, April 10.

All purchases made by such aliens before the passage of said Act confirmed and made as valid as if made after the passage of the Act.

Any such alien to whom any lands in this state may have descended from any ancestor, either alien or not, since January 22, 1817, or would have descended or may or would hereafter, in case such persons claiming by descent were natural-born citizens of the United States, or to whom any lands may have been or may hereafter be devised, shall and may have and hold the same to him, her, or them, and his, her, or their heirs and assigns, for ever, as fully to all intents and purposes as any natural-born citizen of the United States might, may, or can do.—*Vide* Nixon's Digest of the Laws of New Jersey, 1855, page 6.

Delaware.

An alien residing in this state and having made declarations according to law of his intention to become a citizen of the United States, shall be capable of taking by deed or will lands, tenements, and hereditaments in fee simple, or for other estate, and of holding and of aliening the same, and upon the decease of an alien having title or right by purchase or descent, according to this Act, to any lands, tenements, or hereditaments, the same shall descend and pass in the same manner as if said alien were a citizen of the United States; and it shall be no objection to the kindred, husband, or widow of such alien, or of any citizen deceased, taking lands, tenements, or hereditaments by virtue of the intestate law of this state, that they are aliens, if they at the time of the death of the intestate reside within the limits of the United States; and any such kindred being aliens and not residing within the limits of the United States at the time of the intestate's death shall be passed by, and the effect shall be the same as if they were dead.—*Vide* Rev. Book, 1852, Tit. 12, sect. 1.

When title to real estate is claimed by descent by a person capable at the time of the descent of inheriting, it shall be no bar or interruption of such descent that the father, mother, or other ancestor through whom the descent is derived was an alien.—*Id.* sect. 4.

Maryland.

In this state, by the Code of Laws, Art. 481, it is provided that aliens who are actual residents may take and hold land, tenements, and hereditaments, acquired by purchase, or to which they would (if citizens) be entitled by descent, and may sell and dispose of the same; provided, however, that if any male alien shall acquire any title or interest in any real estate, he shall within one year of the acquisition of the same declare his intention of becoming a citizen, and naturalize himself agreeably to the laws of the United States within twelve months after his being capable of becoming a citizen.

Provision is made enabling heirs of such alien to inherit in case of his dying before making such declaration or becoming a citizen after he had acquired property; but such heirs, if male, must comply with the provisions before mentioned. In case of the alien himself, and if infants or *non compos mentis*, the time for making such declaration, &c., is to be computed from the time such alien shall arrive at age, or become of sane mind. But such shall not be capacitated to hold property as trustee for any alien or foreign corporation. Any free white female born within the United States who has married a citizen of the United States, and actually resides therein, shall have and enjoy all the rights and immunities of a native-born citizen.

District of Columbia.

By law of Maryland passed Dec. 19th, 1791 (Laws of Maryland, Vol. II.), which was adopted as the law of the District of Columbia by an Act of Congress passed 27th Feb. 1801, at which time the Government took possession of the District of Columbia, it is provided that any foreigner may by deed or will to be hereafter made take and hold lands within that part of the territory of Columbia which lies within this state, and the same land may be conveyed by him and transmitted to and be inherited by his heirs or relations as if he or they were citizens of this state; provided that no foreigner shall in virtue hereof be entitled to any further or other privilege of a citizen. This law is still in force in the District of Columbia.

The Supreme Court of the United States has decided that a person born in a foreign country, who has already become a citizen by naturalization, is not within the provisions of this Act. His after-purchased lands vest in him as a citizen and are transmitted as such, and not in virtue of a capacity acquired under this Act, and therefore cannot be transmitted as lands which he had acquired while an alien might be to relations who are foreigners.

The statute of 11 & 12 William III. ch. 6, was in force in Maryland at the time of the cession, and is still in force in the District of Columbia. It removes the common-law disability of claiming title through an alien ancestor, but it does not apply to a living alien ancestor, so as to create a title by heirship, where none would exist by the common law, if such living alien ancestor were a natural-born subject or citizen.

Ohio.

It is lawful for any and all aliens that now may have, or hereafter shall be entitled to have, within this state, any lands, tenements, or hereditaments, either by purchase, gift, devise, or descent, to hold, possess, and enjoy the same as fully and completely as any citizen of the United States or of this state can do, subject to the same laws and regulations, and not otherwise.

Iowa.

Foreigners who are or who may hereafter become residents of this state shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native-born citizens.

Indiana.

Any alien who has come or may hereafter come into this state, and who shall have filed in any court of competent jurisdiction the declaration of his intention to become a citizen of the United States, or shall make oath in writing before any officer authorized to take proof of deeds to be recorded that he is a resident of this state, and intends always to be a resident of the United States, and become a citizen thereof so soon as he can be naturalized, shall be authorized and enabled to hold lands to him, his heirs and assigns, which oath must be recorded in the Recorder's office of the county or district in which such lands are situate.

But such alien has no power to convey or devise real estate before he shall be naturalized. If he died within six years without being naturalized, his heirs or devisees, being citizens of the United States, or being aliens and complying with the foregoing provisions, shall take or inherit.

An alien purchasing or acquiring lands when incapable of holding the same, shall hold the same if naturalized before office found, and if he die after having declared his intention to become a citizen, and before naturalization, his widow and heirs, if they have made or shall make declaration of their intention to become citizens, shall take the estate. If an alien die as last aforesaid, leaving no heirs in the country capable of inheriting, his widow and family, on coming to the United States, and making declaration as aforesaid, may take the estate. (*Sic.*)

Illinois.

All aliens residing in this state may take by deed, will, or otherwise, lands and tenements and any interest therein, and alienate, sell, assign, and transmit the same to their heirs or to any other persons, whether such heirs or other persons be citizens of the United States or not, in the same manner as natural-born citizens of the United States or of this state might do, and upon the decease of any alien having title to or interest in any lands and tenements, shall pass and descend in the same manner as if such alien were a citizen of the United States; and it shall be no objection to any persons having an interest in such estate that they are not citizens of the United States, but all such persons shall have the same rights and remedies, and in all things be placed on the same footing, as natural-born citizens and actual residents of the United States.

The personal estate of an alien dying intestate, who at the time of his death shall reside in this state, shall be distributed in the same manner as the estates of natural-born citizens, and all persons interested in such estate shall be entitled to their proper distributive shares thereof, under the laws of this state, whether they are aliens or not.

Minnesota.

In this state any aliens may acquire and hold lands or any right thereto or interest therein by purchase, devise, or descent; and he may convey, mortgage, and devise the same; and if he shall die intestate the same shall descend to his heirs; and in all cases such lands shall be held,

engaged, devised, or mortgaged, or shall descend in like manner and with like effect, as if such alien were a native citizen of this territory or of the United States.

This is done by a statute of the state, which confirms at the same time all titles to lands before conveyed by aliens.

Nebraska.

By a law passed when Nebraska was a territory, the same provisions are made in regard to aliens as are above made in Minnesota, and this is now in force in the state, placing aliens on an equal footing with native-born citizens as far as the holding and transmission of real estate is concerned.

Nevada.

This state, by section 16 of the first article of its Constitution, treats aliens with the greatest liberality. The section is as follows:—"Foreigners who are or who may hereafter "become *bonâ fide* residents of this state shall enjoy the "same rights in respect to the possession, enjoyment, and "inheritance of property as native-born citizens."

Wisconsin.

No distinction shall ever be made by law between the resident aliens and citizens in reference to the possession, enjoyment, or descent of property (Constitution of February 1849). Any alien may acquire and hold lands, or any right thereto, or any interest therein, by purchase, devise, or descent, and he may convey, mortgage, and devise the same, and if he shall die intestate the same shall descend to his heirs, and in all cases such lands shall be held, conveyed, mortgaged, or devised, or shall descend in like manner and in like effect, as if such alien were a native-born citizen of this state or of the United States. A woman being an alien shall not on that account be barred of her dower, and any woman residing out of the state shall be entitled to dower of the lands of her deceased husband, lying in this state, of which her husband died seised, and the same may be assigned to her or recovered by her in like manner as if she and her deceased husband had been residents within the state at the time of his death.

Kansas.

No distinction shall ever be made between citizens and aliens in reference to the purchase, enjoyment, or descent of property.—Constitution of 1859; Bill of Rights, sect. 17.

All aliens may take by deed, will, or otherwise lands, tenements, and any interest therein, and alienate, sell, assign, and transmit the same to their heirs or any other persons, whether citizens of the United States or not; and upon the demise of any alien his lands shall descend as if he were a citizen.—Act of February 24, 1864.

Kentucky.

Any person emigrating to this state with intent to reside therein may purchase and hold lands and real estate, and pass the same by descent, devise, or otherwise, as a natural-born citizen of Kentucky.—Act of February 28, 1835.

Oregon.

White foreigners who are or may hereafter become residents of this state shall enjoy the same rights in respect to the possession, enjoyment, and descent of property as native-born citizens.—Const. of Oregon, Art. 1, sect. 31.

A woman being an alien shall not on that account be barred of her dower, and any woman residing out of the state shall be entitled to dower of the lands of her deceased husband, lying in this state, of which her husband died seised, and the same may be assigned to her or recovered by her in like manner as if she and her deceased husband had been residents within the state at the time of his death. —Stat. of Oregon, 1845-1864, chap. 14, sect. 21.

California.

Aliens shall hereafter inherit and hold by inheritance real and personal estate in as full a manner as though they were native-born citizens of this or the United States; provided that no non-resident foreigner or foreigners shall hold or enjoy any real estates situated within the limits of the state of California five years after the time such non-resident foreigner or foreigners shall inherit the same; but in case such non-resident foreigner or foreigners do not appear or claim such estate within the period in this section before mentioned, then such estate shall be sold upon information of the Attorney-General according to law, and the proceeds in the treasury of said state for the benefit of such non-resident foreigner or foreigners, or their legal representatives, to be paid to them by the treasurer of said state at any time within five years thereafter, when such non-resident foreigner or foreigners, or their representatives shall produce evidence to the satisfaction of the treasurer and bondholder of states that such foreigner or foreigners are the legal heirs to and are entitled to inherit such estate.—Stat. of California, 1856, ch. 116 sect. 1.

Michigan.

By the Constitution of Michigan aliens who are or who may hereafter become *bonâ fide* residents of this state, shall enjoy the same rights in respect to the possession, enjoyment, and inheritance of property as native-born citizens. —Const. 1850, Art. 18, sect. 13.

Missouri.

Aliens residing in the United States who have made a declaration of their intention to become citizens of the United States by taking the oath required by law, and all aliens residents of this state, are capable of acquiring real estate in this state by descent or purchase, and of holding and alienating the same, and shall incur the like duties and liabilities in relation thereto as if they were citizens of the United States.

Aliens acquiring real estate by descent or devise, and incapable of holding the same by reason of their alienage, may sell and convey any real estate so acquired within three years after settlement of the estate of the deceased.—Act of November 17, 1855.; Revised Statutes of 1856, chap. v.

Virginia.

Aliens residing in the state who shall make oath before some court of record in said state, declaring his intention to continue to reside therein, may inherit, purchase, and hold real estate as if he were a citizen of the state, and may alienate and devise the same, and it shall descend if he die intestate, and the alien devisee or heir may take and hold the land, provided he be, or shall within five years become, a resident of the state, and make the declaration above presented of intention to continue to reside therein.

The wife of a citizen of the United States, and anyone whose father or mother was at the time of his birth a citizen, though born out of the United States, may take and hold real estate by devise, purchase, or inheritance.—Code of 1860, Tit. 33, ch. 115, sect. 1, 2, 3, 4.

Florida.

Aliens of any country or nation whatever may purchase, hold, enjoy, sell, convey, or devise any lands and tenements in this state, to the same extent and with the same right as citizens of the United States, and may derive title by descent through aliens.—Acts of Nov. 17, 1829, and Feb. 17, 1833; Digest, Tit. 2, sect. 3 and 1.

West Virginia.

This state, it is understood, has adopted the law of Virginia in regard to this subject. A new code is now in preparation, and not accessible.

Alabama.

There is no modification of the common law in this state in favour of aliens.

Louisiana.

The common law (until recently) has not prevailed in this state. In Phillips *v.* Rogers, *et al.*, 5 Martin, 752, the Supreme Court of Louisiana awarded to the plaintiff, an alien residing in Ireland, the whole estate, real and personal, of his deceased brother, a resident of that state. It is understood that the common law has been or is about to be adopted in Louisiana.

North Carolina.

There is no modification of the common law in this state in favour of aliens.

Georgia.

The only modification of the common law in respect of aliens is in this—that if land be devised or descend to an alien, it shall be sold by the legal representatives of the deceased, and the proceeds be paid over to the heir or devisee.—Code of 1860, chap. vi. sect. 2628.

Texas.

Any alien being a free white person shall have and enjoy in the state of Texas such civil rights as are or shall be

accorded to American citizens by the laws of the nation to which such alien shall belong, or by the treaties of such nation with the United States.

Aliens may take and hold any property, real or personal, in this state by devise or descent from any alien or citizen, in the same manner in which citizens of the United States may take and hold real or personal estate by devise or descent within the country of such alien.

Any alien being a free white person who shall become a resident of this state, shall, in conformity with the naturalization laws of the United States, have declared his intention to become a citizen of the United States, shall have the right to acquire and hold real estate in this state in the same manner as if he was a citizen of the United States.—Laws of Texas, 1853–54, chap. 71, sect. 1, 2, 3.

South Carolina.

By an Act of this state any citizen or alien who has entered into any *bonâ fide* contract, or who has received any grant or deed of conveyance for or relating to any real property in this state, or whose titles are derived from or through aliens, either mediately or immediately, may and shall hold and enjoy the same in fee simple, or for any less estate, according to the nature of his contract, grant, or deed, any law, usage, or custom to the contrary notwithstanding; provided, however, that every alien shall, before he be entitled to the benefits of the Act, declare his or her intention of becoming a citizen of the United States.—Vol. V. Statutes, page 547, s. 1.

By the second section of same Act aliens can devise and convey the property acquired by virtue of the Act to children and grandchildren who were born previously to the acquisition of the property; and in case of non-alienation, or of dying intestate the property, is distributable among their relations under the Distribution Act of the state; provided, however, that the child, grandchild, or distributee to whom the property is conveyed, devised, or distributed, as the case may be, shall within 12 months become a resident of the state, and a citizen thereof as soon as the laws permit.

Arkansas.

Aliens residing in the state who have made declaration according to law, of their intention to become citizens of the United States, are capable of taking by deed or will, and holding, aliening, or devising real estate. And upon the decease of any alien having title by purchase or descent, according to this Act, of any real estate, it shall descend and pass as if such alien were a citizen of the United States, and the husband, widow, or kindred of the deceased alien, or of any citizen may inherit, notwithstanding they are aliens, if at the time of the death they are resident within the United States.—Act of December 6, 1837; Digest of Statutes, 1848, chap. 9.

Tennessee.

An alien may take and hold real estate in this state by purchase, inheritance, or in any other way which may be agreed upon by treaty between the United States and the country of which he is a citizen or subject.

Any alien resident in this state who has legally declared his intention, under the Naturalization Laws, to become a citizen of the United States, may take and hold, dispose of, or transmit by descent any real estate as a native citizen.

An alien who is resident in the United States at the time of the death of an intestate, and has declared, or shall within 12 months thereafter declare, his intention to become a citizen, shall be capable of inheriting the estate of such intestate.

Mississippi.

Aliens residing in this state may acquire and hold real estate therein by purchase, gift, devise, or inheritance, and may, after they have been naturalized according to the laws of the United States, convey the same as other citizens of the United States.

Hereafter whenever any alien residing in this state who may lawfully hold land therein shall die seised or possessed of lands or tenements, the same shall, if such alien shall have been naturalized under the law of the United States, descend to his or their heirs according to the laws of descent in this state; but if such alien or aliens, owning or holding lands within this state, shall die without having been naturalized, then such lands shall be sold as an escheat, in the mode prescribed therefor, and the money arising from such sale shall be paid into the treasury of this state, subject to the claim of the heirs or next of kin of such decedent who shall be entitled thereto, after deducting the expense of converting such lands into money and putting the same into the treasury of said state; provided such heirs or next of kin shall apply for the same within six years from the time such money shall be placed in the treasury of this state.—Rev. Code, 1857, chap. 36, sect. 9.

WURTEMBERG.

My Lord, Stuttgart, June 24, 1868.

I have had the honour to receive your Lordship's despatch of the 16th inst., requiring information as to the disabilities to which aliens are subject in Wurtemberg.

I am able to reply without loss of time that the Wurtemberg Legislation on this subject is extremely liberal and is based entirely on reciprocity. An alien establishing himself in this country can claim by law every advantage and liberty possessed by a Wurtemberg subject desirous of settling himself in a commune to which by birth he does not belong if a similar liberty be granted to Wurtemberg subjects in the country of the alien in question. In a contrary case the law reserves to the authorities the right of refusing to the aliens privileges which would not be enjoyed by Wurtembergers in the foreign country in question, but the exercise of this right by the authorities is very seldom practised, and would be so only under special circumstances.

In the case of an alien purposing to practise any trade or industry in Wurtemberg all that is required is that he shall establish his nationality and furnish proof, if called upon to do so, (and this last does not often occur), of the right of Wurtembergers to do the like in the alien's own country. A case of this nature has, however, lately come before me, where difficulties were thrown in the way of a British subject employing workpeople in a particular fancy manufacture practised successfully in a Wurtemberg town. The individuals who had hitherto had this trade in their hands were jealous of the Englishman's interference and success and the probable consequent rise of prices of labour in the manufacture in question, and notwithstanding the manifest advantage to the town which the competition occasioned, the Englishman was so far incommoded as to be threatened with prohibition of his further proceedings by the authorities there, unless he produced his passport and a certificate from Her Majesty's Legation that a Wurtemberg subject would be permitted to engage in a similar trade in London. The man came to Stuttgart and after being supplied with the papers in question no further obstacle is interposed to his undertaking.

There is a certain latitude in the authority of the police with regard to aliens establishing themselves in Wurtemberg by which if the latter should conduct themselves in a disorderly manner or render themselves obnoxious to the public peace or propriety or even to the Government Authorities they may be summarily sent out of the country, but the same right is exercised by the authorities of any commune in the country against Wurtembergers not belonging to it, and who can be under the above circumstances turned out of the place.

It may therefore be answered to your Lordship's question that no disabilities exist in Wurtemberg against aliens who may purchase real property and inherit the same as freely as natives.

I have instructed Mr. Baillie to report to me upon the state of the law in the Grand Duchy of Baden on the above subject.

I have, &c.
E. C. R. Gordon.

The Right Honourable Lord Stanley,
&c. &c. &c.

APPENDIX No. III.

RIGHT OF ALIENS TO HOLD LANDS.—COLONIAL AND INDIAN LAWS.

MEMORANDUM BY MR. ABBOTT.

Aliens are debarred by the common law of England from holding, inheriting, or transmitting landed property, for, being under a foreign allegiance, they are supposed to be incapable of rendering service and homage to the Sovereign of England, from whom it is a settled principle of tenure that the title to all lands in the kingdom is primarily derived.

That the forfeiture to the Crown of lands held by aliens has been enforced from a very early period appears from 17 Edward the 2nd Stat. 2 cap. 12: "That the king should "have escheats of the lands of Normans, of whose fee "soever they were, saving the service appertaining to the "chief lords of the same fee; and this also was to be "understood, that if any inheritance descended to any "that was born in the parts beyond the sea, whose "ancestors were, from the time of King John, under the "allegiance of the kings of France, and not of the kings "of England, as then late it had happened of the barony "of Monmouth, after the death of John de Monmouth "(whose heirs were of Britain and other places), king "Henry, by the foresaid occasion, recovered many escheats "of Normans' lands out of the fees of other men, and "gave them to be holden of the chief lords of the fee, by "the services due and accustomed therefore."

"An alien is entitled to purchase in fee simple lands, "tenements, or hereditaments, although he cannot hold "them, for, upon office found the king shall have them; "and even on a covenant to stand seised, a use will arise "for an alien; but of course the same result will follow "as in the case of a purchase, and the same would take "effect where an alien purchased lands in joint tenancy; "and the king would, on office found, be entitled to a "moiety."

"With respect to copyholds, it appears to be doubtful "what rights an alien may acquire therein, for the lord is "not to be prejudiced by losing his services and fines; but "it is laid down in Watkins on Copyholds that an alien "cannot be a copyholder; and it should seem that if an "alien purchases any copyhold property it would escheat "to the lord. However, the title of an alien in all respects "will be good against all persons except the Crown in "the case of freeholds, and as against the lord in case "of copyholds."—(Hansard's "Law Relating to Aliens," 1844, pp. 131–133.)

Previously to the Act 7 & 8 Vict. c. 66 aliens could not take houses on lease for a term of years without danger of forfeiture.

The statute 32 Henry the 8th, cap. 16, enacted that no alien strangers, not being denizens, should take any leases of houses, under a penalty of 5*l.*; and all leases granted to strangers, artificers, or handicraftsmen, born out of the King's obeisance (not being denizens) of any dwelling-house or shop within this realm, or any of the King's dominions, are declared to be void, and of no effect; and the person so taking such lease forfeits 100*l.* and the person letting, 100*l.* more; one moiety to the king, and the other to him that will sue for the same.

Lord Coke explains the law as follows: "As to a lease "for years of a house for the habitation of a merchant "stranger, being an alien, whose king is in league with ours, "and a lease for yeares of lands, meadows, &c., upon office "found, the king shall have it; but of a house for habita-"tion he may take a lease for years, as incident to com-"merce, for without habitation he cannot merchandize or "trade. But if he depart or relinquish the realm the king "shall have the lease. So it is if he die possessed thereof, "neither his executors or administrators shall have it, but "the king; for he had it only for habitation as necessary "for his trade or traffique, and not for the benefit of his "executor or administrator. But if the alien be merchant, "then the king shall have the lease for yeares, albeit it were "for his habitation; and so it is if he be an alien enemie "And all this was so resolved by the judges assembled "together for that purpose in the case of Sir James Croft. "Pasch. 29, of the reigne of Queene Elizabeth."

Upon the report of the Aliens Committee of 1843, the law relating to aliens holding personal and leasehold property was amended by the fourth and fifth clauses of the Act 7 and 8 Vict. c. 66.* (Naturalization Act, appended to my memorandum, Addenda I.)

IV. And be it enacted, that from and after the passing of this Act every alien, being the subject of a friendly State, shall and may take and hold, by purchase, gift, bequest, representation, or otherwise, every species of personal property, except chattels real, as fully and effectually, to all intents and purposes, and with the same rights, remedies, exemptions, privileges, and capacities as if he were a natural-born subject of the United Kingdom.

V. And be it enacted, that every alien now residing in, or who shall hereafter come to reside in, any part of the United Kingdom, and being the subject of a friendly State, may, by grant, lease, demise, assignment, bequest, representation, or otherwise, take and hold any lands, houses, or other tenements, for the purpose of residence or of occupation by him or her, or his or her servants, or for the purpose of any business, trade, or manufacture, for any term of years not exceeding twenty-one years, as fully and effectually to all intents and purposes, and with the same rights, remedies, exemptions, and privileges, except the right to vote at elections for members of Parliament, as if he were a natural-born subject of the United Kingdom.

Doubts having arisen whether the Act 7 & 8 Vict. c. 66, of 1844, extended to the colonies, an Act was passed in 1847 (10 & 11 Vict. c. 83) declaring that it did not extend to the colonies, and that all laws, statutes, or ordinances duly passed or to be passed within Her Majesty's colonies or possessions abroad conferring the privileges of naturalization within the limits of such colonies were valid, subject to the usual confirmation by the Crown.

The Acts of the Imperial Parliament constituting various colonies with independent legislatures have expressly provided that the local legislatures should have power to deal with questions of land tenure, and certain colonies have accordingly made provisions by which aliens are enabled, within their limits, to hold land either absolutely or on lease.

Canada.

By the Act of the Dominion of Canada (cap. 66 of 1868) no power is given to aliens who have not been naturalized to hold, inherit, or devise lands.

But by a Consolidation Act of Canada (now the provinces of Ontario and Quebec) cap. 8. s. 9, and a later Act, cap. 16 of 1865, aliens have the same power as to holding, devising, &c. lands as natural-born or naturalized subjects of Her Majesty. And the 9th section of the former Act is expressly kept alive by the Act of the Dominion.

In Nova Scotia, aliens were empowered to hold, devise, &c. lands by c. 34 of Revised Statutes, sect. 1, and this section is expressly kept alive by the Act of the Dominion.

In New Brunswick there does not appear to have been any like power conferred on aliens.

Newfoundland.

No power is conferred upon aliens who have not been naturalized, of holding, &c. lands. There is a general Naturalization Act, 20 Vict. c. 8.

Prince Edward Island.

By Act of 22 Vict. c. 4. (1859) aliens are empowered to hold, &c. land up to the limit of 200 acres.

British Columbia.

The colonies of British Columbia and Vancouver Island were united into one colony, "British Columbia," by Imperial Act, 29 & 30 Vict. c. 67.; and by a subsequent Local Act, No. 37 of 1867, s. 10., which applies to the whole colony, aliens are empowered to hold lands as if they had been natural-born British subjects.

Cape of Good Hope.

By an Act, No. 8 of 1856, all former laws, customs, or usages inconsistent with the Act are repealed, and from its

* With regard to the question of aliens holding real property, the Committee reported, "Several of the witnesses examined by the Committee expressed a decided opinion that it would be expedient to "permit aliens to acquire real property in this country with the same "facility as in France and other European states. It is contended that "foreigners are allowed to hold property in the funds to any extent; "that by paying the cost of letters of denization they may acquire a "legal right to hold any extent of land; that the law which forbids an "alien to hold land is openly and easily evaded; and that this law, "with all others to which the State cannot command obedience, would "be much better abandoned and repealed. On the other hand, it has "been remarked that were a better system of conferring native rights "on foreigners adopted, and were the process rendered less expensive "and more expeditious than at present, little practical evil would accrue "from rendering a foreigner's capacity to hold land dependent on natu-"ralization; and that as in Great Britain certain civil and moral "duties are considered to be attached to the possession of landed pro-"perty, which could hardly be performed by non-resident aliens, it "would be well for the State, on this ground, to refuse the capacity of "holding real property to foreigners not domiciled in this country."

promulgation (4th June 1856) aliens may purchase, acquire, and own, fixed property in the colony, in like manner as natural-born subjects. But beyond this nothing in the Act is to be taken as naturalizing any aliens, or bestowing upon them any of the privileges conferred by deeds of burghership.

Natal.

By Ordinance No. 6 of 1856, aliens are empowered to purchase or hold transfers of lands upon certain conditions, viz.:—The right does not extend to a period beyond that of four years from the date of registration of the transfer, and aliens may not alienate, without license of the Governor; and, further, a fine is imposed unless letters of naturalization be taken out within four years from registration of the title.

By Ordinance No. 7 of 1858, aliens are empowered to hold and give transfers of fixed property in the manner of natural-born subjects.

Under the law No. 1 of 1860 any alien *who shall be the owner of landed property* within the colony and registered in his name of not less a value than 300*l.* is enabled to obtain naturalization without a previous residence of five years, as required from other aliens.

New South Wales.

By the Colonial Act 11 Vict. c. 39, 1847, aliens subjects of a friendly state, may without being naturalized hold every species of personal property, except *chattels real.* But for the purposes of residence or trade they may hold land and houses for 21 years, with all the privileges of natural-born subjects, except that of voting at elections of members of the Legislative Council.

The law is therefore practically the same as in England.

Queensland.

The position of aliens is regulated by the Aliens Act of 1867 (31 Vict. No. 28), the provisions of which as regards aliens holding lands and houses are similar to those of the aforesaid New South Wales Act 11 Vict. c. 39, of which colony Queensland formed part until its separation in 1859.

Victoria.

The "Aliens Statute, 1865" (28 Vict. No. 256), provides that alien friends resident in the colony may inherit, acquire, hold and dispose of every description of property, whether real or personal, in the same manner as natural-born subjects of the Crown, and all dispositions of property made before the passing of the Act to or by such aliens are declared to be valid.

South Australia.

By the Aliens Act, No. 5 of 1864, every person born of a mother who is a natural-born or naturalized subject is capable of holding real or personal estate.

Alien friends may hold every description of property whether personal or real.

Western Australia, Tasmania.

No power is conferred upon aliens who have not been naturalized of holding lands.

New Zealand.

The provisions of the Alien Act, 1866 (30 Vict. No. 17.), are the same as in New South Wales.

Ceylon.

No power is conferred upon aliens who have not been naturalized of holding lands. Special Acts of naturalization are passed in each case.

Bermuda.

The provisions of the Act, No. 11, of 1857, are practically the same as those in New South Wales.

Bahamas.

By an Act, 25 Vict. c. 15, aliens are empowered to hold lands, houses, &c., for any term not exceeding 21 years, with full rights as natural-born subjects, except right of voting, &c.; and the Governor is empowered to grant licenses to any company formed of aliens to hold lands for the purposes for which such company may be formed.

Jamaica.

The Colonial Act, 14 Vict. c. 40, May 1851, confers the same privileges on aliens with regard to leaseholds as the English Act.

By 22 Vict. c. 1 (November 1858) every "immigrant" (*i.e.*, person introduced at the public expense from certain specified places) who may obtain or become entitled to a certificate of industrial residence, becomes entitled to all the privileges of a natural-born subject within the colony.

Turks and Caicos Islands.

By Ordinance No. 8, of 1857, (passed 17th October 1857 and confirmed 13th February 1858,) aliens may hold lands, salt ponds, &c. (except salt ponds at Turks Island) on lease not exceeding 21 years, which lease may be renewed at the end of the term.

British Guiana.

Letters of naturalization are required to enable aliens to hold *property in shipping* but not to enable them to hold or bequeath property, or to qualify them for civil rights and duties within the colony.

Barbados.

By a local Act (28 & 29 Vict. c. 4), aliens may hold leases for purposes of residence or occupation for any term not exceeding 21 years.

Trinidad, St. Vincent, Grenada, St. Lucia, Antigua, Dominica, Tobago.

No power is conferred on aliens who have not been naturalized of holding lands. In some of these islands, special Acts of Naturalization are passed for each person; in others, as St. Vincent and Grenada, there are general Acts of Naturalization.

Nevis.

By Aliens Act of 1856 (No. 77), alien friends may take and hold lands by purchase or otherwise, as if they were natural-born subjects of Her Majesty.

St. Kitts and Anguilla.

By a local Act, No. 127, February 3, 1857, all domiciled or resident liberated Africans are to be deemed natural-born subjects and capable of holding real or personal estate. As are also the children, wherever born, of a mother a natural-born subject.

Aliens, subjects of a friendly state, may acquire and hold either real or personal estate as effectually as natural-born subjects, but they are not thereby made capable of becoming members of the Council or of the Assembly, nor of voting at the election of members of the Assembly.

Gibraltar.

By Order in Council of 1859 aliens, who have been resident and domiciled for 15 years, or who, if resident and domiciled for less than 15 years, have obtained the Governor's special licenses, may hold lands, as if they were British subjects.

Sierra Leone.

By the Imperial Act 16 & 17 Vict. c. 86 (20th August 1853) liberated Africans, domiciled or resident in Sierra Leone, are to be deemed within the colony to be natural-born subjects and capable of holding and transmitting any estate real or personal within the colony. Power is, however, given to the local legislature to alter or repeal any of the provision of the Act so far as they relate to the right to real property.

Honduras.

The Naturalization Act 18 Vict. c. 18 (July 19, 1855) is the same as the South Wales Act.

By the 23d Sect. of the Immigration Act, 24 Vict. c. 5 (1861), every immigrant born out of the British dominions who shall have obtained or become entitled to a certificate of industrial residence is entitled to all the privileges of a naturalized alien, except the capability to become a member of the Assembly, which privilege, however, may be allowed by the superintendent.

Hong Kong.

By the Colonial Ordinance, No. 2 of 1853, aliens may acquire and dispose of real estate within the colony as effectually as natural-born subjects.

[The foregoing information, so far as it relates to the colonies, is in part compiled from the Colonization Circular, No. 27, 1868, issued by the Emigration Commissioners, and has been revised by Mr. Holland, Legal Adviser to the Colonial Office.]

India.

Lord Brougham in the case of the Mayor of Lyons *v.* The East India Company, cited in "Hansard's Law relating to

Aliens," said, with regard to the right of aliens to hold leasehold and freehold property in India, "No instance has "been produced, indeed, it is agreed on all hands that no "instance has ever existed of a forfeiture to the Crown for "this cause. There is no such thing known in those parts "as an inquisition of office, or any analogous proceeding, "or any proceeding whatever for entitling the Crown, or "those exercising its delegated authority, to the real estate "or chattels real of aliens within the district. When those "foreigners die their real estates have descended to their "heirs, or been taken by their devisees, or been administered "as assets by their executors, without any claim ever having "been made by the sovereign power, which would here in "England have been entitled without any office. Eject-"ments have been brought, and the parties in possession "have never been advised to set up the defence that the "lessor of the plaintiff claimed by descent from an alien; "and dower has been assigned to widows alien also."—*Moore's Privy Council Cases*, vol. i. p. 175.

It appears from the printed "Proceedings of the Government of India Revenue, March, 1868," that a report has been prepared by that Government on the state of the law as to the right of aliens to hold lands in India.

This report states that the point was fully raised in the year 1834, when, in the case of General Claude Martin's will, "it was distinctly held by the Supreme Court at "Calcutta that the English law as to aliens had never been "introduced into India. . . . This decision gave rise "to considerable excitement at the time, and the Govern-"ment of India addressed the Court of Directors very "strongly on the subject."

The decision of the Calcutta Court was confirmed on appeal by the Privy Council in the judgment of Lord Brougham above quoted.

Lord Brougham's ruling was accepted as the law on the subject by Sir C. Jackson, as Advocate-General in 1852.

It seems from the "Proceedings" that it may be open to doubt "whether the English alien law has, in effect, "been extended to India by any more recent legislation, "either English or Indian, and whether the transfer of the "executive administration in India from the Company to "the Crown, by the 21st and 22d Vict. c. 106, has in any "way affected the case."

There is nothing in the *Indian* law disabling aliens, as *being aliens merely*, from holding lands. But there have been special regulations showing the jealousy with which the acquisition of land by alien Europeans has been regarded.—*Bengal Regulations of* 1793, 1795, 1803, 1813. Bombay, 1827.

Indeed, up to 1834 no European, whether British or alien, could acquire land or rights in land except in certain specified cases, or by the permission of the Governor-General in either Bengal or Bombay. The law in Madras was not so accurately defined, but was substantially the same.

An Act of 1837, the draft of which was drawn by Lord Macaulay in 1835, was passed partly to clear up doubts which had arisen under the Charter Act of 1833, regarding the nature of the estate which European British subjects could hold in land in India.

"In the original draft of that Act, in Lord Macaulay's handwriting, stands, "It shall be lawful for any subjects of His Majesty to acquire and hold," &c.

But in the course of circulation the words "subjects of His Majesty" were struck through, and the words "any person of whatever nation" substituted. Eventually the original words were restored, and the Act passed accordingly.

The jealousy with which the residence of Europeans, and especially alien Europeans, in the interior was looked upon by the East India Company is ascribed to the doubts which existed as to the jurisdiction of the company over such European residents.

As a matter of fact, nevertheless, the courts of the East India have long since assumed (as early as 1796) and exercised, without demur, such jurisdiction.

The report of the "Proceedings" concludes with a recommendation "that there is no longer any reason of good "policy why European foreigners should not be placed in "the same position as European British subjects with "respect to holding land in India. . . . In practice "European foreigners have resided without let or molesta-"tion, and have even held landed property all over India "for the past forty or fifty years at least. . . .

"On the other hand, there are valid objections to the "state of the law as it now exists. It disinclines cautious "foreigners against acquiring property, and . . . it is "quite possible that it may be made an instrument of "private annoyance and injury. . . . During the Indigo "disturbances in 1860–61, one of the most turbulent and "unpopular of the Indigo planters in Behar was a "Spaniard, Mr. Tolano, who was not at that time even "naturalized, and who had no special permission to hold "land. . . . Had the state of the law been known it "would certainly have been taken advantage of by his "native opponents, to his great injury and loss."

In accordance with this recommendation the following minute was issued on the 11th of April, 1868 ("Pro-"ceedings of the Government of India, Home Department, "Legislative. April, 1868"):—

"The Governor-General in Council has considered it expedient that all the Regulations and Acts which provide against the acquirement of land by Europeans in India should be repealed.

"2. They have no effect as regards Europeans, being British subjects, since Act IV. of 1847, and they can therefore operate only against European foreigners.

"3. His Excellency in Council considers that the retention of these lands, as they now stand, is not only unnecessary and invidious, but might afford an opportunity for malicious injury.

"4. His Excellency in Council accordingly caused all the existing Bengal Laws and Regulations of this nature to be included in the bill for repealing certain enactments which have ceased to be in force or have become unnecessary, which became law as Act VIII. of 1868, on Thursday the 2nd instant.

"5. It is understood that both the Governments of Madras and Bombay have similar repealing bills under consideration.

"*Resolved*, That the attention of the Governments of Madras and Bombay be drawn to the expediency of repealing any laws affecting the free acquirement and enjoyment of immoveable property, or rights in such property, by European aliens which may exist in the code of either Presidency, as, for example, the Bombay Regulation XXIII. of 1827, sections 3 and 4, and the Madras Regulation of 1803, section 41."

CHAS. S. A. ABBOTT.

Woodside, Lynmouth, Barnstaple,
September 24, 1868.

APPENDIX No. IV.

POSITION OF ALIENS AND NATURALIZED ALIENS IN ENGLAND.

1.—CASE OF MR. BRANDAUER.

SIR, 5, Berners Street, W., 12th June 1868.

A CLIENT of ours, Mr. Charles Henry Imanuel Brandauer, a native of Stuttgard, has for several years, first in partnership and then alone, been the proprietor of a steel pen manufactory at Birmingham giving employment to a large number of "hands."

He has also a place of business at Vienna, where he is in partnership with his father-in-law, Mr. Kuhn, trading under the firm of "Carl Kuhn & Co.," a house of respectability and standing.

The factory at Birmingham is of freehold tenure. Mr. Brandauer's former partner was a naturalized British subject but it was found on examining the documents of title on dissolution of partnership, that from a slight oversight in one of them a forfeiture to the Crown had taken place of at least a portion of the factory, Mr. Brandauer being an alien.

On a careful investigation it was found that the only safe way of curing this defect was that the Crown should hold an inquisition at which the property was declared forfeited, and under the powers which the Crown has in such cases the property was then re-granted to a trustee nominated by Mr. Brandauer upon trust for sale.

We should mention that previously Mr. Brandauer had made strennous efforts to become naturalized, but from the circumstance of his not *continuously residing* in England this was refused.

He resides in England frequently but not constantly.

As the whole of the subject of naturalization has we presume been referred to the present Commission, it is desirable that the case of Mr. Brandauer, which is no doubt one of a class should be brought before the Commissioners with a view to the modification of the law.

It does seem very desirable that foreigners who are wishful to invest capital in England in a manner to give employment to large numbers of the English population should not be deterred from doing so by such technicalities.

We are, &c.
BAILEY, SHAW, SMITH, & BAILEY,

To the Secretary to the Royal
Commissioners on the Laws of Naturalization.

5, Berners Street, London, W.,
SIR, June 26, 1868.

WITH reference to our letter to you of the 12th instant and your letter to us of the 15th instant, we beg to apprise you that our client, Mr. Brandauer is in London to-day. He purposes being at Birmingham to-morrow unless you or the Commissioners wish to see him, or he could attend some days hence, if you desire it.

Mr. Brandauer is under the impression (you will know whether accurately or not) that English subjects may hold freehold property in every part of Germany without naturalization. Indeed, he is under the impression that there are only two or three countries besides England where this is not the case, of which Turkey is one.

It must be desirable (viewing the question from the English side) that foreigners should have every facility for and encouragement in employing English artizans *in England*. Had Mr. Brandauer known originally that there was the slightest chance of his having difficulty with reference to the freehold property in Birmingham, he most likely would have been deterred from starting his manufactory in England, for it was indispensable that he should erect special and extensive buildings, as he could not find any suitable for his purpose in the neighbourhood of Birmingham.

Mr. Brandauer mentions that in his own business—that of the pen manufacture—some Frenchmen have, instead of establishing a factory at Birmingham, induced English artizans to go to Boulogne, and have now at that place the largest steel pen manufactory in Europe, where, of course, the few skilled English hands are instructing a number of Frenchmen, and France is thus deriving similar benefits to those which England in past times enjoyed by the extradition by France of many of her best manufacturers.

Might it not be desirable to extend the permission already accorded to aliens to hold on lease premises for the purpose of trade, to their being entitled to become the absolute owners of such property *for the purposes of trade*, but without such ownership carrying rights of voting &c.?

Mr. Brandauer thinks that this right in the countries to which we have alluded is not limited to the purposes of trade, but extends also to purposes of residence and even speculation.

We are &c.
BAILEY, SHAW, SMITH, & BAILEY.
Charles S. A. Abbott, Esq.

2.—LETTER FROM MR. LEONE LEVI.

10, Farrar's Building, Temple,
SIR, December 8, 1868.

A ROYAL Commission having been appointed to inquire into the law relating to the legal position of British subjects naturalized in foreign states, and of foreign-born subjects naturalized in this country, I beg to offer the following observations:—

The law of this country has for many years past been highly favourable to aliens. Commerce, manufactures, industry, science, and art derive benefit from their settlement here, and the Legislature has offered them a frank and hearty hospitality. Yet I venture to say that the law is capable of further improvement. It is not, indeed, from the statute law that an alien derives his charter of freedom. It is the common law that opens to him the courts of justice, that enables him to partake of the benefits of the law of the land, and places him in a position practically amounting to equality, as respects rights and privileges, with native-born subjects. As an evidence of the liberality with which the courts of law and equity are disposed to regard the position of aliens, I have only to refer to the recent decision of the Court of Chancery in the case of Routledge *v.* Low (37 L. J. Ch. N. S. p. 454), where an alien friend, a citizen of the United States, was considered as entitled to take advantage of the British Copyright Act, from the simple fact that at the time of the publication of her work the author was residing temporarily in a part of the British dominions, she having gone to Montreal only for a few days for the sole purpose of publishing her work in British soil. I shall first allude to one point in the present law regarding aliens not naturalized which should be remedied.

At present an alien, not naturalized, cannot hold land for more than 21 years, or, in other words, cannot buy a freehold. He may possess any amount of property in the funds, he may own any number of ships, but cannot hold land. But numbers of aliens possess mills, houses, and land, and it is difficult to say in how many forms fixed property goes into the market, and is indiscriminately purchased by natives and foreigners. On what principle can the difference between land and other species of fixed property be any further maintained? I hold that an alien coming to reside in this country should be allowed to invest his property in whatsoever manner he pleases, and that the right of possessing land should not depend on his becoming naturalized. In France, by the 13th Article in the Civil Code, a foreigner domiciled in the country enjoys all the civil rights of French subjects; and as such he may acquire and possess every kind of property, whether moveable or immoveable (Zachariæ, Droit Civil Français; Merlin Rep. v. Étranger; Troplong, p. 392 et 429. Foreigners are in the same position as natural subjects in Holland and many other countries, and the distinction made in England between moveable and immoveable property is only a relic of the old barbarous law, the "Droit d'Aubain." This law was abolished in the German Confederation by Art. 18 of the Federal Act; in Spain by the *Pacte de Famille*, dated 15th August 1761; in Russia by the treaty of commerce and navigation of 11th January 1787, and it is equally abolished in the United States, Italy, Turkey, &c. In fact, the right of an alien to possess land has become a general law, not only in Europe, but throughout the world.

There is, moreover, a difficulty in the way of obtaining a certificate of naturalization which operates disadvantageously. Persons under age cannot be naturalized, because they cannot take the oath of allegiance. Consequently our schools and colleges lose the advantage of foreign children, who would come here to prepare themselves for the many posts in the civil service open to competition, and in which a limit of age is fixed by the Civil Service Commission. Quite recently a gentleman residing at Florence wished his son, a boy of great promise, to come to England to study, in order to compete for the Indian Civil Service. But two obstacles stood in the way. First, the limit of age being eighteen, the boy could not wait for the naturalization; and, second, in that service naturalized subjects appear to be excluded, the regulations limiting it to any natural-born subject of Her Majesty. I think it would be desirable to allow a person under age, intending to come to this country for his education, to be naturalized, upon a certificate by his father or other relative made before the British consul in the country or place where he resides, and that on his succeeding to obtain an appointment he should be enabled to complete his naturalization by taking the oath of allegiance. May I hope, also, that the civil service, whether of this country or of India, be open in all cases to naturalized subjects? Now that merit, and not patronage, is the proper road to advancement, scarcely any justification can be adduced for any difference on that score.

Under the 7 & 8 Vict. c. 66, by application to the Secretary of State an alien may receive a certificate of naturalization, by which he is enabled to own land for more than 21 years, and travel with an English passport. That law may have been very liberal when it passed 25 years ago, but the times have changed, and I see no advantage in maintaining it if once we admit the principle of conceding to an alien the full enjoyment of civil rights, including that of owning any property whether moveable or immoveable. As for the right of travelling with an English passport, I consider it a constitutional privilege, and should be a sequel to an absolute change of nationality. Whilst I am disposed to attach very little value to the system of granting certificates of naturalization conferring only temporary rights, I am in favour of extending the powers of a naturalized subject upon his consenting to a change of nationality and allegiance. Under the English law, a certificate of naturalization always excepts the right of being a member of the Privy Council, or of either House of Parliament, or of taking any office, civil or military, or to have any grant of land from the Crown. Originally intended as a protection against Roman Catholicism, the

exclusion has been maintained in deference to national susceptibilities; and when the present law on aliens was under the consideration of Parliament, a clause which would have removed the exclusion was taken out in committee. Since, however, the 7 & 8 Vict. c. 66 abolished the provision of 1. G. 1., c. 4, which prevented the passing of any Act of Naturalization with clauses granting such powers, it is held that the Legislature is at liberty to pass special Acts giving to an alien every right as a natural-born subject, and several Acts to that effect were recently passed. But setting aside that this method is most expensive, no regulations appear to exist as to the conditions for obtaining such an Act, unless it be that, by the standing rules of the House of Lords, the consent of the Crown is necessary, before a Naturalization Bill is read a second time. There is much uncertainty, in fact, as to the state of the law on the subject, and since the principle has now been admitted, I would suggest that the power of granting to an alien the full rights of a native-born subject, including that of being a member of either House, and the other excepted privileges, should rest with the Secretary of State, the condition in such cases being, 10 years' residence in this country, satisfactory reference as to character and respectability, and the taking of the oath of allegiance.

In the United States of America, seven years' citizenship are sufficient as a qualification for a representative to Congress, and nine years' citizenship for that of Senator. In France by the constitution of 22 Frimaire an VIII., an alien, after 10 years' residence, was enabled to sit in the legislative assemblies, and in 1808 the period was reduced to one year, as regards those who conferred great services to the State. In 1814, the king considering it necessary "that none should sit in the chambers, but persons whose "birth was a guarantee of his affection to the sovereign and "the laws of the State," reserved to himself the privilege of granting *la grande naturalization*, and stipulated that such letters should be verified by the two chambers. From 1814 to 1848, 22 foreigners only received the "grande naturalization." The decree of 1848 facilitated the naturalization, but in 1849 again it was declared that "the alien "naturalized should not enjoy the right of eligibility to the "National Assembly, except by virtue of a special law." Since, however, the electoral law of 1852 declared that every elector is eligible, a naturalized foreigner, who has undoubtedly the right to vote, possesses also the right of being eligible. And therefore quite recently, in 1863, (see *Moniteur*, 20th Nov. 1863,) Samuel Welles de Lavalette, born at Boston, domiciled in France and duly naturalized, was allowed without any special law, to sit in the Corps Legislatif, as fulfilling all the conditions of nationality, age, and capacity. In the same manner Prince Poniatowski a Pole, naturalized in 1854, was soon after admitted senator, though he neither received the letters of *la grande naturalization* required by the law of 1816, or was so authorized by the special law prescribed by the law of 1849. The French law is therefore now precisely in harmony with my suggestions.

The laws of different countries respecting aliens and naturalization differ materially, and in many points exhibit a conflict which it would be desirable to remove. The Commissioners will doubtless know, that if an English woman marries a Frenchman, by the French law (Art. 12 Civil Code), she becomes a French woman, and by the English law she remains English. And *vice versâ*, if a French woman marries an Englishman, by the same French law she ceases to be French, whilst by the English law she does not acquire an English nationality. Without entering into further particulars, I would urge for the consideration of the Commissioners the expediency of establishing the cardinal principles—1st, that an alien residing in a country, whether in a temporary or permanent manner, should have the right to the full enjoyment of civil rights and the full benefit of the law of the land; 2nd, that a certificate of naturalization, whenever granted, should confer full constitutional rights and privileges, it being always understood that such naturalization does not affect the restoration of such alien to the nationality of birth whenever he once more returns to his native country.

I have, &c.
LEONE LEVI.

APPENDIX No. V.

NATIONALITY OF CHILDREN BORN OF ALIEN PARENTS.

The accompanying Circular was sent from the Foreign Office to Her Majesty's Representatives at European Courts:—

"Foreign Office, August 11th, 1868.

"I have to instruct you to furnish me with a "report for the information of the Naturalization "Commission on the state of the ———— law with "regard to the nationality of children born of alien "parents within the ———— dominions."

AUSTRIA.

MY LORD, Vienna, December 8, 1868.

HAVING addressed myself to Baron Beust by note of the 22d ultimo, to remind his Excellency of the request addressed to him by Lord Bloomfield in August last, to be informed as to the state of the laws in Austria relative to children born of alien parents in this country, I have now the honour to transmit to your Lordship copy, with translation by Mr. Grosvenor, of a note which, in the absence of Baron Beust, I have received from Baron Vesque.

Baron Vesque informs me that in the western (Cisleithan) portion of the empire, all children born of foreign parents are treated as aliens, illegitimate children following the nationality of the mother. But Baron Vesque promises that his reply to Lord Bloomfield's first note will be more complete when he has received the information as regards Hungarian law which he has applied for to the Hungarian Government.

I have, &c.

The Lord Stanley, M.P. A. G. G. BONAR.
&c. &c. &c

Translation.

IN accordance with the wishes expressed by H. E. Lord Bloomfield, &c., in his note of the 15th of August 1867; and referred to by Mr. Bonar, &c., &c., in his note of the 22d of November last, the Imperial Royal Ministry for Foreign Affairs has the honour to inform H.B.M.'s Chargé d'Affaires, that according to the laws in force in the western half of the Austro-Hungarian Monarchy, children born of foreign parents within the limits of the lands represented in the Austrian Reichsrath are treated as aliens on account of their birth.

This rule applies as well to legitimate as to illegitimate children, and in the case of the latter, the nationality of the mother is decisive.

In order to furnish H.M.'s Government with authentic information respecting the provisions of the Hungarian Legislature as regards the nationality of children born of foreign parents in Hungary, the Imperial Royal Ministry for Foreign Affairs addressed a memorandum on this subject to the Royal Hungarian Ministry, but as no answer has up to this date been received, this matter will now be brought again to the recollection of the Hungarian Ministry, and the Imperial Royal Ministry for Foreign Affairs will not fail to communicate the desired information to Her Britannic Majesty's Chargé d'Affaires, so soon as they shall have obtained it.

The undersigned avails himself, &c.

Signed for the Minister for Foreign Affairs,
S. T. VESQUE.

MY LORD, Vienna, December 21, 1868.

WITH reference to my despatch to Lord Stanley, of the 8th instant, informing his Lordship, in reply to the queries addressed to me in his despatch No. 70 circular of the 11th of August, that according to the law of the Western (Cis Lithan) portion of the empire, all children born of foreign parents in Austria are regarded as aliens, illegitimate children of aliens

being regarded to follow the nationality of the mother, I have now the honour to enclose to your Lordship a translation of a note I have this day received from the Imperial Chancery of State, stating that the laws of Hungary on that point are identical with those of Cis-Lietha.

I have, &c.
A. G. G. Bonar.

The Right Hon. Earl of Clarendon, K.G.
&c. &c. &c.

In sequel to the note of this Department, of 30th of last month, the Ministry for Foreign Affairs has the honour to inform Mr. Bonar, &c., that as regards the nationality of illegitimate children born in this country of alien parents the laws in force in the lands belonging to the Hungarian Crown are identical with those of the western portion of the Austro-Hungarian Monarchy.

The undersigned avails, &c.
Vienna, Dec. 20, 1868. Biegeleben.

BADEN.

My Lord, Stuttgart, September 2, 1868.

In compliance with the instructions contained in your Lordship's despatch, marked Circular of the 11th instant, I made the necessary inquiries in order to ascertain the state of the Wurtemburg law with regard to the nationality of children born of alien parents within this kingdom, and the following is the result which I am now able to transmit to your Lordship.

According to Wurtemburg law all children born of alien parents in this kingdom are considered as inheriting the nationality of their parents; that is to say, all legitimate children the nationality of their father, and illegitimate children that of their mother; and the fact of a child of alien parents having been born on Wurtemberg territory does not, according to the laws in force here, exercise any influence whatsoever upon the question of its nationality.

I have the honour to enclose the accompanying translation of a note from Baron Freydorf to Mr. Baillie respecting the Baden law on this subject.

I have, &c.
The Lord Stanley, M.P. G. J. R. Gordon.
&c. &c. &c.

(Translation.)

Carlsruhe, August 28, 1868.

The Baden Legislature proceeds upon the principle that children born of a legally recognized marriage follow the nationality of the father, and illegitimate children that of the mother, consequently the children of a foreign father born in the Grand Duchy of a legally recognized marriage, or illegitmate children of a foreign mother are regarded as aliens.

Nevertheless, Art. 9 of the Baden "Landrecht" provides that anyone born in the country of a foreign parent, shall be entitled within a year after attaining his majority (which takes place in Baden after the age of 21) to claim the rights of a native born subject, only if he resides in the Grand Duchy, he must at the same time declare that he intends to fix his abode there, and, if he is in a foreign country, he must promise to fix his abode in the Grand Duchy, and actually settle there within a year after having made the promise.

According to Art, 9a. of the Baden "Landrecht," however, this claim must be submitted to the consideration of the Government, for their recognition or refusal of the same, whenever such alien possesses by birth the right of nationality or a fixed abode in another State.

The undersigned avails, &c.
Evan M. Baillie, Esq. (Signed) Freydorf.

BAVARIA.

My Lord, Munich, August 20th, 1868.

With reference to your Lordship's circular despatch of the 11th instant, I have the honour to transmit herewith a copy and a translation of a note of the 17th instant, which I received yesterday evening from Mr. de Daxenberger, in Prince Hohenlohe's absence, in answer to my inquiries relative to the state of the Bavarian law with regard to the nationality of children born of alien parents within the Bavarian dominions.

From this note your Lordship will perceive that according to Bavarian law, the children of aliens, even when born in Bavaria, do not acquire the Bavarian citizenship, but are considered and treated as aliens, until they shall have been naturalized in the same manner as all immigrants; but that, on the other hand, the children of immigrants begotten after the naturalization of their parents are considered as Bavarian subjects.

I have, &c.
The Lord Stanley, M.P. Henry F. Howard.
&c. &c. &c.

(Translation.)

The undersigned in answer to the note of Sir H. F. Howard, etc. etc. etc., of the 14th instant, has the honour to reply that according to Bavarian law the children of aliens, being persons not belonging to the Bavarian State, even when begotten and born in Bavaria, do not acquire the Bavarian citizenship, but are considered and treated as aliens, until they shall have been naturalized in the same manner as all immigrants.

On the other hand, the children of immigrants begotten after the naturalization of their parents are considered as Bavarian subjects.

The undersigned, etc.
(Signed) v. Daxenberger.

Sir H. Howard, K.C.B.
&c. &c. &c.

BELGIUM.

My Lord, Brussels, 20 August 1868.

In reply to your Lordship's despatch marked Circular of the 11th instant, in which I am instructed to report on the state of the Belgian law with regard to the nationality of children born of alien parents in the Belgian dominions, I have the honour to inclose herewith copies of the two articles of the Civil Code which afford the information desired.

I beg further to explain that according to the doctrine and jurisprudence most generally received, the individual who complies with the conditions of Article 9 of the Civil Code, is considered a Belgian subject from the day of his birth and not from the day on which he may make the declaration, the declaration having a retroactive effect; therefore the declaration once made the individual making it is considered as never having been a foreigner.

I have, &c.
Howard de Walden and Seaford.

The Lord Stanley, M.P.
&c. &c. &c.

Tout individu né en Belgique d'un étranger pourra, dans l'année qui suivra l'époque de sa majorité, réclamer la qualité de Belge, pourvu que dans le cas où il résiderait en Belgique il déclare que son intention est d'y fixer son domicile, et que, dans le cas où il résiderait en pays étranger, il fasse sa soumission de fixer en Belgique son domicile et qu'il l'y établisse dans l'anneé à compter de l'acte de soumission. (Article 9, Code Civil.)

L'individu né en Belgique de parents étrangers y domiciléés qui aurait négligé de faire la declaration préscrite par l'article 9 du Code Civil est recevable, s'il est habitant du royaume, à demander la grande naturalisation, sans qu'il soit besoin de justifier qu'il ait rendu des services éminents à l'Etat. (Loi du 27 Sept. 1835, Art. 2.)

DENMARK.

British Legation, Copenhagen,

My Lord, July 30, 1868.

As a supplement to my despatch of the 27th ultimo, on the position of aliens in Denmark, I have the honour to enclose herewith, at the request of the Naturalization Commission, the written opinion of Mr. Brock, a distinguished Danish lawyer, with reference:

1st. To the oath required of aliens entering on certain professions.

2ndly. Whether the birth in Denmark of the son of an alien constitutes a Danish subject?

Your Lordship will see by the enclosed document that:

1st. The "Borgherskab" or Burgherbur oath was abrogated in 1858. The oath now taken by brokers, translators, &c. in non-political, and limited to the faithful performance of their office.

2nd. The son of an alien born in Denmark is considered a Dane to all intents and purposes, so long as he remains in Denmark.

I have, &c.

The Lord Stanley, M.P. Charles Lennox Wyke.
&c. &c. &c.

Sir, Copenhagen, July 26, 1868.

Your Excellency has asked my opinion on the following questions:—

1st. Is the "Borgerbur" oath still required for entering on certain professions, and if so, what professions?

2nd. Does the fact of birth in Denmark constitute a son of an alien a Danish subject?

Answer. 1st. The "Borgerbur" oath required by the Danish law for entering on professions of different kinds has been abolished by the law of December 29, 1857. The oath still taken by brokers, translators, and such persons of public trust, that they will faithfully perform the duties imposing on their office, has no influence upon their situation as subjects of the Danish Crown, and is no oath of allegiance.

2nd. The son of an alien, born in Denmark, is regarded a Dane, if he remains here.

I have, &c.

Sir Charles L. Wyke, K.C.B., Gustav Brock,
&c. &c. &c. Advocate of the Supreme Court.

British Legation, Copenhagen,

My Lord, August 17, 1868.

In reply to your circular marked of the 11th instant, instructing me to furnish a report for the information of the Naturalization Commission on the state of the Danish law with regard to the nationality of children born of alien parents within the Danish dominions, I have the honor to refer your Lordship to my dispatch marked of the 28th ult., which contains the information required by the Commission with reference to this subject.

I have, &c.

Charles Lennox Wyke.

The Lord Stanley, M.P.
&c. &c. &c.

FRANCE.

Code Napoleon. Code Civil, liv. I, c. 1.

"9. Tout individu né en France d'un étranger pourra, dans l'année qui suivra l'époque de sa majorité, réclamer la qualité de *Français;* pourvu que, dans le cas où il résiderait en France, il déclare que son intention est d'y fixer son domicile, et que dans le cas où il résiderait en pays étranger, il fasse sa soumission de fixer en France son domicile, et qu'il l'y établisse dans l'année, à compter de l'acte de soumission.

10. "Tout enfant né d'un Français en pays étranger est Français. Tout enfant né en pays étranger d'un Français qui aurait perdu la qualité de Français pourra toujours recouvrer cette qualité en remplissant les formalités prescrites par l'Article 9."

C. 11, Section I.

"17. La qualité de Français se perdra, 1e, par la naturalisation acquise en pays étranger; 2e, par l'acceptation, non autorisée par le Roi, de fonctions publiques conférées par un Gouvernement étranger; 3e, enfin par tout établissement fait en pays étranger, sans esprit de retour. Les établissement de commerce ne pourront jamais être considérés comme ayant été faits sans esprit de retour.

"18. Le Français qui aura perdu sa qualité de Français pourra toujours la recouvrer, en rentrant en France avec l'autorisation du Roi, et en déclarant qu'il veut s'y fixer, et qu'il renonce à toute distinction contraire à la loi Française."

The ninth Article of the Code Napoléon was modified by a Law of 1851:—

"29–29 Janvier et 7 Février, 1851 (10e série, No. 2730) (Article 9, C. N.)—Loi concernant les individus nés en France d'étrangers qui eux-mêmes y sont nés, et les enfants des étrangers naturalisés.

"Article 1. Est Français tout individu né en France d'un étranger qui lui-même y est né à moins que, dans l'année qui suivra l'époque de sa majorité, telle qu'elle est fixée par la loi Française, il ne réclame la qualité d'étranger par une déclaration faite, soit devant l'autorité municipale du lieu de sa résidence, soit devant les Agents Diplomatiques ou Consulaires accrédités en France par le Gouvernement étranger.

"L'Article 9 du Code Civil est applicable aux enfants de l'étranger naturalisé, quoique nés en pays étranger, s'ils étaient mineurs lors de la naturalisation. A l'égard des enfants nés en France ou à l'etranger, qui étaient majeurs à cette même époque, l'Article 9 du Code Civil leur est applicable dans l'année qui suivra celle de la dite naturalisation."

GREECE.

My Lord, Athens, September 3, 1868.

With reference to your Lordship's circular dispatch of the 11th ultimo, I have the honour to inclose herewith a copy of a report, drawn up by the lawyer employed by this Legation, on the state of the Greek law with regard to the nationality of children born of alien parents within the Greek dominions.

I have, &c.

The Lord Stanley, M.P. C. M. Erskine.
&c. &c. &c.

Quelle est la condition des enfants nés sur le sol hellénique de parents ètrangers?

En règle générale, la circonstance qu'un enfant est né sur le sol héllénique ne confère pas la qualité d'Hellène, l'origine seule la donne. Pour résoudre donc la question, si un enfant est ou non Hellène, une seule chose est à considérer: de qui est-il né? L'est-il d'un Hellène, il est lui-même Hellène, en quelque pays qu'il soit né. Ses parents sont-ils étrangers, il est étranger comme eux, alors même qu'il est né en Grèce (Art 14, No. 1 du Code Civil).

Il faut cependant remarquer que la circonstance qu'un enfant est né sur le sol hellénique produit un double effet en sa faveur.

1. Elle lui permet d'acquérir plus facilement qu'un étranger ordinaire la qualité d'Hellène; il n'a, en effet, qu'a remplir trois conditions.

(*a.*) Déclarer, lorsqu'il réside en Grèce, que son intention est d'y fixer son domicile, et l'y établir dans l'année à compter de l'acte de sa soumission.

(*b.*) Faire cette déclaration ou cette soumission dans l'année de sa majorité, et.

(*c.*) Prêter le serment de sujet Hellène devant le Nomarque compétent (Art. 19, et 17 du Code Civil).

2. Elle fait présumer, lorsque ses père et mère sont inconnus, qu'il est né de parents Hellènes, et par conséquent, qu'il est lui même Hellène (Art. 114, No. 3 du Code Civil).

Le principe que l'origine de l'enfant détermine sa nationalité, indépendamment du lieu de sa naissance, ne présente aucune difficulté, lorsque ses père et mère sont l'un et l'autre étrangers; l'enfant est Hellène dans le premier cas, étranger dans le second. Mais que décider si l'un est Hellène et l'autre étranger? L'enfant suivra-t-il la condition de son père ou celle de sa mère?

Si l'enfant est né en legitime mariage, cette question se présentera rarement, car, la femme suivant la condition de son mari (Art. 21 et 25 du Code Civil) les époux seront dans la plupart des cas, l'un et l'autre Hellènes ou l'un et l'autre étrangers. Cependant le principe proclamé par ces articles, devant être entendu en ce sens restrient que la

femme prend la condition qu'a son mari au moment de son mariage, l'hypothèse contraire peut se présenter. Alors l'enfant suivra-t-il la condition de son père ou celle de sa mère? Le père étant le chef de la famille, l'Art. 14, No. 1, décide que l'enfant suivra la nationalité du père.

Quant à l'enfant né d'une mère étrangère et d'un père naturel Hellène, s'il est légalement reconnu par son père seul, ou par son père et par sa mère, il suit la condition de son père (Art. 14, No. 5, du Code Civil). Par *a contrario* il faut décider que s'il a été reconnu seulement par sa mère, il est, comme elle, étranger.

Celui qui est né d'une mère Hellène et d'un père naturel étranger, est réputé sujet Hellène, s'il n'a pas été reconnu par ce dernier (Art. 14, No. 2, du Code Civil), que s'il en a été reconnu, pour obtenir la nationalité Hellénique, il doit remplir les formalités susmentionnées de l'Art. 17 du Code Civil (Art. 19 du même Code).

Reste à examiner la question de savoir si l'enfant prend la condition qu'avait son père ou sa mère au moment de sa conception ou de sa naissance? La question présente de l'intérêt, car la personne dont l'enfant doit suivre la condition a pu, dans l'intervalle de la conception à la naissance, d'Hellène qu'elle était, cesser de l'être par une naturalisation acquise en pays étranger, ou réciproquement, d'étrangère, qu'elle etait, devenir Hellène par une naturalisation acquise en Grèce.

L'Art. 11 du Code Civil proclamant la maxime Romaine: Infans conceptus pro nato habetur, quoties de ejus commodis agitur, et comme aux yeux de la loi hellénique il vaut mieux pour l'enfant qu'il naisse Hellène qu'étranger, nous dirons qu'il suffit, pour qu'un enfant naisse Hellène, que la personne dont il doit suivre la condition ait été Hellène, soit au moment de la conception, soit au moment de sa naissance, soit même dans l'intervalle de ces deux époques.

Les enfants qui naitraient pendant les deux ou les trois ans exigés pour la naturalisation de l'étranger (selon qu'il est ou non d'origine hellénique) deviennent Hellènes par la naturalisation de leur père (Art. 18 du Code Civil). Quant aux enfants qui lui seraient survenus avant la déclaration exigée pour la naturalisation, ils restent étrangers ainsi que sa femme; mais si à l'époque de sa naturalisation ils étaient mineurs, ils peuvent acquérir la nationalité hellénique en manifestant leur volonté à cet égard, dans l'année qui suivra l'époque de leur majorité, devant l'autorité Communale du lieu ou ils veulent fixer leur domicile, en s'établissant en Grèce et en prêtant le serment de sujet Hellène devant le Nomarque compétent (Art. 17 du Code Civil).

L'Art. 20 du même Code décide que l'enfant né de parents qui avaient perdu la qualité d'Hellène, pourra toujours acquérir cette qualité en remplissant les formalités prescrites par l'Art. 17. Le Code Civil de la Grèce n'attribuant la qualité d'Hellène qu'à l'origine, il n'y a pas à distinguer si l'enfant d'un ci-devant Hellène est né à l'étranger ou en Grèce; dès que ceux dont il suit la condition sont étranger il nait nécessairement étranger comme eux, quel que soit le lieu de sa naissance. Cependant il faut remarquer que l'enfant né d'un ci-devant Hellène est traité plus favorablement que l'enfant né en Grèce d'un étranger ordinaire; l'un peut *toujours*, c'est-à-dire, à tout âge, pourvu qu'il soit majeur, réclamer la qualité d'Hellène; l'autre ne le peut, au contraire, que dans un délai assez court, dans l'année qui suit sa majorité.

Cette différence s'explique sans peine; l'enfant né d'un ci-devant Hellène étant Hellène selon la nature, la loi ne doute pas de son attachement pour la Grèce; à quelque époque qu'il se présente, elle l'accepte avec empressement, convaincue qu'elle est que le sentiment qui le fait agir ne peut être que son amour pour sa patrie naturelle. Il n'en est pas de même de l'enfant né en Grèce d'un étranger; celui-là n'a rien d'hellénique. Il se peut qu'il affectionne la Grèce, puisqu'il y est né; mais s'il est trop lent à manifester le désir d'avoir le titre d'Hellène, la loi, avertie pas son indifférence, présume lorsqu'il se présente plus tard, qu'il ne vient que dans son intérêt personnel, aussi le traite-t-elle à l'égal d'un étranger ordinaire.

Athènes le 19/31 Août 1868.

(Signé) D. G. Rhally,
Avocat, Dr. en Droit.

HANSE TOWNS.

My Lord, Hamburg, September 8, 1868.

I have the honour to acknowledge the receipt of your Lordship's circular despatch under date of the 11th of August, instructing me to report as to the law of the Hanse Towns with respect to the nationality of children born of alien parents within their respective territories, and beg leave to report as follows:—

According to the law of Lubeck, all legitimate children born of alien parents within its territory take the nationality of the father, while those which are illegitimate take that of the mother until another nationality is acquired for them.

The law in force in Bremen prescribes merely that children of alien parents who are not citizens of Bremen, are not to be regarded as subjects of that state, and makes no conditions as to their being born in wedlock or not.

According to the law of Hamburg, the nationality of the parents is transmitted to the children without any restrictions whatever as to the place of birth, except in the case of illegitimacy, when the children take the nationality of the mother.

I have, &c.

George Annesley,
Acting Consul-General.

The Lord Stanley, M.P.
&c. &c. &c.

HESSE DARMSTADT.

No. 7.

My Lord, Darmstadt, September 9, 1868.

Upon the receipt of your Lordship's circular despatch, of the 11th ultimo, I addressed a note to Baron Dalwigk of which I have the honour to enclose herewith a copy, and I have now received from His Excellency the answer of which a copy is likewise herewith transmitted.

Your Lordship will learn from this correspondence that children born of alien parents within the Grand Ducal dominions retain their "status" as aliens unless they are appointed to a public employment in the Grand Duchy, or are naturalized by a special act.

I have, &c.

R. B. D. Morier.

The Lord Stanley, M.P.
&c. &c. &c.

Monsieur le Baron,

Chargé par mon Gouvernement de lui fournir un rapport sur les lois qui regardent la nationalité d'enfants nés dans le territoire Grand Ducal d'autres nationaux que ceux du Grand Duché, j'ai recours à la bienveillance de Votre Excellence en la priant de bien vouloir me donner connaissance des lois dont il s'agit.

Je saisis, &c.

(Signed) R. B. D. Morier.

A son Excellence
Monsieur le Baron de Dalwigk.
&c. &c. &c.

Copy.

Monsieur,

En réponse à la communication que vous avez bien voulu m'adresser en date du 19 du mois passé j'ai l'honneur de porter à votre connaissance que, d'après l'article 13 de la Constitution du Grand Duché, l'indigénat est acquis:

1. Par la naissance, pour ceux dont père ou mère sont à ce moment sujets Hessois;
2. Par le mariage, pour une femme étrangère qui se marie avec un sujet Hessois;
3. Par la nomination à un emploi public;
4. Par réception particulière.

En conséquence, les enfants nés dans le territoire Grand Ducal d'autres nationaux que ceux du Grand Duché sont reconnus étrangers tant qu'ils n'ont pas acquis l'indigénat Hessois en vertu d'une des dispositions susmentionnées.

Agréez, &c.

(Signé) Baron de Dalwigk.

Darmstadt, le 7 Septembre 1868.

ITALY.

Codice Civile del Regno d'Italia, lib. I., tit. 1.

"4. The child of a citizen is a citizen.

"5. If the father has lost his citizenship before the birth of the child, the latter is reputed a citizen if he is born within the State and resides therein.

"Nevertheless, on becoming of age, according to the laws of the realm, he may elect to take the quality of an alien on making a declaration before the authorities of the civil State in which he resides, or, if in a foreign country, before the Royal Diplomatic or Consular Agents.

"6. The child, born in a foreign country, of a father who has lost his citizenship before the child's birth, is reputed as alien.

"He can, however, elect to take the quality of a citizen on making a declaration as prescribed by the preceding Article, and fixing his domicil in the kingdom during the year in which he makes such declaration.

"Nevertheless, if he has accepted public employment in the kingdom, or has served in the army or navy, or otherwise satisfied the requirements of the conscription without seeking exemption as an alien, he shall be considered a citizen without further process.

"7. When the father is unknown the child of a citizen mother is a citizen.

"When the mother has lost her citizenship before the birth of the child, the dispositions of the two preceding articles become applicable.

"If even the mother is unknown, a child born in the kingdom is a citizen.

"8. The child of an alien who has established his domicil within the kingdom uninterruptedly for ten years is considered a citizen: residence for commercial purposes is not sufficient to constitute domicil.

"The child can, however, elect to be considered an alien, on making the declaration prescribed in Article 5.

"When the alien has not established his domicil in the kingdom for ten years, the child is considered an alien; but the dispositions of the two first paragraphs of Article 6 are applicable to the case.

Extract of paragraph 10.—"The wife and minor "children of an alien who has obtained citizenship becomes "citizens, on the condition of their also establishing their "residence in the realm, but the children can elect to "take upon them the quality of aliens on making the "declaration prescribed in Article 5."

Extract of paragraph 11.—"The wife and minor children "of one who has lost his citizenship become aliens, unless "they have continued to reside within the realm.

"Nevertheless, the wife can re-acquire citizenship in the case and by the means stated in the second paragraph of Article 14, and the children according to the second and third paragraphs of Article 11.

NETHERLANDS.

No. 280.

My Lord, The Hague, Sept. 14, 1868.

With reference to your Lordship's dispatch, circular, No. 43, of the 11th ultimo, instructing me to furnish a report, for the information of the Naturalization Commission, on the state of the Netherlands Law with regard to the nationality of children born of alien parents within the Netherlands dominions, I have the honour, herewith, to transmit to your Lordship copy of a note dated the 3rd instant from the Netherlands Minister of Foreign Affairs supplying information on the subject.

I have, &c.

The Lord Stanley, M.P. E. A. J. Harris.
&c. &c. &c.

Copy.

La Haye, le 3 Septbre. 1868.

Monsieur le Ministre,

Par votre office du 17 Août dernier, vous avez bien voulu me demander des renseignements touchant la nationalité des enfans nés de parents étrangers sur le territoire du royaume. J'ai l'honneur de porter à votre connaissance qu'il y a lieu de distinguer, quant à cette catégorie de nationaux, entre la nationalité complète, s'étendant à l'exercise des droits civils et politiques, et la nationalité restreinte, ne comprenant que la jouissance des droits civils.

La nationalité complète est acquise aux enfans nés de parents étrangers (Art. 1 de la loi du 28 Juillet 1850, F.O. No. 44):

1. Lorsqu'ils sont nés, soit dans le royaume, soit à l'étranger, de parents établis dans le royaume en Europe (Art. 1, No. 1).

L'article 3 détermine les conditions de l'établissement.

2. Lorsqu'ils sont nés dans le royaume en Europe de parents qui n'y sont pas établis, et déclarent dans l'année, après avoir accompli l'âge de 23 ans, à l'autorité du lieu de leur domicile, leur intention de continuer à y résider, Art. 1, No. 2.

Ne jouissent que de la nationalité restreinte les enfans nés de parents étrangers (Art. 1 et 5 du Code Civil):

1. Qui sont nés, soit sur le territoire Néerlandais, soit à l'étranger, de parents établis dans le royaume ou dans ses colonies (Art. 5, No. 1 et No. 3);

2. Qui sont nés dans le royaume en Europe de parents qui n'y sont pas établis lorsqu' eux-mêmes s'y établissent, (Art. 5, No. 2).

Espérant que ce qui précède suffira au but qui se propose la Commission de Naturalisation, je saisis cete occasion pour, &c. &c.

(Signé) Roest van Limburg.

Vice-Admiral Harris,
&c. &c. &c.

PORTUGAL.

No. 38.

My Lord, Lisbon, August 27, 1868.

On the receipt of your Lordship's circular despatch of the 11th instant, I addressed a note to the Minister of Foreign Affairs, requesting his Excellency to inform me as to the actual state of the Portuguese law, with regard to the nationality of children born of aliens within the Portuguese dominions.

In his Excellency's note to me of the 22d instant, in reply to the above, and of which I have the honour to inclose a copy and translation, your Lordship will find a statement of the Portuguese law on the matter.

I have, &c.

The Lord Stanley, M.P. Ch. A. Murray.
&c. &c. &c.

(Translation.)

Foreign Department Lisbon, August 22, 1868.

Most Illustrious and Excellent Sir,

I had the honour to receive the note which your Excellency was pleased to address to me on the 19th instant, requesting, in the name of your Government and for the information of the Commission on Naturalization, to be made acquainted with the present state of the law, as regards the nationality of children born of aliens within the Portuguese dominions.

In reply it is my duty to state to your Excellency that the law declares that those born in this kingdom of an alien father are Portuguese citizens, provided the latter does not reside in this country in the service of his own nation, and unless the former should declare, when of age or emancipated, or through their parents or guardians if minors, that they do not wish to be Portuguese citizens (Civil Code, Title 11, Article 18, No. 2).

Those born in this kingdom when the mother alone is Portuguese, if illegitimate (No. 1).

The declaration required in No. 2 shall be made before the Municipality of the place where the declarer shall have resided (§ 1).

A minor on coming of age or when emancipated, may, by means of a new declaration, made before the Municipality of the place which he may have chosen for his domicile, recall the declaration which may already have been made during his minority, by his father or guardians, in accordance with No. 2 (§ 2).

I avail, &c.

(Signed) Carlos Bento da Silva.

Sir Charles A. Murray,
&c. &c. &c.

PRUSSIA.

No. 2.

My Lord, Berlin, September 5, 1868.

With reference to your Lordship's despatch to Lord Augustus Loftus, marked circular No. 173 of the 11th ultimo, instructing His Excellency to furnish your Lordship with a report with regard to the nationality of children born of alien parents within the Prussian dominions, I have the honour to inclose to your Lordship herewith, copy and translation of a note from the Prussian Foreign Office, in which it is stated

that no special legal provisions exist in Prussia with regard to this question. Monsieur von Kehler incloses, however, a copy of the law of the 31st of December 1842, with reference to the acquirement or loss of the rights of Prussian subjects, and remarks that, in accordance with the provisions of this law, the general principle observed with regard to nationality is that legitimate children follow the nationality of the father and illegitimate children that of the mother. No legal consequences, as regards nationality, are attached to the circumstance of a child being born in the Prussian dominions.

I have the honour to transmit to your Lordship a translation of the law inclosed in Monsieur von Hehler's note.

I have, &c.,
FRANK C. LASCELLES.

The Lord Stanley, M.P.
&c. &e. &c.

(Translation.)

Berlin, August 31, 1868.

ACCORDING to the contents of His Excellency Lord A. Loftus' letter of the 24th instant, the Government of Her Britannic Majesty are desirous of obtaining information relative to the legal provisions in force in Prussia with respect to the nationality of the children born of foreign parents within the Prussian dominions.

With reference to this subject, the undersigned has the honour to inform His Excellency Lord A. Loftus, that no special legal provisions exist in Prussia with regard to this question. In accordance with the regulations laid down in the annexed copy of the law of the 31st December 1842, respecting the acquirement or loss of the quality of a Prussian subject, the general principle is observed with reference to the decision of personal relations and also of nationality that legitimate children follow the nationality of the father, and illegitimate children that of the mother, unless an alteration is made in consequence of the proceedings of the children themselves. No special consequences with respect to nationality are attended to the fact of being born in Prussia.

The undersigned avails, &c.
(Signed) V. KEHLER.

His Excellency Lord A. Loftus,
&c. &c. &c.

Law respecting the acquisition and loss of the quality of Prussia by a Prussian subject, and his admission to foreign citizenship. December 31st, 1842.

We FREDERICK WILLIAM, &c., &c.,
Ordain, &c.

Article 1.

The rights of Prussian subjects are founded on

1. Descent (§ 2).
2. Legitimization (§ 3).
3. Marriage (§ 4) and
4. Permission (§§ 5, &c.).

Adoption does not alone produce this effect.

§ 2.

Every legitimate child of a Prussian subject is by birth a Prussian subject, even though born in a foreign country. Illegitimate children follow the *status* of the mother.

§ 3.

If the mother of an illegitimate child is a foreigner and the father a Prussian, the child may become a Prussian subject by means of legitimization drawn up in accordance with the Prussian laws.

§ 4.

A foreign woman becomes a Prussian subject on her marriage with a Prussian.

§ 5.

Permission to become a Prussian subject may be granted upon the issuing of a deed of naturalization which the police authorities are empowered to grant.

§ 6.

A permission to a foreigner to enter the service of the Prussian state takes the place of the deed of naturalization. An exception to this rule is made in cases of foreigners employed abroad as consuls or commercial agents.

§ 7.

The rights of Prussian subjects can only be granted to those foreigners who

(1.) Are capable of receiving them in accordance with the laws of their former country.
(2.) Have led an irreproachable life.
(3.) Have got a house or the means of subsistence in the place where they have settled.
(4.) Are in a position to sustain themselves and their families in that place.
(5.) If they are subjects of a German state, have fulfilled their military obligations to their original country, or have been released from so doing.

§ 8.

The police authorities are bound before granting naturalization rights to inform the municipality of the district where the applicant purposes to reside, in accordance with the requirements of § 7, No. 2, 3. 4, and to listen to their statement and to regard their objections.

§ 9.

The grant of naturalization confers all the rights and duties of a Prussian at the date of the grant.

§ 10.

The permission to become a Prussian subject will be extended, unless a special exception is made, to the wife and children under age. If one of these should not have complied with the requirements of § 7, No. 2, respecting a blameless life and should therefore not be admitted, the whole family must be refused.

§ 11.

Nothing in this law shall affect the rights and duties of subjects resulting from the possession of landed property, and especially from the possession of manors and from the oath of homage.

§ 12.

No parish may receive a foreigner as a member until he has obtained the rights of a Prussian subject.

§ 13.

Residence within the Prussian state shall not for the future constitute a claim for becoming a Prussian subject.

§ 14.

Foreigners who wish to reside in Prussia, and do not wish to be regarded as mere travellers, may be called upon to prove the continuance of their former allegiance by means of a certificate (Heimathschein).

§ 15. The quality of a Prussian subject is lost:
1. By discharge upon the subject's request.
2. By sentence of the competent authority.
3. By living ten years in a foreign country.
4. By the marriage of a female Prussian subject with a foreigner.

§ 16. The discharge has to be asked for from the police authority of the province in which the subject's domicile is situated, and is effected by a document made out by the same authority.

§ 17. The discharge cannot be granted:
(1.) To male subjects who are between seventeen and twenty years of age, until they have got a certificate of the military commission of recruitment of their district, proving that their application for discharge is not made merely to avoid the fulfilling of their military duty in the standing army.
(2.) To actual soldiers, belonging either to the standing army or to the reserve; to officers of the militia and to public functionaries, before their being discharged from service.
(3.) To subjects having formerly served as officers in the standing army or the militia, or having been appointed military employés, with the rank of officers, or civil

functionaries, before they have got the consent of the former chief.

(4.) To the persons belonging to the militia, not being officers, after their having been convoked for actual service.

§ 18. To subjects wishing to emigrate into a State of the German Confederacy, the discharge may be refused if they cannot prove that the said State is willing to receive them.—(See Act of the German Confederation, Art. 18, No. 2, lit. A.)

§ 19. For other reasons than those specified in §§ 17 and 18, the discharge cannot be refuse in time of peace. For the time of war, special regulations will be made.

§ 20. The document of discharge effects, at the moment of its delivery, the loss of the quality as Prussian subject.

§ 21. If there is no special exception, the discharge comprehends also the wife and the minor children that are still under their father's authority.

§ 22. Subjects living in a foreign country may lose their quality as Prussians by a declaration of the police authority of Prussia, if they do not obey, within the time fixed to them, the express summons for returning to their country.

§ 23. Subjects who either—

(1.) Leave our States without permission, and do not return within ten years, or—

(2.) Leave our States with permission, but do not return within ten years after the expiration of the term granted by the said permission, lose their quality as Prussian subjects.

§ 24. Entering into public service in a foreign State.

The entering of a subject into public service in a foreign State is allowed only after his discharge (see § 20) has been granted to him. Anybody who has obtained it, is permitted to do so without restriction.

§ 25. A subject who—

(1.) Either takes public service in a foreign State, with our immediate permission.

(2.) Or is it appointed in our States by a foreign power, in an office established with our permission, as, for instance, that of consul, commercial agent, &c., remaining in his quality as a Prussian.

§ 26. General disposition.

Subjects who emigrate without having obtained their discharge, or violate, by their entering into public service in a foreign State, the disposition of § 24, are to be punished according to the laws existing in that respect.

Given under our hand and seal, Berlin, this 31st of December 1842.

FREDERICK WILLIAM.

RUSSIA.

No. 181.

MY LORD, St. Petersburgh, August 25, 1868.

IN obedience to the Instructions contained in your Lordship's despatch marked Circular of the 11th instant, I have the honour to report that the general law of Russia in regard to aliens is, that all foreign subjects who have not taken an oath of allegiance to Russia in due form, are held to be aliens. The law of the $\frac{1}{22}$ February 1864, of which an abstract was enclosed in my despatch of the 30th June last, stipulates:

5. "The allegiance (to Russia) when sworn to (by the subject of a Foreign Power,) is merely personal, and does not affect children, whether of age or minors, previously born. Those born after the adoption of Russian nationality are acknowledged as Russians.

12. "Children of Foreigners not Russian subjects, born and educated in Russia, or if born abroad, yet who have completed their education in a Russian upper or middle school, will be admitted to Russian allegiance, should they desire to be so, a year after they shall have obtained their majority; and lastly,

13. "The children of Foreigners wishing to become Russian subjects will be admitted to Russian allegiance on the same terms as their parents."

I have, &c.

ANDREW BUCHANAN.

The Lord Stanley, M.P.
&c. &c. &c.

SAXONY.

MY LORD, Dresden, November 27, 1868.

WITH reference to your Lordship's circular despatch of the 11th August, directing me to report on the state of Saxon law with regard to nationality of children born of alien parents within the Saxon dominions, I have the honour to enclose in translation the information furnished me by the Saxon Government on the subject.

I have, &c.

J. HUME BURNLEY.

IN reply to the note of H. B. M's. chargé d'affaires of the 19th inst., the undersigned has the honour to state, with reference to paragraph 2 of the law of the Kingdom of Saxony of the 2nd of July 1852, relative to acquisition and loss of citizenship, copy of which is herewith annexed, that children of aliens born in Saxony do not by the mere accident of birth acquire Saxon nationality, inasmuch as the right of Saxon citizenship *by birth* is obtained only on the supposition that either the father or the mother (whether lawfully married or not) were at the time of such birth, either here or abroad, Saxon subjects.

The undersigned, &c.

Dresden, Nov. 21 1868. FRIESEN.

Paragraph 2 of the law relative to acquisition and loss of Saxon citizenship of 2nd July 1852.

By birth all those are entitled to Saxon citizenship whose father or if illegitimate whose mother, at the time of their birth, whether at home or abroad, were Saxon subjects.

SPAIN.

MY LORD, Madrid, October 8, 1868.

WITH reference to my despatch of the 18th of August last, enclosing copy of a note which I addressed to the Spanish Minister for Foreign Affairs, requesting His Excellency to furnish me with information respecting the nationality of children born of alien parents in Spanish dominions, I have now the honour to forward to your Lordship a translation of the Marquis Roneali's reply to my communication.

I further beg to enclose copies of the Spanish constitution and of the Royal Decree of November 17, 1852, in which the passages having particular reference to the subject in question will be found marked.

I have, &c.

JOHN F. CRAMPTON.

The Lord Stanley, M.P.
&c. &c. &c.

SIR, Lequeitio, September 15, 1868.

THE minister of the interior informs me, under date of 4th inst., that the constitution at present in force in the Spanish Monarchy and the Royal Decree of 17th November 1852, from the Legislation which actually governs the nationality of children born of foreign parents in Spanish dominions.

I have the honour to inform you of this in reply to the note from your legation dated the 17th August last, and avail, &c.

(Signed) MARQUIS RONCALI.

H. B. M. Minister Plenipotentiary.

Extract from the Constitution of the Spanish Monarchy, May 23, 1845.

Titulo 1. De los Españoles. Articulo, 1°.

"The following are Spanish subjects:—

"1. All persons born within the dominions of Spain.

"The children of a Spanish father or mother, even though born without the Spanish dominions."

Extracts from the Royal Decree of the 17th of November 1852.

"Capitulo 1. De los estranjeros y su clasificacion en España.

"Art. 1. The following are to be deemed aliens.

"1. All persons born of alien fathers without the Spanish dominions.

"2. The children of an alien father and Spanish mother, "born without the said dominions, unless they have "reclaimed Spanish nationality.

"3. Those born within Spanish territory of alien fathers "or of an alien father and Spanish mother, unless they "have made a similar reclamation.

"4. Those born without the Spanish dominions of "fathers who have lost their Spanish nationality.

"5. Spanish women married to alien husbands.

* * * * * * * * *

"Capitulo 3. Art. 24. Aliens domiciled or temporarily "resident within the Spanish dominions and their children "are exempt from military service unless they have "reclaimed Spanish nationality.

"But this does not apply to the sons whose parents "have been born within Spanish territory, even though "they may have preserved their alien nationality."

SWEDEN.

No. 9.

My Lord, Stockholm, September 17, 1868.

With reference to your Lordship's despatch, marked circular of the 11th of August, as to the Swedish law on the subject of the children of alien parents born in Swedish dominions, I have the honour to enclose herewith copy of a note which I have received from the Swedish Minister for Foreign Affairs, wherein he informs me that there is no provision in the Swedish Fundamental Law or in the Civil Code on this subject, neither does there exist any special stipulation as to the nationality of children born in Swedish dominions of alien parents.

It is generally received, however, as expressed in Count Wachtmeister's note inclosed, that the nationality of the children is noways affected by the place of their birth, but by the nationality of their parents, and notably of the father.

I have, &c.
J. Pakenham.

The Lord Stanley, M.P.
&c. &c. &c.

Monsieur, Stockholm, 12 Septembre 1868.

En réponse à Votre note du 18 du mois passé, j'ai l'honneur de vous communiquer qu'il n'y a pas dans les lois fondamentales, ni dans le Code Civil, ni même dans une ordonnance spéciale une stipulation relative à la nationalité d'un enfant né en Suède de parents étrangers. Cependant on a toujours été d'avis que la nationalité ne dépend aucunement du lieu de naissance, mais bien de la nationalité des parents, notamment de celle du père. Ainsi les enfants de sujets étrangers ne jouissent pas, par le fait qu'ils sont nés en Suède, de droits meilleurs ou autres que ceux accordés à tout sujet étranger.

Veuillez agréer, Monsieur, &c.
(Signed) Wachtmeister.

Monsieur Pakenham,
&c. &c. &c.

SWITZERLAND.

No. 98.

My Lord, Berne, September 6, 1868.

In your despatch, marked circular, of the 11th ultimo, I am instructed to furnish your Lordship with a report, for the information of the Naturalization Commission, on the state of the Swiss law with regard to the nationality of children born of alien parents in Switzerland.

Finding it difficult, without the assistance of the Federal Government, to draw up a report on this subject, the laws concerning which appear to vary in different cantons, I addressed a note to the President requesting him to obtain for me, from the various Cantonal Governments, replies to the following questions, which I thought calculated to procure the information required by the Naturalization Commission.

1st. What is considered to constitute a *Swiss citizen* according to the laws of the various Cantons?

2nd. In what manner, if in any, can such citizenship be forfeited?

3rd. Are the children of alien parents born in the Canton regarded by the law as Swiss citizens?

a. De facto by the mere incident of their birth on Swiss territory?

b. If not, how long must the parents have resided in Switzerland previous to the birth of the children, or what additional circumstance, beyond the fact of their birth on Swiss territory, are required to constitute the children of Swiss citizens?

c. Are the children expected to *elect* Swiss citizenship by some *formal act* on their coming of age? and what is held to constitute a presumptive election of Swiss citizenship on their part?

In reply I have received a communication from the President, copy of which I have the honour herewith to enclose, together with the printed work therein referred to, drawn up by the Federal Chancery on the Cantonal Regulations for acquiring the right of citizenship.

I have, &c.
J. Savile Lumley.

The Lord Stanley, M.P.
&c. &c. &c.

Copy.

Berne, 31 Aout 1868.

Dans la Note que Monsieur le Ministre de Sa Majesté, Britannique a adressée le 19 courant au Conseil Fédéral, Son Excellence a manifesté le désir de recevoir divers renseignemens sur l'état de la législation Suisse *relative à la nationalité d'enfans de parents étrangers qui naissent sur le territoire Suisse*, renseignemens résumés sous la forme des questions suivantes:

1° Qu'est-ce qui est nécessaire pour que quelqu'un soit considéré comme citoyen Suisse d'après les lois des différents Cantons?

Pour devenir citoyen Suisse il est nécessaire que quelqu'un acquièrt le droit de bourgeoisie d'un Canton et d'une Commune Il n'existe pas de droit de bourgeoisie Suisse particulier. Le droit de bourgeoisie communal existe en première ligne et s'acquiert par descendance, donation, ou paiement d'une somme d'achat determinée dont le chiffre varie suivant l'état des biens communaux et chaque fois suivant le point de vue de la législation cantonale.

Apres l'acquisition d'un droit de bourgeoisie communal, la naturalisation a lieu dans le Canton respectif soit par le Governement ou par l'autorité législative, naturalisation pour laquelle il faut de nouveau payer une somme d'achat particulière. Sans la naturalisation l'incorporation dans une commune n'a aucun effet. En ce qui concerne la naturalisation d'étrangers, le droit fédéral ne contient que la seule prescription de l'Article 43 de la constitution fédérale à teneur de laquelle les étrangers ne peuvent être naturalisés dans un Canton qu'autant qu'ils seront affranchis de tout lien envers l'état auquel ils appartiennent. Le détail des législations cantonales report d'un recueil de dispositions y relatives de chaque Canton publié en 1862 par la Chancellerie fédérale, dont ci-joint un exemplaire. Si, depuis-lors, des changemens ont peut être été apportés à ces dispositions, ils concernent en tout cas plutôt la forme que le fond.

2. De quelle manière le droit de bourgeoisie, si en général il peut se perdre, se perd-t-il?

Le droit de bourgeoisie Suisse ne cesse que par la mort, ou par la rénonciation volontaire de celui qui le possède à son droit de cité cantonal et communal et par la démission ou le congé que lui donne l'autorité cantonale compétente. Mais cet affranchissement des liens qui l'unissent envers l'état n'est accordé que lorsque la preuve existe en bonne et due forme de l'acquisition d'un droit de bourgeoisie ou de cité étranger. Les enfans légitimes d'un Suisse absent acquierent toujours le droit de bourgeoisie de leur père et les enfans illégitimes celui de leur mère, attendu que pour cela aucune formalité autre que la preuve de la descendance n'est nécessaire. La nationalité Suisse ne se perd pas par une longue absence, &c. comme en général suivant la prescription du même Article 43 de la Constitution fédérale, aucun canton ne peut priver un de ses ressortissants du droit d'origine ou de cité.

3. Les enfants qui naissent dans un canton de parents étrangers sont ils, d'après la législation, considérés comme citoyens Suisses et cela:

a. De facto, par le seul fait de la naissance de ces enfants sur territoire Suisse.

Dans le cas de la négative :

b. Combien de temps les parents doivent-ils avoir habité la Suisse avant la naissance de l'enfant, ou quelles autres circonstances (abstraction faite de la naissance de cet enfant sur territoire Suisse) sont nécessaires pour qualifier les enfants commes citoyens Suisses ?

c. Doit-on s'attendre de la part des enfants qu'ils *opteront* pour le droit de bourgeoisie Suisse par un *acte formel*, lors de leur majorité?

Qu'est-ce qui motive la supposition d'une option présomptive de leur part du droit de bourgeoisie ?

En repondant à cette question et à ses trois subdivisions, le conseil fédéral a l'honneur de faire observer que les principes qui viennent d'être développés ne souffrent aucune espèce d'exceptions ; ce n'est notamment non plus le cas en faveur d'étrangers qui sont nés en Suisse quand même eux et leurs parents auraient été très long temps domiciliés en Suisse. Sous ce rapport la Suisse maintient purement et simplement le même principe que celui qu'elle reconnait pour les descendants de ces propres ressortissants, les enfants légitimes suivent la condition de leur père et les enfans illégitimes la condition de leur mère.

Désirant que ces renseignemens puissent être de quelque utilité à la Commission d'incorporation pour laquelle ils ont été démandés, le Conseil Fédéral profite encore de cette occasion pour renouveler à S.E. Mr. Savile Lumley les assurances de sa haute considération.

An nom du Conseil Fédéral
Le Président de la Confédération,
(Signed) DUBS.

Le Chancelier de la Confédération,
(Signed) SCHIESS.

UNITED STATES.

The common law of the United States is the same as in England, and regards every child born within the dominions and allegiance of the United States as a citizen of the United States.

The Naturalization Act of 1802 (United States' Statutes at Large, Vol. 2. p. 153.) provided :

" 3. The children of persons duly naturalized under any of the laws of the United States, or who, previous to the passing of any law on that subject by the Government of the United States may have become citizens of any one of the said States, under the laws thereof, being under the age of 21 years, at the time of their parents being so naturalized or admitted to the rights of citizenship shall, if dwelling in the United States, be considered as citizens of the United States, and the children of persons who now are or have been citizens of the United States shal., though born out of the limits and jurisdiction of the United States be considered as citizens of the United States : *Provided*, that the right of citizenship shall not descend to persons whose fathers have never resided within the United States."

This section of the Act of 1802 was confirmed by an Act of the 10th of February 1855 (United States' Statutes at Large, vol. 10, p. 604).

" 1. Persons heretofore born or hereafter to be born out of the limits and jurisdiction of the United States, whose fathers were or shall be at the time of their birth citizens of the United States, shall be deemed and considered and are hereby declared to be citizens of the United States : *Provided however*, That the rights of citizenship shall not descend to persons whose fathers never resided in the United States."

WURTEMBERG.

(See Baden.)

APPENDIX No. VI.

NATURALIZATION TREATIES BETWEEN THE UNITED STATES AND OTHER POWERS.

NORTH GERMAN CONFEDERATION.

TREATY between the United States and Prussia, February 22, 1868.

His Majesty the King of Prussia, in the name of the North German Confederation, and the President of the United States of America, led by the wish to regulate the citizenship of those persons who emigrate from the North German Confederation to the United States of America, and from the United States of America to the territory of the North German Confederation, have resolved to treat on this subject, and have for that purpose appointed Plenipotentiaries to conclude a Convention; that is to say,

His Majesty the King of Prussia, Bernard König, Privy Councillor of Legation; and

The President of the United States of America, George Bancroft, &c. :

Who have agreed to and signed the following Articles :—

ARTICLE I.

Citizens of the North German Confederation who have become naturalized citizens of the United States of America, and shall have resided uninterruptedly within the United States five years, shall be held by the North German Confederation to be American citizens, and shall be treated as such.

Reciprocally : citizens of the United States of America who become naturalized citizens of the North German Confederation, and shall have resided uninterruptedly within North Germany five years, shall be held by the United States to be North German citizens, and shall be treated as such.

The declaration of an intention to become a citizen of the one or the other country has not for either party the effect of naturalization.

ARTICLE II.

A naturalized citizen of the one party, on return to the territory of the other party, remains liable to trial and punishment for an action punishable by the laws of his original country and committed before his emigration; saving always the limitation established by the laws of his original country.

ARTICLE III.

The Convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between the United States on the one part, and Prussia and other States of Germany on the other part, the 16th day of June 1852, is hereby extended to all the States of the North German Confederation.

ARTICLE IV.

If a German naturalized in America renews his residence in North Germany without the intent to return to America, he shall be held to have renounced his naturalization in the United States.

Reciprocally : if an American naturalized in North Germany renews his residence in the United States without the intent to return to North Germany, he shall be held to have renounced his naturalization in North Germany.

The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country.

ARTICLE V.

The present Convention shall go into effect immediately on the exchange of ratifications, and shall continue in force for 10 years. If neither party shall have given to the other six months' previous notice of its intention then to terminate the same, it shall further remain in force until the end of 12 months after either of the High Contracting Parties shall have given notice to the other of such intention.

ARTICLE VI.

The present Convention shall be ratified, &c., and the ratifications shall be exchanged at Berlin within six months from the date hereof.

In faith whereof the Plenipotentiaries have signed and sealed this Convention.

Berlin, the 22nd of February 1868.

(Signed) GEORGE BANCROFT.

My Lord, Washington, May 8, 1868.

I have the honour to transmit herewith for your Lordship's information, copy of a despatch which has been addressed by Mr. Bancroft, United States Minister at Berlin, to Mr. Seward, relative to the interpretation given by Count Bismarck to some of the stipulations of the treaty of naturalization between the United States and the North German Confederation of the 22nd of February last.

This despatch has been lately laid before Congress in a message from the President.

I have, &c.
Edwd. Thornton.

The Lord Stanley, M.P.,
&c. &c. &c.

The Treaty between the United States and the North German Confederation.

The President, on Monday, sent a message to Congress, enclosing the following documents :—

Department of State, Washington,
To the President, April 27, 1868.

The despatch of Mr. Bancroft, a copy of which is herewith submitted, relieves the treaty recently negotiated between the United States and North Germany of some injurious misapprehensions which have hitherto existed, and I respectfully submit the expediency of communicating the despatch to Congress.

I am, &c.
W. H Seward.

Sir, American Legation, Berlin, April 6, 1868.

That no doubt might exist of the correctness of my interpretation of our treaty with North Germany, as communicated to you in my despatch of February 22, I left a copy of that despatch at the Foreign Office, and no objection whatever was made to its contents. The report made upon the treaty by the committee of the North German Council was not well digested, and was not wholly free from ambiguity.

Yesterday the treaty came up for acceptance in the Imperial Diet.

Mr. Konig, in the first instance, and then Count Bismarck took the occasion publicly and in the clearest and most emphatic manner to confirm my interpretation of it in every particular. Ex-Consul Meier, the member from Bremen, to whom the President of the Diet had referred the treaty, one of the first merchants in Europe, and well known in America from his long residence among us, reported the treaty to the Diet with the full conviction of its merits He declared his peculiar satisfaction that the natural right of emigration and change of nationality was for the first time made a part of the recognized international law by North Germany and the United States. Dr. Schleider, so well known to you from his long residence as Minister at Washington, not omitting to make some cavils at what he called "small defects," spoke substantially and heartily for the treaty, and for the most liberal interpretation of its several articles. Mr. Konig, the plenipotentiary who signed the treaty on the part of North Germany, in explanation of the first article, said that a five years' continuous residence in America, and no more, was all that the treaty required in regard to residence. The Chancellor of the Confederation, Count Bismarck, spoke on the same point, declaring that the words of the article were too plain to be misunderstood; that the period of five years was to date from the moment when the emigrant should cross the American line, and that the continuity of residence which was required was to be interpreted, "*Nicht in koerperlichem sondern, in juristischem sinne,*" "not in a corporal but in a legal sense."

The interpretation of the second article of the treaty was equally explicit. Dr. Schleider, of the Committee of the Diet, reported that as inasmuch as the liability of the naturalized citizen on his return to his original country extended only to breaches of law committed before emigration, it followed that any breach of the law which might be committed by itself was excluded from the class of punishable actions. This view was confirmed by Mr. Konig, who pointed out that as the emigrant remained liable only for acts committed before emigration, emigration itself, and the consequent withdrawal from military duty, could not be included among such acts. "So then," said Dr. Lowe, one of the ablest members of the Diet, and well known as a long and esteemed resident of New York, "the hateful military "business is now put aside, and the emigrant on his return "is not liable to arrest for the violation of the military duty "from which he had withdrawn by emigration." While he fully accepted the explanation of Mr. Konig, Dr. Lowe still intimated a wish that it might be confirmed by Count Bismarck himself.

The Chancellor immediately arose and replied as follows: "The gentleman who has last spoken, fears that a person who "has lived five years in America, and been naturalized there, "may yet on his return here be held to military duty. This "impression I can designate as perfectly and absolutely un-"founded. The literal observation of the treaty includes in "itself that those whom we are bound to acknowledge as "American citizens cannot be held to military duty in North "Germany. That is the main purpose of the treaty. Who-"soever emigrates, *bonâ fide*, with the purpose of residing "permanently in America, shall meet no obstacle on our part "to his becoming an American citizen, and his *bonâ fides* will "be assumed when he shall have passed five years in that "country, and, renouncing his North German nationality, "shall have become an American citizen. I believe, therefore, "that no room has been left open for the anxiety that has "been expressed, and I lay great stress upon here placing "the subject in its true light."

Dr. Lowe questioned the Chancellor on this point once more, saying, "To my joy, I think I may understand the "Chancellor to say that no prosecution for unauthorized "emigration can take place, even if the emigrant shall have "ceased to be an American?" Count Bismarck replied, "I "herewith confirm the declarationwhich the gentleman de-"sires;" and added, jocosely in form, seriously in substance, "and I might almost assert that we will treat the five years' "absence in America, when connected with naturalization, "as a fulfilment of the military duty in the North German "Confederacy."

The fourth article of the treaty came also under consideration. Mr. Lasker, one of the ablest members of the Diet, inquired if the German naturalized in America, and returning to Germany, would, after a two years' residence in Germany, be held liable to military duty. The text of the treaty, he said, gave no colour to such an interpretation, but the report of the Council of the Confederation was ambiguous, and therefore he called upon the Councillor for a clearer explanation. In the beginning of the debate, ex-Consul Meier has most clearly explained that the American law required from the person who becomes naturalized a total renunciation of his allegiance to any other power. Holding fast to this fact, Count Bismarck replied, that the German American citizen, on resuming his relations as a citizen of North Germany, would, under the treaty, stand in the light of a foreigner emigrating into North Germany; that he could not be held to the discharge of any old military duty, but only to such "new" military duty as would attach to every foreigner emigrating into North Germany and becoming naturalized there.

The President now put the question on the acceptance or the treaty, and the whole Diet, with the exception of two of three Poles—who, as it seemed to me, only declined voting—rose to their feet with alacrity. All the proceedings were marked by the disposition to cherish the most friendly relations with the United States. I send you herewith the debate as it appeared concisely in the *North German Gazette* of last evening, and in the *National Gazette* of this morning, on the fourth article.

I will add a few words. The American law exacts from the citizen who becomes nationalized a perpetual renunciation by oath of his former nationality. Hitherto the Prussian Government has made no formal recognition of our naturalization laws; but now that it becomes bound by treaty to respect them, it could not have restored the returning American German to his German citizenship had not the consent of the United States to his release from his obligation to them been given, as it is given by the fourth article of this treaty.

I am, &c.
George Bancroft.

William H. Seward, Esq.,
Secretary of State, &c. &c.

BAVARIA.

My Lord, Berlin, June 6, 1868.

Mr. Bancroft, the American Minister at this Court, has, by direction of Mr. Seward, placed in my hands for transmission to her Majesty's Government the annexed copy

of the Treaty of Naturalization and supplementary protocol signed between the United States of America and Bavaria at Munich on the 26th ultimo.

This treaty is the same "mutatis mutandis," as that lately concluded between the United States of America, and the North German confederation. The supplementary protocol is intended to explain portions of the treaty which might be considered of a vague and doubtful interpretation, more especially referring to, and defining the position of the naturalized Bavarian, or naturalized American on their return to their original countries.

Mr. Bancroft has officially forwarded to Count Bismarck a copy of these documents, thereby placing the protocol on record, and establishing it in default of any disavowal on the part of the North German Confederation as the rightful interpretation of the treaty.

I have, &c.

(Signed) AUGUSTUS LOFTUS.

The Lord Stanley, M.P.
&c. &c. &c.

His Majesty the King of Bavaria, and the President of the United States of America, led by the wish to regulate the citizenship of those persons who emigrate from Bavaria to the United States of America, and from the United States of America to the territory of the kingdom of Bavaria have resolved to treat on the subject, and have for that purpose appointed plenipotentiaries to conclude a convention, that is to say—

His Majesty the King of Bavaria.
Dr. Otto Baron von Völderndorff, Councillor of the Ministry, and
The President of the United States of America.
George Bancroft, Envoy Extraordinary and Minister Plenipotentiary,—who have agreed to and signed the following articles:—

ARTICLE 1.

Citizens of Bavaria who have become, or shall become naturalized citizens of the United States of America, and shall have resided uninterruptedly within the United States five years shall be held by Bavaria to be American citizens and shall be treated as such.

Reciprocally, citizens of the United States of America who have become or shall become naturalized citizens of Bavaria, and shall have resided uninterruptedly within Bavaria five years shall be held by the United States to be Bavarian citizens, and shall be treated as such.

The declaration of an intention to become a citizen of the one or the other country has not for either party the effect of naturalization.

ARTICLE 2.

A naturalized citizen of the one party on return to the territory of the other party, remains liable to trial and punishment for an act punishable by the laws of his original country, and committed before his emigration, saving always the limitation established by the laws of his original country, or any other remission of liability to punishment.

ARTICLE 3.

The convention for the mutual delivery of criminals, fugitives from justice, in certain cases, concluded between the United States on the one part, and Bavaria on the other part, the 12th day of September 1853, remains in force without change.

ARTICLE 4.

If a Bavarian naturalized in America renews his residence in Bavaria without the intent to return to America he shall be held to have renounced his naturalization in the United States.

Reciprocally: If an American naturalized in Bavaria renews his residence in the United States without the intent to return to Bavaria, he shall be held to have renounced his naturalization in Bavaria.

The intent not to return may be held to exist when the person naturalized in the one country resides more than two years in the other country.

ARTICLE 5.

The present convention shall go into effect immediately on the exchange of ratifications, and shall continue in force for ten years. If neither party shall have given to the other six months' previous notice of its intention then to terminate the same, it shall further remain in force until the end of twelve months after either of the high contracting parties shall have given notice to the other of such intention.

ARTICLE 6.

The present convention shall be ratified by his Majesty the King of Bavaria and by the President, by and with the advice and consent of the Senate of the United States, and the ratifications shall be exchanged at Munich within twelve months from the date hereof.

In faith whereof the Plenipotentiaries have signed and sealed this convention.

Munich, the 26th of May 1868.

(Signed) GEORGE BANCROFT. (L.S.)

Dr. OTTO FREIHERR VON VÖLDERNDORFF (L.S.)

PROTOCOL.

Done at Munich the 26th of May 1868.

The undersigned met to-day to sign the Treaty agreed upon, in conformity with their respective full powers, relating to the citizenship of those persons who emigrate from Bavaria to the United States of America, and from the United States of America to Bavaria, on which occasion the following observations, more exactly defining and explaining the contents of this Treaty, were entered in the following Protocols:

I.—RELATING TO THE FIRST ARTICLE OF THE TREATY

1. Inasmuch as the copulative "and" is made use of, it follows, of course, that not the naturalization alone, but an additional five years' uninterrupted residence is acquired before a person can be regarded as coming within the Treaty, but it is by no means requisite that five years' residence should take place after the naturalization.

It is hereby further understood that if a Bavarian has been discharged from his Bavarian indiginate, or on the other side, if an American has been discharged from his American citizenship, in the manner legally prescribed by the Government of his original country, and then acquires naturalization in the other country in a rightful and perfectly valid manner, then an additional five years' residence shall no longer be required, but a person so naturalized shall, from the moment of his naturalization, be held and treated as a Bavarian and respectively as an American citizen.

2. The words "resided uninterruptedly," are obviously to be understood, not of a continual bodily presence, but in the legal sense, and therefore a transient absence, a journey, or the like, by no means interrupts the period contemplated by the first article.

II.—RELATING TO THE SECOND ARTICLE OF THE TREATY.

It is expressly agreed, that a person who under the first article is to be held as an adopted citizen of the other state, on his return to his original country cannot be made punishable for the act of emigration itself, not even though at a later day he should have lost his adopted citizenship.

III.—RELATING TO ARTICLE 4 OF THE TREATY.

It is agreed on both sides that the regulated powers granted to the two governments respectively, by their laws for protection against resident aliens, whose residence endangers peace and order in the land, are not affected by the treaty.

In particular the regulation contained in the second clause of the Tenth Article of the Bavarian military law, of the 30th January 1868, according to which, Bavarians emigrating from Bavaria before the fulfilment of their military duty cannot be admitted to a permanent residence in the land till they shall have become 32 years old, is not affected by the treaty. But yet it is established and agreed, that by the expression "permanent residence" used in the said article, the above described emigrants are not forbidden to undertake a journey to Bavaria for a less period of time, and for definite purposes; and the royal Bavarian government, moreover, cheerfully declares itself ready in all cases in which the emigration has plainly taken place in good faith, to allow a mild rule in practice to be adopted.

2. It is hereby agreed that when a Bavarian naturalized in America, and reciprocally an American naturalized in Bavaria took up his abode once more in his original country with the intention of return to the country of his adoption, he does by no means thereby recover his former citizenship; on the contrary, in so far as it relates to Bavaria, it depends on his Majesty the King whether he will or will not in that event grant the Bavarian citizenship anew.

The Article Fourth shall accordingly have only the meaning that the adopted country of the emigrant cannot prevent him from acquiring once more his former citizenship, but not that the State to which the emigrant originally belonged is bound to restore him at once to his original relation.

On the contrary, the citizen naturalized abroad must first apply to be received back into his original country in the manner prescribed by its laws and regulations, and must acquire citizenship anew exactly like any other alien.

But yet it is left to his own free choice whether he will adopt that course or will preserve the citizenship of the country of his adoption.

The two plenipotentiaries give each other mutually the assurance that the respective Governments in ratifying this treaty will also regard as approved, and will maintain the agreements and explanations contained in the present protocols without any further formal ratification of the same.

(Signed) G. Bancroft. (L.S.)
(Signed) Dr. Otto von Völdendorff. (L.S.)

Note.—Ratifications were exchanged on the 18th of September. Similar conventions have been negotiated with Baden, Hesse, and Wurtemberg.

MEXICO.

The President of the United States of America and the President of the republic of Mexico, being desirous of regulating the citizenship of persons who emigrate from Mexico to the United States of America, and from the United States of America to the republic of Mexico, have decided to treat on this subject, and with this object have named as plenipotentiaries, the President of the United States, William H. Seward, Secretary of State; and the President of Mexico, Matias Romero, accredited as envoy extraordinary and minister plenipotentiary of the republic of Mexico to the government of the United States; who, after having communicated to each other their respective full powers, found in good and due form, have agreed upon the following articles:

Article I.

Those citizens of the United States who have been made citizens of the Mexican republic by naturalization, and have resided without interruption in Mexican territory five years, shall be held by the United States as citizens of the Mexican republic and shall be treated as such. Reciprocally, citizens of the Mexican republic who have become citizens of the United States, and who have resided uninterruptedly in the territory of the United States for five years, shall be held by the republic of Mexico as citizens of the United States, and shall be treated as such. The declaration of an intention to become a citizen of the one or the other country has not for either party the effect of naturalization. This article shall apply as well to those already naturalized in either of the countries contracting as to those hereafter naturalized.

Article II.

Naturalized citizens of either of the contracting parties, on return to the territory of the other, remain liable to trial and punishment for an action punishable by the laws of his original country, and committed before his emigration; saving always the limitations established by his original country.

Article III.

The convention for the surrender in certain cases of criminals, fugitives from justice, concluded between the United States of America of the one part and the Mexican republic on the other part, on the eleventh day of December one thousand eight hundred and sixty-one, shall remain in full force without any alteration.

Article IV.

If a citizen of the United States naturalized in Mexico renews his residence in the United States without the intent to return to Mexico, he shall be held to have renounced his naturalization in Mexico. Reciprocally, if a Mexican naturalized in the United States renews his residence in Mexico without the intent to return to the United States, he shall be held to have renounced his naturalization in the United States.

The intent not to return may be held to exist when the person naturalized in the one country resides in the other country more than two years.

Article V.

The present convention shall go into effect immediately on the exchange of ratifications, and it shall remain in full force for ten years. If neither of the contracting parties shall give notice to the other six months previously of its intention to terminate the same, it shall further remain in force until twelve months after either of the contracting parties shall have given notice to the other of such intention.

Article VI.

The present convention shall be ratified by the President of the United States by and with the advice and consent of the Senate thereof, and by the President of the Mexican republic with the approval of the Congress of that republic, and the ratifications shall be exchanged in Washington within nine months from the date hereof.

In faith whereof, the plenipotentiaries have signed and sealed this convention at the city of Washington this tenth day of July in the year of our Lord one thousand eight hundred and sixty-eight.

William H. Seward.
M. Romero.

APPENDIX No. VII.

STATISTICS. REGISTRATION OF THE BIRTHS, DEATHS, AND MARRIAGES OF BRITISH SUBJECTS IN FOREIGN COUNTRIES.

Statistics.—1. British Subjects in Foreign Countries.

(Extracted from the Census of England and Wales, 1861, Vol. III., pp. 4, 5.)

1. *Persons absent from the United Kingdom.*

The people of these islands are more moveable than other nations, and large numbers of them are always abroad, sometimes on distant voyages, sometimes on the Alps, sometimes in the deserts of Africa, or the strangest places; but generally in ships at sea, in the great commercial entrepôt, in the capitals of Europe, in our colonies, or in the States of America.

The measures which were taken to procure the returns of the army and navy, and merchant seamen abroad, either on sea or land, have been already described, and they were successful. The numbers exceeded a quarter of a million (250,356), of whom 126,273 belonged by birth to England and Wales. The army and navy of a country are an integral part of its population they should, therefore, be counted among the numbers. But the population of travellers and of temporary settlers in other States are less accurately defined; their numbers are not easily ascertained, and they are represented to some extent by exiles and foreign visitors in England. They are, therefore, excluded from our tables. The number of the British subjects, including the Scotch and the Irish, abroad, of which we have returns, was 67,969; this number does not include the English in America, in India, or in the colonies, neither does it include any of the English in France, except those who were domiciled. Upon the other hand, some of the people born at the Mediterranean stations were inscribed in the Consular registers as British subjects; but as a general rule the Maltese and Ionians are excluded from the list.

France is the country to which the English most resort in Europe, and 25,844 are domiciled there; 4,092 are returned in Belgium, 827 in Holland, 1,124 in Switzerland, 7,365 in Germany, 5,467 in Italy, including Rome, 2,072 in Portugal, and 3,879 in Spain, 525 in Greece, 2,360 in Turkey, and 931 in Egypt; in Denmark 372, in Norway 242, and in Sweden 411; in Russia 3,749. Passing to Asia, 30 of Her Majesty's subjects were returned in Persia, 1,072 in China, 81 in Japan, and 24 in Siam. The English population in India according to the returns of the Indian Government (apparently defective) amounted to 125,379, including the English army, 85,008 strong. They are not included in Table 5, page 81; see Tables 325–332, pp. 213–17.

340 English people are in the empire of Morocco. Algeria and the rest of Africa make no return.

Central America returns 145 English residents, Ecuador 27, Chili 4,152, of whom 3,265 are males, chiefly miners, and Brazil 2,838.

Table 6, pages 82–3, shows in detail the particular places in which the English resided, and the notes supply some necessary explanations.

The number of each of the two sexes returned abroad did not greatly differ, as the males were 36,734, and females 31,235. In France and Belgium the women exceeded the men in number; and in Germany there was little difference. The girls at school probably effect this result. In China, Japan, Chili, Brazil, and India, the men preponderated largely.

The natives of England in the United States exceed the numbers in all other countries. Mr. Kennedy, the able superintendent of the Census of the United States has favoured us with an elaborate return of the number of the inhabitants of each State in 1860 who were born in this kingdom, amounting in the aggregate to 2,224,743; of whom it was ascertained that 477,455 were born in England and Wales, 108,518 in Scotland, and 1,611,304 in Ireland; 27,466 were described simply as born in the United Kingdom. In addition to these numbers 249,970 were born in British America, and 1,419 in Australia. The distribution of the 2,474,713 emigrants over the several States is shown in the Appendix, Table 7.

Our information about foreigners in England and Wales is tolerably complete, and we shall refer to the details hereafter. The number was 84,090, or exclusive of those from the United States, 76,229. This is some compensation, therefore, for the English abroad, who, as has been already stated, are not included in our numbers.

British-born Subjects in Foreign Countries from which Returns have been received.

Extracted from Census 1861, Vol. II., pp. lxxv, vi, vii.)

France (domiciled) *	25,844
Switzerland	1,124
Spain	3,879
Portugal	2,072
Italy	4,413
Rome	1,054
Greece †	525
Turkey	2,360
Germany	4,508
Austria	1,113
Hungary	59
Prussia	1,685
Belgium	4,092
Holland	827
Denmark	372
Norway	242
Sweden	411
Russia	3,749
Persia	30
China	1,072
Japan	81
Siam	24
Egypt	931
Morocco	340
Central America	145
Ecuador	27
Chili	4,152
Brazil	2,838
	67,969
United States of America	2,476,132
	2,544,101

* The return applies only to natives of the United Kingdom who were *domiciled* in France at the time of the Census; persons temporarily visiting France for purposes connected with business, pleasure, or health, are therefore, not included.

† British subjects, not including Maltese or Ionians, or persons protected as British subjects.

2. Aliens resident in England and Wales.

(Census 1861, Vol. III., pp. 39, 40.)

In the midst of 19,982,623 British subjects lived 84,090 subjects of Foreign States. They are of all ages; but there is a great excess of men between the ages of 20 and 40; 9,502 of the subjects of Foreign States belong to America, 518 to Africa, 358 to Asia, and 73,434 to Europe; 40,909 of them are in London, and the rest are distributed all over England.

The diplomatic corps stands amongst the subjects of Foreign States first in importance, but its numbers are not considerable. The merchant seamen amount to 15,561, chiefly from Norway, Denmark, Sweden, and Germany, the descendants of the same races as invaded England.

We give a table of the ages and occupations of the subjects of European States. Of the subjects of France 12,989 are reckoned, including teachers of languages, governesses, cooks, servants, merchants, clerks, seamen (1,532), tailors, bootmakers, dressmakers, and smaller numbers in a greater variety of smaller occupations.

Italy sends us musicians, artists, priests, figure and image makers, looking-glass makers, and merchants. 667 Italian seamen were in our ports; Germany, with Austria and Prussia, besides seamen (4,624), supplied us with a large number of musicians, teachers of the German language, servants, merchants, factors, and commercial clerks, watch and clock makers (965), engine and machine makers, tailors, shoemakers, with many bakers, and a large colony of sugar refiners (1,345).

The cities, and especially the metropolis, are the principal seats of foreign residence. London in 1851 contained 30,057 persons born in foreign parts; and in 1861 it contained 48,390 foreigners by birth.

Liverpool in the two censuses contained 4,167, and 4,412 foreigners; Manchester and Salford 2,035, and 3,086 persons born in foreign parts; Birmingham, Hull, and Brighton were the only other towns that contained more than 1,000 foreigners.

Of 100 foreigners residing in England 36 were born in Germany, Austria, and Prussia, 16 in France, 9 in the United States of America, and 39 in all the other States of the world.

Aliens (foreigners born abroad) resident in England and Wales, according to the Census of 1861. (Census, Vol. II., pp. lxxv, vi, vii.)

France	12,989
Switzerland	2,341
Spain	1,337
Portugal	527
Italy	4,489
Greece	574
Turkey	331
Germany	21,438
Austria	1,669
Hungary	245
Prussia	7,206
Belgium	2,031
Holland	5,512
Denmark	2,534
Norway	3,161
Sweden	1,801
Russia	1,633
Poland	3,616
	73,434
Asia	358
Africa	518
United States of America	7,861
Mexico, Brazil, and other States	1,641
Not stated	278
	84,090

3.—NUMBER AND NATIONALITY OF ALIENS NATURALIZED IN ENGLAND, 1845-68.

ANALYSIS of the Returns laid before Parliament showing the Number and Nationality of Aliens naturalized since the passing of the Act 7 & 8 Vict. c. 66.—August 6, 1844.

Year.	Austria.	Bavaria.	Belgium.	Denmark.	France.	Greece.	Hanse Towns.	Italy.	Holland.	Poland.	Portugal.	Prussia.	Germany.	South America, Central, & Mexico.	Russia.	Spain.	Sweden and Norway.	Switzerland.	Turkey.	United States.	Total.
1845	8	11	3	16	8	1	14	21	9	9	4	73	57	–	–	1	14	16	3	1	269
1846	17	2	4	7	9	3	10	12	7	12	–	26	64	–	4	5	3	8	4	1	198
1847	7	2	2	10	12	1	18	18	6	5	2	36	39	2	6	4	8	12	18	3	211
1848	5	4	1	13	19	–	16	12	5	7	4	34	39	1	5	2	–	8	5	5	185
1849	5	4	–	1	13	6	4	10	6	7	1	21	30	–	3	–	4	12	6	2	135
1850	9	4	1	4	12	7	7	11	5	10	–	20	39	–	6	3	2	10	5	2	157
1851	6	2	7	6	15	5	15	14	7	6	–	34	35	–	3	2	7	10	2	2	178
1852	8	3	2	5	13	7	5	9	1	6	1	18	58	–	3	1	3	8	–	–	151
1853	12	1	8	5	11	2	16	2	8	5	3	58	52	–	6	1	7	14	2	1	214
1854	10	8	–	8	8	3	7	22	4	8	1	44	45	2	1	2	3	3	4	4	187
1855	17	9	9	7	14	7	9	17	4	7	–	53	60	2	1	2	3	6	9	5	241
1856	20	9	4	4	14	5	7	8	10	8	4	44	46	–	5	2	4	4	3	1	202
1857	6	8	2	2	16	1	10	9	3	8	–	48	51	–	3	4	7	5	4	6	193
1858	21	–	3	–	16	2	7	13	7	17	–	76	49	–	8	1	4	5	5	2	236
1859	27	1	3	7	24	2	8	14	5	23	–	70	82	–	9	–	7	6	8	1	297
1860	15	7	7	8	25	3	13	13	–	19	–	64	78	–	10	2	2	11	12	3	292
1861	16	7	1	8	18	4	11	7	6	28	1	28	53	–	11	2	4	7	16	5	233
1862	18	7	12	6	20	5	9	17	–	26	–	66	38	1	18	–	8	6	13	4	274
1863	6	5	6	6	13	5	19	12	4	17	–	82	52	–	10	–	2	8	10	7	264
1864	15	8	9	10	13	8	17	14	7	21	1	66	76	–	15	3	4	8	8	7	310
1865	15	5	9	7	21	7	8	13	2	27	–	83	73	–	9	2	10	18	9	9	327
1866	9	9	14	8	18	8	13	18	7	29	–	86	94	–	9	2	13	9	14	6	366
1867	22	7	9	6	27	8	17	21	7	10	2	60	103	–	16	6	–	7	17	6	351
1868*	11	2	2	2	21	2	5	3	6	9	–	49	35	–	5	3	–	8	6	6	175
	305	125	118	156	380	102	265	310	126	324	24	1,239	1,348	8	166	50	119	209	183	89	5,646
																Miscellaneous		–	–		189
																					5,835

(Extract from Parliamentary Paper, July 7, 1868.)

RETURN of the Names and Descriptions of all ALIENS who, in each Year from 1847, inclusive, have obtained from the Legislature ACTS of NATURALIZATION, including the Right of SITTING IN PARLIAMENT, and being of HER MAJESTY'S PRIVY COUNCIL.

Year.	Name.	Description.	Place of Birth.
1849	Tufton, Richard, and	Esquire	Verdun.
	Tufton, Henry (an infant), son of the above		Place of birth not mentioned in the Act.
1858	Acton, Sir John Emerick Edward Dalberg	Baronet	Naples.
1866	Lowther, Francis William	Lieutenant, R.N.	Genoa.
1867	De Ferrieres, Charles Conrad Adolphus Du Bois, commonly known as Baron de Ferrieres.	Baron	Holland.
,,	Bischoffsheim, Henri Louis	Banker, City of London	Holland.
,,	Lange, Daniel Adolphus	East India Merchant, City of London	Holland.
1868	Bolckow, Henry William Ferdinand	Ironmaster, Middlesborough	Sulten.
,,	Allhusen, Christian†	Merchant, Newcastle-upon-Tyne	Kiel.

* The Return for 1868 is made up to the end of June.
† This Bill will receive the Royal Assent next Commission.

Registration of the Births and Deaths of British Subjects in Foreign Countries.

There is no Act of Parliament for the registration of the births of children born of British fathers in foreign countries, nor for the registration of deaths.

A system of registration has, however, been in force for some years at Her Majesty's legations and consulates.

"The Act (respecting marriages) does not provide for "the registration of the births and deaths of British "subjects in foreign countries. But it is, nevertheless, "very important that such registers should be kept at "each consulate, and should be transmitted home to be "deposited in the office of the Registrar General. Con- "sular officers will, therefore, keep two registers, one "for births and the other for deaths; and they will give "publicity to the fact that they are authorized to insert "therein such entries of births and deaths as may be "reported to them for registration, provided that not more "than seven years have elapsed since the occurrence of "these events. Forms of the registers can be obtained at "the Foreign Office.

"At the expiration of each year, consular officers will "transmit to the Secretary of State a copy of each register "so kept during the year which has elapsed, certified under "their hand and seal to be correct, in order that the same "may be transmitted to the Registrar General. Should "no registration have taken place during that period, a "certificate to that effect must be sent.

"A sum of 2*s.* 6*d.*, as provided by the Order in Council "of the 1st of May 1855, is payable for each registration." (Consular General Instructions, p. 25.)

It appears on inquiry at Somerset House that British subjects very generally avail themselves of the opportunity afforded to them by the Foreign Office instructions for registering the births of their children in all countries, except in the United States, where very few children are registered. There were no entries of births at the consulates of New York and Boston during the years 1865-1866.

A table furnished by the Registrar General is annexed, showing the number of births registered at Her Majesty's consulates since the system has been in practice, and also the number registered during the year 1866, the last year for which the returns are complete.

As this registration of births and deaths is not authorized by statute, the registries have no legal validity, and the Registrar General is not empowered to give copies of the entries to applicants, as in other cases of registration. It is considered desirable that this should be remedied.

If any provision is made by Act of Parliament for the registration of the births of those children whose fathers wish to record their British nationality, some small fee should be required to be levied, to enable local consular agents to be appointed for the purpose when the consular district is inconveniently large. Local consular agents have been appointed in this manner for the registration of the marriages of British subjects in the mining districts in the interior of Brazil.

Registration of Births in this Country.

The registration of births in this country was provided for in the Registration Act, 6 & 7 William 4, c. 86, s. 20.

"§ XX. And be it enacted, that the father or mother of "every child so born in England after the said first day of "March, or in case of the death, illness, absence, or inability "of the father and mother, the occupier of the house or "tenement in which such child shall have been born, shall "within forty-two days next after the day of every such "birth give information, upon being requested so to do, to "the said registrar, according to the best of his or her "knowledge and belief, of the several particulars hereby "required to be known and registered touching the birth of "such child."

It will be seen that the registration is not compulsory. All that the person is bound to do is to give information within 42 days *upon being requested to do so.*

There is no penalty under the Act for not giving such information; and in order to enforce the Act the Crown has to proceed by indictment for a misdemeanor. As a rule, parents recognize the utility of the registration and register without giving any trouble, but cases do occur occasionally in which they refuse to register. Such a case occurred in October 1866, when Alfred Brooks was indicted at the Berkshire Quarter Session for refusing to furnish the registrar with the particulars required by the Act. He pleaded guilty, and was sentenced to seven days imprisonment.

As all the children born in England are, by the common law, British subjects, the registration does not include any statement as to the nationality of the father. This, however, could be readily introduced if requisite.

Number of Births registered at British Consulates and Embassies abroad, from the Year 1850 to 1866, inclusive, and the Number registered to the last-mentioned Year.

Consulates.

Country.	1850–1866.	1866.
Austria	56	1
Belgium	49	1
Bight of Biafra	2	0
Borneo	5	0
Brazil	698	46
Buenos Ayres	21	0
Chile	210	22
China	222	20
Denmark	6	0
Egypt	207	32
France	615	80
Algeria	3,467	266
Frankfort	74	4
Greece	69	6
Grey Town	8	1
Hanse Towns	26	1
Hayti	80	2
Japan	23	2
Mexico	137	5
Monte Video	75	1
Morocco	60	5
Netherlands	53	12
New Granada	32	1
Norway	89	6
Paraguay	3	0
Persia	24	1
Peru	95	5
Portugal	253	18
Prussia	49	1
Roman States	108	7
Russia	237	20
Salvador	8	0
Sandwich Islands	40	0
Sardinia	207	18
Saxony	29	1
Siam	20	3
Two Sicilies	235	20
Society Islands	53	1
Spain	1,091	36
Sweden	29	2
Switzerland	112	20
Tripoli	11	2
Tunis	9	0
Turkey	845	78
Tuscany	72	6
United States	165	6
Venezuela	3	0
Total in Consulates	9,982	759

Embassies.

Baden	9	0
Bavaria	3	0
Berlin	51	10
Berne	23	6
Dresden	37	4
Florence	9	8
Hanover	21	4
Wurtemberg	24	4
Total in Embassies	177	36

Registration of Marriages at Consulates.

The registration of marriages of British subjects at Her Majesty's consulates is regulated by the Consular Marriage Act (12 & 13 Vict. c. 68), by which the Consuls authorized to solemnize marriages are required to forward to the Foreign Office annually copies of the entries in the consular register of all marriages which have taken place during the year, or *nil* returns in case of there having been no such marriages. The copies of these entries are forwarded to Somerset House, and taken charge of by the Registrar-General, who thus possesses duplicate copies of all consular marriage registers. As the registry entries are numbered consecutively, he can see if any duplicate copies of entries are omitted to be sent.

Registration of Marriages at Legations.

These precautions are not observed at embassies and legations.

There is no Act of Parliament to regulate the manner in which the registration of marriages at embassies and legations should be effected, or to give legal validity to the copies of entries forwarded to England.

In 1816 an arrangement was made by which the Bishop of London was to keep the registry entries of these marriages, and the following notice was published:—

"The Lord Bishop of London having been applied to in numerous instances to permit foreign marriages, births, and burials of British subjects to be recorded in his registry, has permitted a book to be kept therein, in which the memorials of the same may be entered and preserved, at the request of such persons as are desirous thereof.—March 23, 1816."

On the 6th of May 1816 a circular was addressed to the embassies and legations, with instructions as to the manner in which certificates were to be forwarded, and requiring that a fee of 1*l.* for the Bishop of London's registrar should be sent with them.

An Act was passed in 1823 (4 Geo. 4. c. 91.) to remove doubts as to the validity of marriages solemnized at embassies and legations, but made no provision for registration.

A case arose in 1854 in which Her Majesty's minister at Brussels refused to allow a marriage to be celebrated at the legation between parties who declined to pay the fee of 1*l.*, and the opinion of the law officers having been taken, it was decided that the parties could not be legally compelled to pay the fee, and that although Her Majesty's ambassadors and ministers might at their discretion legally refuse to allow marriages to be celebrated at their residences, yet that they ought not to refuse so to do on the ground of the parties declining to avail themselves of the right of registration at the London registry office, and to pay the sum of 1*l.* for that purpose.

It seems a very undesirable state of things that consular marriages and returns of births and deaths should be registered at the Registrar-General's and diplomatic marriages elsewhere, and still more undesirable, looking to the class of persons who are married at the embassies and legations, that the proof of such marriages should depend on the will or ability of the persons married to pay a fee.

The subject deserves consideration, and should it be deemed expedient to regulate the registration of marriages at embassies and legations in the same manner as the registration of marriages at consulates, there would be little difficulty in doing so, as the Consular Marriage Act will probably be revised during the ensuing year on the recommendation of the Marriage Law Commission.

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